No. 13-3408

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

KAPLAN HIGHER EDUCATION CORP., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio, No. 1:10 CV 02882
The Honorable Patricia A. Gaughan

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES and RULES

MISCELLANEOUS

Statement in Support of Oral Argument

Given the significance of the issues to the enforcement efforts of the Equal Employment Opportunity Commission (EEOC), the Commission respectfully requests oral argument.

Jurisdictional Statement

The Equal Employment Opportunity Commission brought this enforcement action against Kaplan Higher Education Corporation (KHEC), Kaplan, Inc. (KI), and Iowa College Acquisition Corp. d/b/a Kaplan University (ICAC) pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*.[1] The district court had jurisdiction under 28 U.S.C. §§ 451, 1337, 1343, and 1345. Final judgment was entered on January 28, 2013. Judgment, R111, PID-5649.[2] EEOC timely filed a Notice of Appeal. Notice of Appeal, R121, PID-6074. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of Issues

1. Whether the district court abused its discretion when it excluded EEOC's expert testimony.

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[1] The term "Kaplan" refers to all Defendants.

[2] "R.__" refers to the district court docket entry. "PID" refers to the "Page ID #" referenced in 6th Cir. R. 28(a)(1). Short references to page numbers will be to PID pagination.

Statement of the Case

EEOC filed its complaint on December 21, 2010 alleging that Kaplan's use of credit history as a selection criterion violates Title VII because it has a disparate impact on black applicants and employees. Complaint, R1, PID-1; Amended Complaint, R58, PID-1292-93.

On November 30, 2012, Kaplan moved for summary judgment and to exclude the testimony of EEOC's expert who testified that Kaplan's use of credit history has a disparate impact on black applicants. Summary Judgment Motion, R79, PID-2411; Motion to Exclude, PID-3633. On January 28, 2013, the district court granted Kaplan's motion to exclude EEOC's expert and, in the same order, granted summary judgment to Kaplan. Order, R110, PID-5626; Judgment Entry, R111, PID-5649. EEOC filed a motion for reconsideration on February 26, 2013.[3] Motion for Reconsideration, R.113, PID-5652; Notice of Appeal, R.121, PID-6074. The district court denied EEOC's motion for reconsideration on May 6, 2013. Order, R127, PID-6116.

[3] The motion was filed one day past the due date because the district court's CM/ECF system was unavailable. Stern Declaration, R115, PID-5860.

Statement of Facts

On February 5, 2009, Kaplan hired Shandria S. Nichols as a Financial Aid Advisor. Charge, R13-1, PID-76. On February 15th, Kaplan told Ms. Nichols that she was being fired because of her credit report. *Id.*; Nichols Dep., R80-10, PID-2607. Ms. Nichols, who is black, filed an EEOC Charge of Discrimination alleging that Kaplan's use of credit history discriminates based on race in violation of Title VII. Charge, R13-1, PID-76. Following an investigation of the Charge, EEOC initiated this enforcement action alleging that Kaplan's use of credit history has an unlawful disparate impact on black applicants and employees in violation of Title VII. Amended Complaint, R58, PID-1294.

In 2004, Kaplan began using credit history information in its hiring process. Seelye Dep., R80-11, PID-2611. During the hiring process, once Kaplan makes the decision to offer a position, a background check is ordered. Saad Report, R83-2, PID-3720.[4] Kaplan obtains the applicant's credit report and decides whether it disqualifies the applicant from hire. Rogoff Dep., R80-8, PID-2454-56. Credit checks are required for all accounting and financial aid positions and any other position Kaplan believes is "capable of substantially influencing the company's financial outcomes," such as Bookkeeper and Bookstore Manager. Seelye Dep.,

[4] In some cases, contingent offers may be made pending a background check. Saad Report, R83-2, PID-3720, n. 19. In others, no formal offer can be made until the background check is completed. *Id.*

R80-12, PID-2641. Kaplan uses credit history to determine the presence of "financial stress" that it believes may cause an employee to engage in financial fraud. Aamodt Report, R83-3, PID-3766.

All applicants, regardless of position, must also pass a broader background check, including a review of the applicant's criminal history and education. Murphy Report, R92-2, PID-4225; Background Process Report, R81-16, PID-3198-3200.

Kaplan reviews credit history at two stages during the hiring process. Kaplan hires a background check agency to conduct the first credit check. Seelye Dep., R80-11, PID-2625. Kaplan tells the agency to apply a list of "bullet-point" credit check criteria that Kaplan developed. *Id.* at PID-2625-29; Seelye Dep. Ex. 4, R80-11 at PID-2643. If an applicant's credit history doesn't satisfy any one of the criteria, the applicant doesn't pass the first credit check. Summary Judgment Motion, R79-1, PID-2424. If an applicant passes, the agency sends Kaplan an automated e-mail advising that the applicant "Passed" the credit check and is eligible for hire. Seelye Dep., R80-11 at PID-2624; Seelye Dep. Ex. 3, R80-12, PID-2641; Rogoff Dep., R80-8, PID-2687. An applicant who doesn't pass is graded "Review" and the agency sends that result to Kaplan, along with the applicant's credit report, in an e-mail. Seelye Dep., R80-11, PID-2625-27.

Kaplan conducts a second credit check on applicants who do not pass the first credit check. Murphy Report, R92-2, PID-4226. This second credit check is conducted by Kaplan personnel. Seelye Dep., R80-11, PID-2625. Kaplan's reviewers look at the credit report and determine whether the applicant should be disqualified from hire based on credit history. *Id.* at PID-2626-27. Based on the applicant's credit history, Kaplan grades applicants as "Pass," "No Grade," "Review," or "Fail." Murphy Report, R92-2, PID-4230. Kaplan assigns "No Grade" or Review" during the second credit check when applicants withdraw or when Kaplan removes them from consideration. Summary Judgment Motion, R79-1, PID-2439, n. 13.

EEOC retained Dr. Kevin R. Murphy, Ph.D. as an expert witness. Murphy Report, R92-2, PID-4246. Dr. Murphy holds a Ph.D. in industrial/organizational psychology and multivariate statistics. *Id.* at PID-4246. To determine whether Kaplan's credit checks have an adverse impact on black applicants, Murphy conducted an analysis of general population studies and an internal analysis of Kaplan's applicant flow. *Id.* at PID-4240; Murphy Declaration, R92, PID-4166, ¶6.

Citing external studies, Murphy explained there are well-known differences in the likelihood that blacks and Hispanics will have unfavorable credit histories as opposed to whites. Murphy Report, R92-2, PID-4239. As a result, Murphy

concluded that the use of credit history information as a basis for denying employment is very likely to result in adverse impact for black and Hispanic applicants. *Id.*, *citing* Gallagher, K., *Rethinking the Fair Credit Reporting Act: When requesting credit reports for 'employment purposes' goes too far,* Iowa Law Review, 91, 1593-1620 (2006). Notably, Kaplan's labor economist expert acknowledged that "there is no doubt that economic status is highly related to credit behaviors" and that "if blacks are more likely to be on the lower end of the economic status spectrum . . . they will have disproportionately more credit issues[.]" Saad Report, R83-2, PID-3712, ¶¶7-8.

Murphy conducted an internal analysis of Kaplan's applicant flow; to do so he reviewed numerous data files, documents, and images. Murphy Report, R83-1, PID-3664; Murphy Declaration, R92, PID-4166, ¶¶5-6. To compile relevant data, Murphy needed to obtain the following information: (1) credit check outcome data showing whether applicants passed the first credit check conducted by the background check agency; (2) credit check outcome data showing whether Kaplan eliminated applicants from hire based on the second credit check; and (3) race identification for the applicants. Murphy Dep., R83-5, PID-3891-92; Murphy Dep., R95, PID-4453-54.[5]

[5] In the scope of credit-checked positions, credit checks are required for applicants, for employees transferring to a credit-checked position, and for employees who were hired without having been credit checked. The parties

Race identification information for Kaplan's applicants subjected to credit checks was missing from both the background check agency's data and Kaplan's data. GIS Data Excerpt, R81-12, PID-3004-3109; Murphy Dep., R83-5, PID-3865; Murphy Report, R92-2, PID-4227.[6] Section 709(c) of Title VII requires employers to keep records prescribed by EEOC as to whether unlawful employment practices have been or are being committed, and Section 713 authorizes EEOC to issue procedural regulations. In 1978, the Uniform Guidelines on Employee Selection Procedures (UGESP), 29 C.F.R. Part 1607, were issued pursuant to EEOC's authority under Sections 709 and 713(a) of Title VII. Pursuant to § 1607.4 of UGESP, employers are required to maintain and have available for inspection "records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunity of persons by identifiable race, sex, or ethnic group…." 29 C.F.R. § 1607.4A. However, Kaplan's data files did not include information about the race of its applicants. Murphy Report, R92-2, PID-4227; Murphy Declaration, R92, PID-4166, ¶7.

To obtain race identification information, EEOC subpoenaed the

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referred to all such persons as "applicants" and they were analyzed together for statistical purposes. R92, Murphy Declaration, PID-4166, n.1.

[6] In the Statement of Work prescribing the background check agency's duties, Kaplan did not tell the background check agency to collect, retain, or produce race identification information. GIS Statement of Work, R81-7, PID-2966-72.

Departments of Motor Vehicles (DMV) in various states. Murphy Report, R92-2, PID-4243-45. EEOC sent the DMVs lists of Kaplan's applicants and asked the DMVs to identify the race of individuals listed or produce their drivers' license photos. *Id.* DMVs from a total of 43 states, the District of Columbia, and two U.S. territories produced information.[7] *Id.* DMVs in 36 states, the District of Columbia, and two U.S. territories produced DMV photos. *Id.* at PID-4243-4244, §V. DMVs in 11 states[8] produced spreadsheets listing name, race and, in some cases, social security number for those requested. *Id.* at PID-4227; 4244-45, §VI. DMVs from four states are listed as producing both DMV spreadsheets and photos. *Id.* at PID-4243-45, §§V, VI. All photos the DMVs produced were color photos. Murphy Declaration, R92, PID-4167, ¶8. With every color photo the DMVs also produced a name identifying the person depicted in the photo. Murphy Dep., R83-5, PID-3906-07.

Murphy obtained data from the background check agencies to identify credit checked applicants. Murphy used data from General Information Systems (GIS),

[7] The district court incorrectly identified how many DMVs produced information and what they produced. Order, R110, PID-5634.

[8] In his August 2012 report, Murphy identified 11 states that produced DMV spreadsheets. Murphy Report, R92-2, PID-4244-45, §VI. Three states are listed twice because they produced spreadsheets two times – before Murphy prepared his May 2012 report and after the May report when Kaplan produced more applicant information.

the agency that conducted Kaplan's credit checks from 2008 to 2011.[9] Murphy Dep., R83-5, PID-3889; Saad Report, R83-2, PID-3719. The GIS data included information about applicants who were credit checked from January 2008 to April 2011. Saad Report, R83-2, PID-3723, n. 38. After removing redundancies, Murphy created a dataset that included information about 4,670 applicants. Murphy Report, R92-2, PID-4228. While the 4,670 dataset identified applicants who were credit checked by GIS, Murphy couldn't determine and match credit check outcome data (that, is, whether someone passed or didn't pass the credit checks) for everyone in the 4,670 dataset. *Id.* at PID-4231.

Of the 4,670 applicants in the dataset, Murphy was able to race identify 1,090 as black, white, Asian, or Hispanic. Murphy Report, R92-2, PID-4228; Saad Report, R83-2, PID-3725. Murphy did not race identify the remaining 3,580 applicants as black, white, Asian, or Hispanic. Murphy Report, R92-2, PID-4228.

Murphy determined credit check outcomes for as many applicants as

[9] From 2006 to 2011, Kaplan used three background check agencies; EEOC subpoenaed data dating back to 2006 from all of them. Reply in Support of Motion to Modify CMO, R42, PID-731-32. Background checks were conducted by Sterling Information Systems (Sterling) beginning in 2006 and by GIS beginning in 2008. Opposition to Motion to Modify CMO, R41, PID-504-05. HireRight conducted background checks on 709 applicants for 10 months between January and October 2011. Saad Declaration, R84, PID-4005, ¶13. Murphy didn't use the Sterling data because it didn't include sufficient credit check outcome information. Murphy Dep., R95, PID-4439. Murphy didn't use the HireRight data because it related to a different process. *Id.* at PID-4440.

possible. Murphy Dep., R83-5, PID-3937-38. To determine credit check outcomes, Murphy read, interpreted, and coded, third-party data maintained by background check agencies, credit reports, and e-mails sent to and from Kaplan. Murphy Dep., R83-5, PID-3881-82. Murphy and his team read the entire reports to identify the background issues (*e.g.*, criminal, educational, credit) and interpret the outcomes. *Id.* at PID-3895-97, 3937-38.

Murphy removed from the 4,670 dataset 37 individuals who failed Kaplan's criminal or education background checks. Murphy Report, R92-2, PID-4228. For the subset of remaining 4,633 credit checked applicants, Murphy determined and matched outcome credit check data from the first credit check for 1,072 persons who he race identified as black, white, Asian, or Hispanic. *Id.* at PID-4228-29.[10] Before conducting his statistical analyses, Murphy removed the Asian and Hispanic applicants from the dataset of 1,072 to isolate the impact credit checks have on black applicants as compared to white applicants. *Id.* at PID-4230-32.

Murphy explained that the dataset he analyzed was not a "random sample." Murphy Dep., R83-5, PID-3891-92. Instead, Murphy included in the process everyone for whom he had credit check outcome data and race identification. *Id.* Murphy did not exclude any applicant from his data for any reason unless he was

[10] Sixteen Asian applicants and 81 Hispanic applicants were removed from the set of 1,072 before Murphy conducted his statistical analyses. Murphy Report, R92-2, PID-4229.

lacking both pieces of information. *Id.* at PID-3891-92; Murphy Dep., R95, PID-4453-54. *See also* Murphy Dep., R83-5, PID-3915-17; Murphy Dep., Ex. 13, R83-7, PID-3949-82 (identifying credit checked applicants who were race identified as black, white, Asian, or Hispanic).

Murphy presented his analysis in a report dated May 1, 2012. Murphy Report, R92-1, PID-4174-4220. By court approved stipulation, the report was amended on August 17, 2012 after Kaplan produced more applicant information. Murphy Report, R92-2, PID-4227; Stipulation, R70, PID-1816. In both reports, Murphy analyzed the rates at which blacks and whites (1) passed the first credit check conducted by the background check agency, and (2) were disqualified from hire based on the second credit check conducted by Kaplan.[11] Murphy Report, R92-2, PID-4230-31. Both analyses showed that Kaplan's credit checks have a disparate impact on black applicants. *Id.* at PID-4174-4220.[12]

In his August 17 report, Murphy analyzed the rate at which black and white

[11] Murphy also analyzed the second credit check by comparing the rate at which Kaplan graded blacks and whites as "Pass," "Fail," "No Grade" or "Review." That analysis of Kaplan's grading results (which Murphy called the "Pass" vs. "No Pass" analysis) is not related to the issues in this appeal.

[12] The number of black and white applicants included in each analysis varies because each analysis uses a different source of outcome data. Murphy Report, R92-2, PID-4231, n. 4. For example, in Murphy's August 17 report, he found GIS first credit check outcome data for 527 black applicants and 448 white applicants (Murphy Report, Table 4, R92-2, PID-4230) and he found Kaplan second credit check outcome data for 486 black applicants and 423 white applicants (Murphy Report, Table 6, R92-2, PID-4231).

applicants passed the first credit check and found that whites passed at a rate of 53.1% while blacks passed at a rate of 33.2%. Murphy Report Table 4, R92-2, PID-4230. Murphy applied a statistical analysis to the dataset and found statistically significant disparate impact. *Id*. Murphy also analyzed the rate at which Kaplan determined that blacks and whites "Passed" or "Failed" the second credit check and found that whites passed at a rate of 84.2% while blacks passed at a rate of 66.7%. Murphy Report Table 6, R92-2, PID-4231. Murphy applied a statistical analysis to the dataset and, again, found statistically significant impact. *Id.*

Because Kaplan's data included no applicant race identification, Murphy relied initially on a combination of DMV spreadsheets and photos to race identify applicants. Murphy Report, R92-2, PID-4227. The DMVs returned spreadsheets listing the name and race of 385 individuals, as well as the social security numbers and race of 113 individuals. Murphy Dep. Ex. 13, R83-7, PID-3949. Murphy did not have outcome data for all of those individuals and, therefore, some could not be included in his dataset. *Id.* Of the individuals for whom the DMV returned spreadsheets identifying race, Murphy was able to include approximately 380 of them based on race identification information and outcome data.[13] Additionally,

[13] Murphy did not calculate the number of persons who were race identified in the DMV spreadsheets as black, white, Asian, or Hispanic and matched to outcome data and the race identification spreadsheet he produced does not reflect the totals.

Murphy reviewed 906 of the DMV photos that were produced.[14] Murphy Report, R92-2, PID-4228. Ultimately, there were 692 individuals who Murphy was able to identify as black or white based on the DMV photos and for whom he had matching outcome data. Murphy Declaration, Ex. D, R92-4, PID-4278.

Murphy had five people review the 906 DMV photos and observe whether the person depicted was black, white, Asian, or Hispanic. Murphy Report, R92-2, PID-4227. Those who could not be identified as black, white, Asian, or Hispanic were recorded as "other." *Id.* All five photo reviewers, or panelists, had extensive research experience (5-27 years with a median of 24) in multicultural, multiracial, treatment outcome research where there is often a question about how individuals are characterized by race. *Id.*; Murphy Dep., R83-5, PID-3910. The panelists had field experience dealing with thousands of people who are self-identified or race identified by another source and where race identification was part of the field work. Murphy Dep., R83-5, PID-3911-12.

Murphy Dep., Ex. 13, R83-7, PID-3949. The approximate number is found by subtracting the 692 individuals race identified by DMV photo alone from the 1,072 dataset of credit checked applicants who Murphy matched to outcome data and race identified as black, white, Asian, or Hispanic. *Compare* Murphy Declaration, Ex. D, R92-4, PID-4278 and Murphy Report, R92-2, PID-4229.

[14] There were DMV photos of more individuals produced, but Murphy either could not match them to someone who was credit checked and/or was unable to find outcome data for them. Therefore, not all photos were reviewed. Murphy Dep., R83-5, PID-3891-92.

The five panelists looked at the DMV photos individually, without input from one another. Murphy Dep., R95, PID-4442. The photos were reviewed during three separate rating sessions. Murphy Report, R92-2, PID-4227. At each session all five panelists conducted reviews. Murphy Dep., R95, PID-4442.

The panelists were provided with the photo or driver's license containing the photo, both of which included the driver's name. Murphy Dep., R83-5, PID-3906-07; DMV Photo Sample, R92-5, PID-4281-87. All driver's license photos were color photos. Murphy Declaration R92, PID 4167, ¶¶ 8, 9. The photos were large enough to depict recognizable faces and consisted of clear images. DMV Photo Sample, R92-5, PID-4281-87. Before sending photos to the panelists, Murphy looked at each photo to ensure that it was appropriately clear to support a rating. Murphy Declaration, R92, PID-4167, ¶9. In some cases, more than one photo was produced for the same person. *Id.* In those cases, Murphy or his staff chose the clearest photo and gave the same photo to all of the panelists. Murphy Dep., R83-5, PID-3930-31.

Murphy imposed an inter-rater reliability requirement on race identifications that were based on DMV photos. Murphy did not accept any race identifications by DMV photo unless at least 80% (four out of five) of the panelists, working independently, recorded the same observation about the race of the person in the photo. Murphy Report, R92-2, PID-4227. Combined, two groups of panelists

produced a total of 803 race identifications based on the DMV photos. *Id.* at PID-4228. The first group of five panelists reviewed 891 photos. At least four out of five panelists agreed as to 88% of the photos. As to 74.9% of the photos, the panelists reached perfect agreement. As a result, Murphy accepted 788 race identifications from the first group. Later, 15 additional DMV photos were produced. Murphy asked two staff members to assist him in reviewing the 15 new photos using all five categories previously used and the same process. *Id.*; Murphy Dep., R83-5, PID-3909. The three panelists agreed unanimously on the race identification of the 15 photos. *Id.*

Kaplan asked Murphy during his deposition what he did "as part of the process" to determine whether the panelists were accurately identifying race from the DMV photos. Murphy Dep., R95, PID-4443. Murphy responded that he looked at the consistency between the panelists' DMV photo race identifications and the DMV race identification data and found they were "highly consistent." *Id.* Murphy prepared a spreadsheet identifying what race identification source was used for each race identified applicant; where more than one source was available, Murphy measured the consistency between race identification by DMV photo and the second source. Murphy Dep. Ex. 13, R83-7, PID-3949-82. For 57 of the applicants race identified by DMV photos, there was another source of race identification data for the same applicants. R83-5, Murphy Dep., PID-3949. For

47 of those 57 applicants, the panelists race identified applicants using DMV photos and the DMVs also produced race identification data for the same applicants. Murphy Dep. Ex. 13, R83-7, PID-3949. The panelists' race identifications were consistent with DMV race identification data at a rate of 95.7%. *Id.* Murphy concluded that using DMV photos to race identify applicants was "highly reliable" based on the consistency rate of 95.7%. Murphy Dep. Ex. 13, R83-7, PID-3949. For 10 of the 57 applicants who were race identified by DMV photo, Murphy found race identification for the same applicants in Kaplan's PeopleSoft hire data.[15] *Id.* The panelists' race identifications were consistent with PeopleSoft at a rate of 80%. *Id.*

Kaplan retained Dr. Ali Saad, Ph.D., as a rebuttal expert witness. Saad Report, R83-2, PID-3709. Dr. Saad holds a Ph.D. in economics with a specialization in labor economics. *Id.* at PID-3710. On August 27, 2012, Saad produced a rebuttal report on the sole issue of disparate impact.[16] *Id.* at PID-3707-

[15] PeopleSoft is Kaplan's proprietary human resources database that includes information about Kaplan hires such as name, address, and job title. Interrogatory Answers, R51-14, PID-1091. Murphy learned from Kaplan's expert's report that PeopleSoft included race identification for 808 black and white hires. R83-9, Murphy Dep. Ex. 15, PID-3992.

[16] On August 27, 2012, Kaplan produced a second rebuttal expert report from Dr. Michael G. Aamodt, Ph.D. Aamodt Report, R83-3, PID-3764-3844. The report related solely to job relatedness and business necessity. *Id.* On September 5, Murphy submitted a rebuttal report. Murphy Rebuttal Report, R92-3, PID-4268-72.

44. Kaplan asked Saad to "study the data" in order to "review and respond" to Murphy's reports regarding disparate impact. *Id.* at PID-3709. Saad did not compile his own data and did not add, or subtract, applicants from the data that Murphy compiled.[17] *Id.* at PID-3710. Instead, Saad relied on Murphy's data, including Murphy's race identifications, to run Saad's statistical analyses. Saad Report, R82-3, PID-3707-44.

The core disagreement between the parties' experts was whether statistical analyses should be applied to aggregated or disaggregated data. Saad disaggregated the applicant data into smaller pools, analyzed the disaggregated data, and found no disparate impact. Saad Report, R83-2, PID-3730-38. By contrast, Murphy analyzed the aggregated data and found impact. Murphy Dep., R83-5, PID-3869; Murphy Declaration, R92, PID-4172-73. The district court did not reach that issue and, therefore, whether data should have been disaggregated is not an issue in this appeal.

Regarding race identification, Saad did not say that DMV data or photos are an inappropriate or unreliable source of race identification. Saad Report, R83-2,

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[17] In his report, Saad said he couldn't replicate all of the analyses Murphy conducted because "backup materials" were missing. Saad Report, R83-2, PID-3709, 3717. However during his deposition, Saad confirmed he "follow[ed] exactly what [EEOC's expert] did from his analysis data set to his tables" and that he could, and did, replicate the analyses reflected in Murphy's August 17 report. Saad Dep., R96, PID-4461.

PID-3707-44; Saad Dep., R96, PID-4457-66. Saad offered no opinion about what source of race identification, if any, should be used in lieu of DMV photos and/or data. Nor did Saad attempt to race identify any applicants using any source. Finally, Saad did not say in his report, deposition, or subsequent Declaration that any applicant who Murphy race identified (including by DMV photo) is a different race from the race Murphy identified.

Instead, in a section of his report entitled "Dr. Murphy's Process for Identifying Race is Flawed" Saad identified purported flaws in the race identification "process." Saad Report, R83-2, PID-3741-42. The purported flaws in the process were that: (1) as to 891 of the 906 DMV photos reviewed, Murphy "himself did not participate in reviewing" the photos; (2) Murphy's report did not explain how the DMV photos were selected; (3) the panelists who reviewed DMV photos did not reach unanimous consensus as to 12% of the photos they reviewed;[18] and (4) of the 4,670 credit checked applicants, Murphy race identified only 1,090 applicants. *Id.* at PID-3741, ¶50. As to six of the applicants race identified by DMV photo, Saad said that Murphy erred in transferring to the electronic file what the panelists recorded in their paper records.[19] *Id.* at PID-

[18] In fact, panelists failed to reach the 80% consensus rate as to 12% of the photos reviewed. Murphy Report, 92-2, PID-4228.

[19] For example, while the electronic file Murphy compiled showed that 60% of the panelists identified an applicant, McNulty, as white, the panelists' paper records

3741-42, ¶51. Saad also said that Murphy made a "few errors" when recording background check agency data. *Id.* at PID-3726, n. 46. Saad described the coding discrepancies as a "variety of little issues" identified in his report. Saad Dep., R96, PID-4462.

Shortly after Kaplan issued its rebuttal expert report, Kaplan deposed Murphy on September 12, 2012. Murphy Dep., R83-5, PID-3852. EEOC deposed Saad on September 24. Saad Dep., R96, PID-4457. After EEOC deposed Saad, Kaplan wrote EEOC a letter dated September 26 seeking answers to 11 questions about Murphy's analysis. Letter, R83-6, PID-3946-47. Kaplan's questions included inquiries about data sources and coding, many of which were directly related to criticism that Saad raised in his rebuttal report and deposition.[20] *Id.*

The parties agreed that Kaplan would depose Murphy a second time. Letter, R94-3, PID-4427-28; Stern Declaration, R94, PID-4420, ¶6. The purpose of the second deposition was for Kaplan to ask Murphy about his rebuttal report (regarding job relatedness and business necessity) and ask more questions about

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showed that 80% of the panelists identified McNulty as white. Saad Report, R83-2, PID-3742.

[20] Kaplan's September 26 letter stated that "backup materials" were missing and, therefore, Kaplan couldn't replicate the analyses EEOC's expert conducted. Letter, R83-6, PID-3947. However, during his September 24 deposition, Saad confirmed that he could, and did, replicate the analyses in Murphy's August 17 report. Saad Dep., R96, PID-4461.

the expert's statistical analyses including Kaplan's 11 questions. *Id.* Kaplan deposed Murphy for the second time on November 8, 2012. Murphy Dep., R95, PID-4430.

To answer follow-up questions at his second deposition, Murphy prepared documents that answered some of Kaplan's 11 questions and addressed other issues raised during his first deposition and Saad's deposition. Murphy gave the documents to Kaplan and they were marked as deposition exhibits. *Id.* at PID-4438. On the same day Kaplan gave the documents to its expert, Saad. Saad Declaration, R84, PID-4006, ¶14. Saad analyzed the documents, which included all updated Tables, and addressed them in a Declaration filed with Kaplan's *Daubert* motion. *Id.*

In part, the documents Murphy produced at his second deposition answered questions about data coding discrepancies. Murphy resolved the coding discrepancies, which resulted in coding corrections for 22 applicants. Murphy Dep. Ex. 14, R83-8, PID-3984-89. Making the 22 coding corrections did not change any of the conclusions Murphy reached in his August 17 report. *Id.* at PID-3985. Again, Murphy found statistical significance. *Id.* at PID-3989. During the deposition, the Tables from Murphy's August 17 report were reproduced and the updated Tables adjusted for coding corrections were produced. *Id.* at PID-3984-89. Kaplan asked Murphy various questions about the updated Tables and

analysis. *Id.*

During the second deposition, Kaplan asked Murphy to answer Question #8 from Kaplan's list of 11 questions. Murphy Dep., R83-5, PID-3901-10. Kaplan's Question #8 was whether Murphy used PeopleSoft race-identified data "to identify or help identify race" and "how such data was used in conjunction with" race identifications based on DMV photos. Letter, R83-6, PID-3947, ¶8. Murphy responded that, at the time he compiled the data, he could not use PeopleSoft because he couldn't open the proprietary database. Murphy Dep., R83-5, PID-3901. Later, after PeopleSoft was produced in usable form, Murphy included it and analyzed the results. *Id.*; Murphy Dep. Ex. 15, R83-9, PID-3992-95. Murphy explained at his second deposition that adding PeopleSoft made no difference in any of the conclusions he reached in his August 17 report. Murphy Dep., R83-5, PID-3901-02. Again, Murphy found statistical significance. *Id.* During the deposition, the Tables from Murphy's August 17 report were reproduced and the updated Tables adding PeopleSoft were produced. Murphy Dep. Ex. 15, R83-9, PID-3992-95. Kaplan asked Murphy various questions about the updated Tables and analysis. Murphy Dep., R83-5, PID-3926-28.

On November 30, 2012, Kaplan filed a *Daubert* motion to exclude Murphy. Memorandum in Support of *Daubert* Motion, R82-1, PID-3636. In the motion, Kaplan stated for the first time that Murphy should not have used DMV photos to

race identify any applicants because race identifying someone by looking at that person's DMV photo is unreliable as a matter of law. *Id.* at PID-3638, 3641-42. Kaplan filed no expert testimony on the issue. *Id.*

With the *Daubert* motion, Kaplan filed a Declaration from Saad dated November 30. Saad Declaration, R84, PID-4003-4066. In the Declaration, Saad offered two new observations about the 4,670 dataset of credit checked applicants, which included 3,580 applicants who Murphy didn't race identify, and the 1,090 dataset of applicants who Murphy race identified as black, white, Asian, or Hispanic. *Id.* at PID-4005, ¶9. Saad observed that 13.3% of the applicants in the 4,670 dataset were coded by Kaplan as "not eligible." Saad did not explain what he meant by "not eligible," but EEOC assumes he meant the rate at which Kaplan coded the applicants as "Fail." Saad also observed that, in the 1,090 dataset, the fail rate was higher – that is, Kaplan coded 23.8% of those applicants as "Fail." *Id.*

In his November 30 Declaration, Saad also said that the applicants in the 1,090-person dataset included a larger percentage of Georgia residents and a smaller percentage of Wisconsin residents than the 4,670-person dataset. *Id.* at PID-4005, ¶11. Regarding this purported "imbalance" of applicants from Georgia and Wisconsin, Saad suggested that Murphy should have made "adjustments to the statistical analyses." *Id.*

Finally, in his Declaration Saad addressed the 57 cases where applicants

were race identified by DMV photo and Murphy had another source of race identification data for the same applicants. *Id.* at PID-4010, ¶28. In response, Saad said that a "sample size" of 57 is "too small." *Id.*

On December 21, 2012, EEOC filed its opposition to Kaplan's *Daubert* motion. *Daubert* Opposition, R93, PID-4403. With the opposition, EEOC filed Murphy's Declaration responding to various challenges including Kaplan's new argument that race identification by DMV photo was inherently unreliable. Murphy Declaration, R92, PID-4165-73. Murphy reiterated the steps that were taken to ensure reliability of race identification by DMV photo. *Id.* Murphy also responded to Kaplan's argument that when Murphy gave panelists DMV photos to review, he shouldn't have allowed them to see the names of the persons depicted in the photos. *Id.* at PID-4167-68, ¶10. Murphy explained that Kaplan's argument was incorrect and that there is no reason to assume that providing the name rendered the DMV photo process unreliable. *Id.*

Regarding Saad's observation about an "imbalance" of people from Georgia and Wisconsin, Murphy explained there is no need to adjust his statistical analysis for statehood because Kaplan applicants who lived in Georgia and Wisconsin were subjected to the same set of credit check criteria as everyone else. Murphy Declaration, R92, PID-4171, ¶20. Further, Saad identified no reason to analyze applicants separately, for statistical purposes, based on where they live. *Id.*

Regarding the 23.8% fail rate of the 1,090 dataset, Saad had already acknowledged in his Declaration that after PeopleSoft was added, the pass rate "dramatically increased" for all applicants, including blacks and whites. Saad Declaration, R84, PID-4007, ¶¶15-17. Murphy echoed this observation saying it is obvious that the pass rate in his datasets would increase after adding PeopleSoft. MurphyDeclaration, R92, PID-4170, ¶17. In any event, Murphy added that the raw "pass" rate of all applicants in a dataset is not determinative – such data does not, by itself, bear on whether credit checks have a disparate impact on blacks. Murphy Declaration, R92, PID-4170, ¶17.

Murphy also addressed Saad's testimony that the consistency between race identifications by DMV photo and race identifications from other sources was based on a sample that was too small. Murphy Declaration, R92-4, PID-4168, ¶11. As Murphy explained, the evidence was not a sample – the 57 cases constituted all cross-references in the data between DMV photo race identifications and other race identification information. *Id.* Murphy repeated that the consistency rate supports the reliability of race identifying applicants by DMV photo. *Id.*

Regarding the argument that using DMV photos to race identify applicants rendered the statistical analysis unreliable, Murphy responded that even if one removes all applicants who were race identified by DMV photo alone, there is still statistically significant disparate impact. Murphy Declaration, R92, PID-4170,

¶18; Murphy Declaration, Ex. D, R92-4, PID-4278-80. After removing applicants who were race identified by photo, 54.1% of whites pass the first credit check while 34.2% of blacks pass. Murphy Declaration, Ex. D, R92-4, PID-4278. Murphy also analyzed the rate at which Kaplan determined that whites and blacks "Passed" or "Failed" the second credit check and found that 82.1% of whites pass while 68.8% of blacks pass. *Id.* at PID-4279. Murphy applied a statistical analysis to the dataset and, again, found statistically significant impact. *Id.*

Standard of Review

The Court reviews a district court's decision to exclude expert testimony for an abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *First Tennessee Bank National Association v. Barreto*, 268 F.3d 319 (6th Cir. 2001). A district court abuses its discretion where it relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard. *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 295 (6th Cir. 2007). An abuse of discretion is found where the Court is "firmly convinced that a mistake has been made." *Dickenson v. Cardiac and Thoracic Surgery of Eastern Tennessee*, 388 F.3d 976, 980 (6th Cir. 2004).

Summary of Argument

EEOC showed that Murphy's use of DMV color photos to race identify applicants was reliable and, therefore, Murphy's statistical analyses should not

have been excluded.

The district court abused its discretion by applying factors that are not reasonable measures of reliability as defined by *Daubert* and *Kumho*. The court erred when it held that no reliable observations about an applicant's race can be drawn by looking at his or her DMV color photo. The court erroneously rejected EEOC's evidence that Murphy's photo race identifications were highly consistent with other race identification data and, therefore, had a low error rate. The court erred when it excluded Murphy's testimony based on purportedly improper controls and when it excluded Murphy's because he failed to show that the use of color photos to race identify applicants has been peer reviewed. The court also erred when it excluded Murphy's testimony because he did not show representativeness, which does not apply to the datasets at issue. Finally, the court erred when it rejected Murphy's testimony that, even if one removes applicants who were race identified by DMV photo alone, there is still disparate impact.

Argument

I. Expert testimony is admissible where it is reliable.

Before the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court and a majority of other circuits used the test set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to determine the admissibility of scientific evidence. *United States v. Bonds*, 12

F.3d 540, 553 (6th Cir. 1993). *Frye* created the "general acceptance" test. *Id.* at 554. The *Frye* test required proof that the scientific principle from which a deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. *Frye*, 293 F. at 1014.

In *Daubert*, the Supreme Court rejected the *Frye* test and redefined the standard for admission of expert scientific evidence. *Bonds*, 12 F.3d at 554. The Supreme Court found that the *Frye* test was superseded by Federal Rule of Evidence 702. *Id.* Pursuant to Rule 702, rejection of expert testimony is the exception rather than the rule. Fed.R.Evid. 702, Advisory Committee's Note (2000). A witness qualified as an expert may testify about scientific, technical, or other specialized knowledge that will assist the fact finder to understand the evidence or to determine a fact in issue. *Id.*; Fed.R.Evid. 702.

The Supreme Court explained that a "rigid general acceptance requirement" is at odds with the "liberal thrust" of the Federal Rules which favor "relaxing the traditional barriers" to opinion testimony. *Daubert* at 588-89; *Bonds* at 554. The Court concluded that the *Frye* test was "austere" and incompatible with the Rules. *Id.* "*Daubert* sets out a 'flexible' and more lenient test that favors the admission of any scientifically valid expert testimony." *Bonds* at 565.

Daubert explained that under the Federal Rules the trial court must ensure that scientific testimony is both relevant and reliable. *Daubert* at 588-89. The

Court indicated that by reliability it meant evidentiary reliability or "trustworthiness," and that, in turn, evidentiary reliability means scientific validity. *Id.*; *Bonds* at 554. The word "knowledge," as used in Rule 702, means "more than subjective belief or unsupported speculation" and the term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truth on good grounds." *Gross v. Commissioner of Internal Revenue*, 272 F.3d 333, 339, n. 3 (6th Cir. 2001). Methodology is valid where it results from "sound and cogent reasoning," *Bonds* at 540, and is "'well grounded and justifiable [and] applicable to the matter at hand.'" Black, *A Unified Theory of Scientific Evidence*, 56 Fordham Law Review 595, 599, n. 9 (1988). The subject of scientific testimony need not be known with certainty, but an inference or assertion must be supported by good grounds, based on what is known. *Id.*

II. Reliability may be shown using any reasonable measures.

In *Daubert*, the Court did not explicitly define "reliability" or apply it to evidence, but the Court "did begin to draw the parameters of this inquiry" by providing a non-exhaustive list of factors. *Bonds*, 12 F.3d at 555. However, the Court explicitly stated that the non-exhaustive list was not a "checklist" or "test." *Daubert*, 509 U.S. at 593. The proposed factors included (1) whether a theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of

error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation, and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Daubert*, 509 U.S. at 589-92; *Bonds* 12 F.3d at 555. In *Daubert*, the Court emphasized that the inquiry envisioned by Rule 702 is "a flexible one" and that its focus is on reliability and relevance.

In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999) the Supreme Court repeated that "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Id.* at 141. This flexibility is necessary because experts of all kinds tie observations to conclusions through the use of "general truths derived from . . . specialized experience." *Id.* 149-50. In *Kumho*, the Court explained that the factors it highlighted in *Daubert* are not applicable in every case:

> [W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.
>
> *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged.

Id. at 151. The specific factors proposed in *Daubert* should be considered where they are "reasonable measures of the reliability of expert testimony." *Id.* at 152.

However, in *Kumho* the Court endorsed the lower court's approach of analyzing expert evidence using the factors proposed in *Daubert* "*or any other* set of reasonable reliability criteria." *Id.* at 158 (emphasis in original); *see In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008) (*Daubert* factors are not dispositive in every case and should be applied only "where they are reasonable measures of the reliability of expert testimony"); *see also Gross v. Commissioner of Internal Revenue*, 272 F.3d 333, 339 (6th Cir. 2001) (the Supreme Court did not intend to turn the proposed *Daubert* factors into a "straightjacket").

III. EEOC established that its expert testimony is reliable.

The proponent of expert evidence need only establish that the pertinent admissibility requirements are met by a preponderance of the evidence, pursuant to Rule 104(a). Daubert, 509 U.S. at 592-93, n.10. Here, EEOC more than satisfied that standard.

Murphy's use of DMV color photos to race identify 692 applicants was a reliable means of identifying which applicants were black or white for purposes of including them in a statistical analysis. Murphy used sound procedures to control the process and it produced a reasonable factual basis to support Murphy's race identification of the applicants. *See United States v. Bonds*, 12 F.3d 540, 560 (6th Cir. 1993) (district court should consider the existence and maintenance of

standards controlling the technique's operation). Each panelist in the group looked at the same photo as all other panelists and all panelists participated in each of the three sessions.

Murphy controlled the process to ensure that photos were reviewed under the same circumstances by the same reviewers. Murphy Report, R92-2, PID-4227; Murphy Dep., R95, PID-4442. *Id.* For each group of photos reviewed, panelists filled out the same form to record observations and each panelist recorded observations using the same five categories. *Id.* When the forms were completed, Murphy's staff translated the observations from the forms to an electronic file. To resolve questions Saad raised about coding errors, Murphy re-read all of the panelists' forms and the electronic file. Murphy Dep. Ex. 14, R83-8, PID-3984. Murphy found 22 coding discrepancies (3% of all cases) and corrected them. *Id.*; *see also McReynolds v. Sodexho Marriott Services*, 349 F.Supp.2d 30, 39 (D.C. Dist., 2004) ("the fact that expert was open to and did correct deficiencies in his preliminary reports argues *for* reliability of his testimony, not for its exclusion.") (emphasis in original). All panelists looked at each photo separately and recorded their observations without input from one another. Murphy Dep., R95, PID-4442.

Murphy also imposed an inter-rater reliability requirement on the DMV photo race identifications. Murphy did not accept any race identification unless at least 80% (four out of five) of the panelists, working independently, recorded the

same observation about the race of the person in the photo. Murphy Report, R92-2, PID-4227.

Murphy also measured whether the race identifications by DMV photo were consistent with other race identification information produced for the same applicants. Murphy Dep., R95, PID-4443. The panelists' race identifications were consistent with DMV race identification data at a rate of 95.7% and consistent with PeopleSoft at a rate of 80%. Murphy Dep. Ex. 13, R83-7, PID-3949.

Murphy also used a group of panelists who had extensive (5-27 years with a median of 24) research experience in multicultural, multiracial, treatment outcome research where there is often a question about how individuals are characterized by race.[21] Murphy Report, R92-2, PID-4227; Murphy Dep., R83-5, PID-3910. The panelists had experience dealing with people who are race identified by various sources and where race identification was part of their work. Murphy Dep., R83-5, PID-3910.

Kaplan had an obligation to maintain outcome and race identification data for applicants who were credit checked. *See* discussion of EEOC's recordkeeping regulations, *supra*. EEOC's recordkeeping regulations have the force of law. In

[21] This applies to the group of five panelists who reviewed 891 of the 906 photos. Murphy and two staff members race identified the additional 15 photos obtained from the DMVs based on new applicant information that Kaplan produced after Murphy issued his May report. Murphy Report, R92-2, PID-4227; Murphy Dep., R83-5, PID-3909.

EEOC. v. Rogers Bros., Inc., 470 F.2d 965-66 (5th Cir. 1972), a case brought "to compel . . . compliance with the reporting procedures prescribed by section 709(c) of [Title VII]," the court granted EEOC injunctive relief and said:

> The assertion that the EEOC somehow has no standing to prosecute the present action must be flatly and unequivocally rejected. Beyond any possibility of doubt Congress conferred upon the Commission explicit statutory authority to seek judicial relief against an employer's willful noncompliance with the reporting requirements of Title VII.[22]

Similarly, in *EEOC v. Koch Meat, Co., Inc.*, No. 91 C 4715, 1993 U.S. Dist. LEXIS 128 (N.D. Ill. Dec. 7, 1992) (unpublished) following a trial in which one issue was defendant's failure to retain applications of people it didn't hire, the court found that the defendant's "practice of discarding application forms that it received from persons whom it did not hire" violated section 709(c) and EEOC's regulations at 29 C.F.R. § 1602.14. *Id.* at *4. *See also Wards Cove v. Atonio*, 490 U.S. 642,

[22] In discussing a class race, black, disparate treatment hiring claim in *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277 (5th Cir. 1994), the court said in a footnote that the plaintiffs "seem[ed] to suggest that [the court] should draw an adverse inference against [defendant]" due to its failure to preserve applications for a 1-year period as required by UGESP, and then stated that the Uniform Guidelines were not legally binding because they were not promulgated as regulations and do not have the force of law. *Id.* at 1287 n.13. The authority cited for the "nonlegally binding" statement involved a substantive provision of UGESP (the 80% rule). EEOC's position is that sections 709(c) and 713(a) of Title VII provide direct authority for the agency to issue binding recordkeeping regulations, including those within UGESP. In fact, deciding to follow the Commission's guidelines on pregnancy discrimination in *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976), the Supreme Court distinguished substantive regulations from those issued under the authority of section 713(a). *Id.* at 141 n.20.

657-58 (1989) ("employers falling within the scope of the [UGESP] are required to 'maintain records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s].' . . . Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force").

In *Phillips v. Cohen*, the plaintiffs brought a disparate impact race discrimination claim challenging the employer's use of facially neutral criteria used in the promotions process. The employer prevailed on summary judgment but this Court reversed, holding that the plaintiffs' statistical proof of impact was sufficient to withstand summary judgment. *Id.* at 399-400. This Court reversed, holding that the district court's assessment of the plaintiffs' statistical evidence was "erroneous or at best, incomplete." *Id.* The court reasoned that the plaintiff's expert should not be penalized for the employer's failure to retain relevant information:

> Admittedly, it can fairly be said that both expert's analysis suffers from some flaws; however, such flaws may be unavoidable given the absence of data on who applied for promotions. In any event, such flaws relate to the weight of the reports which is a matter for the trier of fact. Importantly, [the plaintiffs' expert's] report provides some basis for finding that African-Americans received less promotions, at least for overcoming summary judgment.

Id. at 400-01. *See Jahn v. Equine Services*, 233 F.3d 382, 390 (6th Cir. 2000) (where relevant records are missing, an expert may not know answers to "even the most fundamental questions" and "it seems patently unfair to allow [the defendant] to benefit from what seems to be a deplorable, and perhaps even negligent, absence of record-keeping.").

Murphy's race identifications by DMV photo should be assessed in light of Kaplan's failure to comply with the record-keeping requirements promulgated in UGESP. *Cf. Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded by statute on other grounds, IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (where employer failed to discharge its duty to produce overtime records, "a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof" that does not penalize the employee).

IV. The district court abused its discretion in excluding EEOC's expert testimony.

A. The district court erred in rejecting photographs as a source of race identification.

The district court erred when it held that no reliable observations about an applicant's race can be drawn by looking at his or her DMV color photo. As discussed above, EEOC showed that Murphy's DMV photo identification process was reliable. Kaplan did not show that anyone in Murphy's dataset was not, in fact, the race that Murphy identified. The district court's wholesale rejection of

proof that Murphy's process was reliable, in favor of Kaplan's speculation that one might incorrectly race identify someone by visual means, constitutes an abuse of discretion. "[I]t is not the district court's role under *Daubert* to evaluate the correctness of the facts underlying an expert's testimony." *See I4I v. Microsoft*, 598 F.3d 831, 856 (Fed. Cir. 2010).

Moreover, the attack on Murphy's use of DMV photos, as opposed to some other method of race identification, is untenable. Kaplan argued that EEOC should have recreated Kaplan's missing data by compelling applicants to tell EEOC over the phone what race they are and, if that didn't work, compelling applicants to send EEOC forms disclosing their race. *Daubert* Reply, R101, PID-4762-63. As the district court acknowledged, Murphy explained that such surveys produce low response rates or an over-representation of responses from non-minorities. R92, Murphy Declaration, PID-4168, ¶12 *citing* Ellis, C. & Krosnick, J., *Comparing Telephone and Face-to-Face Surveys in Terms of Sample Representativeness: a Meta-Analysis of Demographic Characteristics*, The Ohio State University (1999); R110, Order, PID-5637, n. 5. Kaplan insisted that if mail-outs and telephone surveys failed, EEOC should have conducted "in-person visits" with applicants to collect race identification information about them and, if that didn't work, EEOC should have issued subpoenas to the applicants compelling them, presumably, to appear for depositions to disclose their race. *Daubert* Reply, R101, PID-4763.

The impracticability of Kaplan's approach is obvious, but even if it were possible to gather race identification information using such methods that does not mean Murphy's reliance on DMV data and photos is unreliable. *I4I v. Microsoft*, 598 F.3d at 856-57 ("The existence of other facts . . . does not mean that the facts used failed to meet the minimum standards of relevance and reliability."). Accepting Kaplan's position would mean that an employer could avoid disparate impact challenges simply by failing (in violation of UGESP) to retain identifying information on individuals subjected to its selection procedures.

B. The visual race identification cases cited by the court are distinguishable.

The district court cited four cases for the proposition that courts disfavor visual identification of race.[23] Order, R110, PID-5640. Three of the cases involve the *Lamberth* study which analyzes the rate at which Hispanic and black motorists are subjected to traffic stops as compared to other motorists. None of the cases

[23] The district court cited EEOC's EEO-1 guidance stating that employers should visually identify an employee's race only if the employee refuses to self-identify. Order, R110, PID-5641. For practical reasons, the process employers use to racially identify their employees, for purposes of EEO-1 reporting, simply doesn't apply to the race identification of applicants in an enforcement action. Further, encouraging employers to compile EEO-1 reports based on employee self-identification provides EEOC with a more effective means of identifying potential Title VII violations.

supports the exclusion of Murphy's testimony.

In *United States v. Mesa-Roche*, 288 F.Supp.2d 1172 (D. Kan. 2003) and *United States v. Duque-Nava*, 315 F.Supp.2d 1144 (D. Kan. 2004), two criminal cases, Hispanic defendants challenged the traffic stops that led to their arrests. Both cases were decided by the same judge, The Honorable Julie A. Robinson. As evidence of racial profiling, the defendants in both cases compared the rate at which the deputy who stopped them conducts traffic stops of Hispanics and blacks as compared to various benchmarks. One of the benchmarks was the *Lamberth* study comparing the percentage of Hispanic and black motorists who are stopped in relevant geographic areas to the percentage of Hispanics and blacks in the "transient motor population."

In both cases, Judge Robinson found that the *Lamberth* study's measurement of the transient motorist population was insufficient to use as a benchmark. To race identify the transient motorist population, observers watched motorists while they were driving on stretches of highway or watched them from certain intersections. While standing on the roadside, the observers recorded the race or ethnicity of the motorists and, if time permitted, the gender, age group and state of license plate. Judge Robinson rejected the data because the "spotters" who observed and recorded race had a "short period of time . . . to record this information as a car passes them by." *Id.* at 1190. Moreover, the observers

worked in dusk/dark conditions. Further, there was no consistent inter-rater reliability imposed – that is, "[t]he study did not sufficiently test the accuracy of the recorded racial and ethnic data, by using multiple spotters per each vehicle." *Id.* Instead, inter-rater reliability was used only twice out of the many spotter tests conducted for multiple police departments at various places and times. *Id.*

Although Judge Robinson did not rely on the *Lamberth* transit motor population data, she did use the *Lamberth* traffic stop data as a benchmark. That data was gathered from various police agencies, including the Kansas Highway Patrol. To obtain the traffic stop data, police officers were instructed to record the race or ethnicity of motorists during traffic stops by visual observations or by the officer asking the motorist to self-identify. The district court found no reason to question the reliability of the traffic stop data which was based, in part, on race identification derived from the police officers' observations. Using this data as a benchmark, the district court found that the traffic stops at issue had a discriminatory effect. *Mesa-Roche* at 1190; *Duque-Nava* at 1159.

In *United States v. Alcaraz-Arellano*, 302 F.Supp.2d 1217, 1218 (D. Kan. 2004), a different district court in Kansas assessed the same studies at issue in *Mesa-Roche* and *Duque-Nava*. The district court also rejected transient motorist population benchmark data because it had been obtained either (1) by observers standing on the roadside and race identifying drivers of passing cars, or (2) by

observers who made their observations while driving in traffic on the highway and attempting, from their cars, to identify the race of people driving by. In that context, the district court reasoned that it would be "difficult to stand on the side of a road, particularly at night, and record the race, gender, and approximate age of a person driving a car, and at the same time turn and look at the license plate to figure out what county they came from . . . ." *Id.* at 1230. In *Alcaraz-Arellano*, the court agreed "with expert testimony that a better method of gathering benchmark data is to have two or three surveyors to look at the same car and compare results to measure the extent to which surveyors uniformly perceive race." *Id.* The court said there was little empirical evidence about the rate at which Hispanic and white drivers can be distinguished, but that "[t]he difficulty of this task would appear to be compounded under the circumstances present in the rolling surveys, when surveyors were asked to record multiple data regarding motorists who they passed or who passed them in their vehicles." *Id.*

Here, the district court relied on *Alcaraz-Arellano* for the proposition that Murphy's panelists could not have reliably distinguished Hispanics from whites. But the circumstances under which race was identified in *Alcaraz-Arellano* are vastly different from those used here. The benchmark surveys in *Alcaraz-Arellano* were conducted by people who either stood by the roadside and observed the race of passing drivers or, while they were driving in traffic on the highway, tried to see

the race of drivers passing by in their vehicles. Moreover, in *Alcaraz-Arellano*, the observers had to record far more than race in the "split second" they had to look – at the same time, they also had to record age, gender, and license plate information.[24]

In *Smith v. Chrysler Financial Co.*, No. 00-CV-6003, 2004 U.S. Dist. LEXIS 28504 (D. N.J., December 30, 2004) (unpublished), the plaintiffs alleged that a car dealership's pricing policies had a disparate impact on black consumers. The defendant argued that the plaintiffs suffered no injury, and therefore lacked standing, because the mark-up on the plaintiffs' sales contract was lower than the average mark-up for similarly situated white consumers. *Id.* at *7. To support the argument, the defendant looked at "black-and-white photocopies" of customers' driver's licenses to determine their race. *Id.* at *8. The district court was unwilling to deprive the plaintiffs of standing based on that review because the process had a great potential for error. The court did not indicate what the potential for error was – for example, the use of black-and-white photocopies of driver's licenses instead of color copies. Instead, the court concluded that the rate at which sales were marked up for blacks and whites was a disputed material fact. Aside from the

[24] In *Alcaraz-Arellano* the district court agreed with expert testimony that a more reliable method of gathering the data was to have two or three observers race identify the same people and then measure the extent to which they "uniformly perceive race." That is what Murphy did here when he imposed an inter-rater reliability standard.

procedural and other relevant differences between *Smith* and this case, the photographs reviewed in *Smith* were black-and-white photocopies of driver's licenses. Here, only color photos were reviewed. Murphy Declaration R92, PID-4167, ¶¶ 8, 9. Moreover, there is no evidence that the defendant in *Smith* used multiple reviewers, imposed any inter-rater reliability requirement, compared the results to another race identification source, or otherwise used a process similar to Murphy's.

C. Federal courts have recognized that race may be observed by visual means.

In *Vulcan Society of N.Y.C. Fire Department v. Civil Service Commission*, 490 F.2d 387, 391 (2d Cir. 1973), the district court found that tests used to select firefighters had a disparate impact on black and Hispanic applicants. The plaintiffs showed disparate impact by comparing the percentage of black and Hispanic applicants who entered the testing halls as compared to the percentage of them who passed the tests. On appeal, the court rejected the argument that the plaintiffs' method of race identifying the applicants – by looking at them – was unreliable. Race was observed in two surveys. First, the Vulcan Society (an organization representing black firefighters) posted people in front of the testing halls to observe how many black and Hispanic applicants entered. Second, using a "sight survey," people from the fire department looked at test takers to see how many black and Hispanic applicants passed the tests and were deemed qualified. The court rejected

the idea that such methods of race identification were unreliable:

> While the rather crude procedures of physical observation used in the surveys doubtless led to error in some cases, it is hard to believe that survey errors could have accounted for the striking racial imbalance that the results indicated. . . . It may well be that the cited figures and other more peripheral data relied on by the district judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should. "Certainty generally is an illusion, and repose is not the destiny of man." We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

Id. at 392-393.

This Court cited *Vulcan* with approval in reversing a district court's exclusion of statistical evidence:

> The district court also rejected the statistical evidence because of a lack of "applicant flow data" until 1968 and data reporting errors thereafter. The district court seemed to require proof to a mathematical certainty, but there is no such requirement. *Vulcan Society of N.Y.C. Fire Department v. Civil Service Commission*, 490 F.2d 387, 393 (1973). Deficiencies in a data base "may, of course, detract from the value of such evidence," *Teamsters*, 431 U.S. at 340 . . . but ordinarily would not obliterate its evidentiary value. There was no indication that the reporting errors accounted for the "striking racial imbalance" indicated by the data. *Vulcan*, 490 F.2d at 392. In short, none of the defects cited by the district court were fatal and it was "unfair to ignore (the figures) entirely."

Detroit Police Officer's Association v. Young, 608 F.2d 671, 687 (6th Cir.), *cert. denied*, 452 U.S. 938 (1979).

In *United States v. Pasadena Independent School District*, No. H-83-5107,

1987 U.S. Dist. LEXIS 16912, *20 (S.D. Tex., April 18, 1987) (unpublished), the Department of Justice brought a disparate impact claim alleging that the defendant school district engaged in a pattern or practice of race discrimination in the recruitment and hiring of black teachers. DOJ's expert, Dr. Janice Madden, conducted both an internal applicant flow analysis and an external availability analysis based on census data. Applicant data collected for the analyses included information about each applicant's race which was derived for most applicants from their applicant and personnel files. Where available, photographs were used to race identify the applicants:

> The data collected and used for the analyses included for each applicant . . . race (black, nonblack, or unknown), principal subject area applied for . . . date of application, and whether or not offered a job by [defendant] . . . All such data were obtained from [defendant's] applicant and personnel files with the exception of the race identification of some applicants *for whom that information* was not in their files *in the form of either a photograph* or an explicit declaration.

Id. at *7, emphasis added. If "neither a clear photograph nor an explicit declaration as to race existed in an applicant's file," then DOJ race identified applicants using external sources which included "driver's license records" and other documents. *Id.* The court concluded that "the racial identifications drawn from [the defendant's] application files and those determined from external sources are accurate . . . and have been appropriately used by the Government in its economic and statistical studies." *Id.* at *9.

In *Parrish v. Board of Commissioners of the Alabama State Bar*, 533 F.2d 942 (5th Cir. 1976), the plaintiffs sued the Alabama State Bar for discouraging or preventing blacks from applying for admission to the Bar. The plaintiffs challenged the Bar's practice of requiring applicants to submit their photographs with their applications on the grounds that the practice violated the Equal Protection Clause and was not justified by any compelling state interest. The district court granted summary judgment for the Bar. On appeal, the plaintiffs argued that they had been denied sufficient discovery to oppose the Bar's summary judgment motion. The Fifth Circuit agreed, reasoning that "because . . . all applicants were required to file photographs, thus making possible an identification by race," evidence that white and black applicants who gave similar answers to exam questions, but were graded differently, was crucial. *Id.* at 947-48. The Fifth Circuit held – without relying on any expert testimony or other authority – that the Bar's practice of requiring applicants to submit their photographs produced a "clearly racially identifiable application form" and "without question put it within the power of the [Bar] to utilize racial identification as an ingredient in the grading of examination papers." *Id.*

In housing discrimination cases, courts have explained race identification by visual means is admissible even where not offered by an expert. *Saunders v. General Services Corporation*, 659 F.Supp. 1042, 1058 (E.D. Va., 1987) (it

requires no expert to recognize that people can identify the race of those depicted in photographs); *Ragin v. Macklowe Real Estate Co.*, 6 F.3d 898, 905-06 (2d Cir. 1993) (someone's race may be discerned by a layperson, or "the ordinary reader," and race identifying people based on their photographs does not require the use of any mechanical test; expert testimony on the topic is "no doubt" admissible but not necessary).

D. The district court erred when it rejected evidence of consistency between photo race identifications and other race identification data.

The district court was plainly incorrect when it held that EEOC failed to show that Murphy's race identifications by photo had an acceptable "error rate." Even if such a factor applies here, Murphy showed that the DMV photo identifications were highly consistent, as measured by comparisons between panelists' observations and other race identification sources. When asked how he measured the accuracy of the panelists' observations, Murphy testified at his depositions that he looked at the rate at which the panelists' observations matched the DMV data and PeopleSoft. Murphy Dep., R95, PID-4443; Murphy Dep., Ex. 13, R83-7, PID-3949. Murphy also reiterated in his *Daubert* Declaration that the high consistency rate was evidence of reliability.

The 57 cases Murphy used to analyze consistency between DMV photo identification and other race data did not constitute a "sample." Those cases constituted all instances in Murphy's data where an applicant was race identified

by DMV photo and Murphy also had another source of race identification for that applicant. Murphy Dep., R83-5, PID-3949. Moreover, the experts' disagreement about about whether the group of 57 cases is "too small" to measure the accuracy of 906 DMV photo reviews must be resolved by the fact finder and does not justify excluding Murphy's entire analysis. *See Smith v. United Brotherhood of Carpenters v. Joiners of America*, 685 F.2d 164, 167 (6th Cir. 1982) (district court erred when it excluded plaintiffs' statistical evidence in disparate impact case on the grounds that the sample size was too small).

Disputes about whether the tests performed to measure an error rate are the correct tests or are sufficient go to the weight of expert testimony, not its admissibility. In *United States v. Bonds*, 12 F.3d 540 (6th Cir. 1993) this Court applied *Daubert* to the question of whether DNA evidence obtained from a blood sample should have been admitted. Regarding the question of whether a theory or technique can be and has been tested, the Court held that the issue is not how the theory was tested, or whether it could have been tested using another method. *Id.* at 558. Instead, the relevant inquiry is whether the theory "can be" or has been tested. Debates about whether another, superior, method could have been used to test an expert's work bear on the weight of expert testimony, not its admissibility. *See also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142-43 (9th Cir. 1997) (debates about accuracy of data gathered from survey bears on weight

of expert testimony, not its admissibility).

E. The district court erred when it excluded Murphy's testimony based on purportedly improper controls.

The district court erred when it excluded Murphy's testimony because Murphy participated in race identifying 15 applicants by DMV photo and, where multiple photos were produced for the same applicant, Murphy or his staff chose the clearest photo and gave it to the panelists. R110, Order, PID-5640. Notably, while the district court found Murphy's process was flawed because he participated in race identifying 15 DMV photos, Saad said in his report that the process was flawed because Murphy *wasn't involved* in reviewing the photos. R83-2, Saad Report, PID-3741, ¶50 (identifying as a flaw the fact that "Dr. Murphy himself did not participate in reviewing the photographs").

An expert's analysis is not unreliable merely because the expert participated in identifying a relevant characteristic of the applicant pool and also analyzed the results. *See McReynolds v. Sodexho Marriott Services, Inc.*, 349 F.Supp.2d 3040-42 (D.C. Dist. 2004) (in case challenging discriminatory promotion practices, plaintiffs' expert, Dr. Bernard Siskin, defined and selected which black employees were promoted when compiling the data and then statistically analyzed the data). Experts are often involved in defining an external labor market benchmark which the same experts use to identify and analyze disparities in an employer's hiring practices. *See, e.g., Davis v. Cintas*, 717 F.3d 476, 492-93 (6th Cir. 2013) (both

parties' experts compiled external benchmarks, used the benchmarks they constructed as bases for measuring disparities in employer's hiring practices, and analyzed the results). Kaplan did not show how Murphy could have skewed the results by participating in 15 photo reviews. Moreover, it is difficult to imagine how, merely by selecting the clearest images where multiple photos were produced, Murphy could have altered the appearance of someone so dramatically as to control what race panelists would record or how many of them would record the same race. *See McReynolds* at 41 ("[D]efendant does not explain the relevance of this purported deficiency by showing how the change in [promotion] definitions materially affected Siskin's *results*."), emphasis in original; *see also Hemmings v. Tidyman's*, 285 F.3d 1174, 1188-89 (9th Cir. 2002) (defendant may not rest an attack on "unsubstantiated assertion of error" but must produce "credible evidence that curing the alleged flaws would also cure the statistical disparity").

F. The district court erred when it excluded Murphy's testimony because he included names with the DMV photographs.

Here, Murphy gave panelists not only the DMV photographs but also the names of persons depicted in the photographs. Murphy Dep., R83-5, PID-3906-07; DMV photo sample, R92-5, PID-4281-87. The district court identified this as a flaw in Murphy's process. Courts have acknowledged that last names may be used to reliably identify Hispanics in an applicant pool. *EEOC v. Paramount Staffing*, No. 02 06 CV 2624, 2010 U.S. Dist. LEXIS 49042, *29 (W.D. Tenn.,

May 17, 2010) (unpublished) (explaining identifying Hispanic employees by surname is admissible method of race identifying hires); *see also Gomes v. AVCO*, 816 F.Supp. 131, 136-37 (D. Conn. 1993) (identifying Portugese workers based on surnames is admissible even though it may not necessarily indicate country of origin and even though females may have a Portugese surname by marriage); *see also Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (surnames may be used to identify Mexican-Americans to measure disparity between population and percentage of Mexican-Americans summoned for grand jury service).

Kaplan argued that including names with the photos made the review process unreliable. Murphy opposed the argument, saying it was incorrect. Murphy Declaration, R92, PID-4165-73. The district court accepted Kaplan's view of the evidence, stating that the court "does not believe that determining race (even solely for corroboration) based on an individual's name is appropriate."[25] Order, R110, PID-5641, n. 6. The court erred when it improperly excluded Murphy's testimony based on the court's belief that last names should not be used in any race identification process. *Cf. In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529-30 (6th Cir. 2008) ("[A] court must be sure not to exclude an

[25] Notably, Saad never testified that Murphy shouldn't have given the panelists the last names of the people in the DMV photos. As was the case with Kaplan's argument that race identification by visual means is inherently unreliable, Kaplan proffered no expert testimony that using photographs and/or last names to race identify applicants is unreliable.

expert's testimony on the ground that the court believes one version of the facts and not the other").

G. The district court erred when it excluded Murphy's testimony because he did not show that using color photos to race identify applicants has been peer reviewed.

The district court also excluded Murphy's testimony because he did not show that the practice of observing someone's race by looking at the person's photograph has been subject to peer review. However, in *Daubert* the Supreme Court held that general acceptance and peer review are not required to establish admissibility, nor do they necessarily correlate with reliability. *Daubert* at 593. Whether the expert's work is generally accepted may have a bearing, but is not required to assess reliability: "A 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.'" *Id.* Here, requiring Murphy to show that an expert's use of color photos has been the subject of peer review is not a reasonable measure of reliability.

H. The district court erred in excluding Murphy's testimony because he did not show representativeness.

The district court erred when it excluded Murphy's statistical analysis because he failed to show that the racial characteristics or credit outcomes of the applicants in the 1,090 dataset were representative of those in the 4,670 dataset.

Saad conceded that of the 4,670 dataset Murphy race identified 1,090 applicants as black, white, Asian, or Hispanic. Saad Report, R83-2, PID-3725. Murphy explained that in the process of compiling the data he analyzed, he included everyone for whom he had credit check outcome data and race identification. Murphy Dep., R83-5, PID 3891-92; Murphy Dep. R95, PID 4453-54. Saad did not identify any race identified applicant for whom there was outcome data who Murphy should have included in the data he analyzed. Therefore, representativeness is not a proper measure of reliability in this situation. Kaplan presented no evidence that the data Murphy analyzed was different in any relevant way from the 4,670 dataset.[26] *See Detroit Police Officer's Association v. Young*, 608 F.2d 671, 687 (6th Cir.) (district court errs when it rejects a challenged statistical analysis absent evidence that errors actually accounted for the statistical disparity), *cert. denied*, 452 U.S. 938 (1979).

The court erred when it concluded that because the 4,670 dataset of credit checked applicants had a lower failure rate than the 1,090 dataset of race identified applicants for whom Murphy had some outcome[27] data, the data Murphy analyzed

[26] The district court rejected Kaplan's argument that Murphy should have analyzed more of the data he gathered. Order, R110, PID-5647.

[27] Of the 1,090 applicants who Murphy race identified, he found first credit check outcome data for 1,072 of them. Murphy Report, R92-2, PID-4228-29. Before conducting the statistical analyses, Murphy removed the Asian and Hispanic applicants. *Id.* at PID-4230-32.

was different from the "applicant pool" in some relevant way. Order, R110, PID-5646. The conclusion that there was a relevant difference is not supported by any record evidence – including expert testimony. To the contrary, Murphy testified that the raw pass/fail rate of persons in a dataset does not, by itself, determine disparate impact. Murphy Declaration, R92, PID-4170, ¶17. While it is true that Saad said he observed a 13.3% failure rate in the 4,670 dataset of credit checked identified applicants and a 23.8% failure rate in the 1,090 dataset of race identified applicants, Saad never testified that such a disparity was relevant or rendered Murphy's analysis unreliable. Saad Declaration, R84, PID-4005, ¶9. That disparity does not show that blacks or whites in the 4,670 dataset failed at different comparative rates than the blacks or whites in the data Murphy analyzed. Moreover, Saad's observation that the 1,090 dataset of race identified applicants had a failure rate of 23.8% referred only to Murphy's original dataset; as Saad's Declaration makes clear, Saad knew that Murphy had since added PeopleSoft to the dataset he analyzed. Saad Declaration, R84, PID-4007, ¶¶15-17. In the same Declaration, Saad observed that after PeopleSoft was added, the pass rate in the 1,090 dataset of race identified applicants "dramatically increased" for all applicants, including blacks and whites. *Id.* In fact, the updated analysis shows that after adding PeopleSoft, the rate at which Kaplan coded blacks and whites as "Fail" in the data Murphy analyzed goes down to 15.7%. Murphy Declaration, Ex.

D, Table 6, R92-4, PID-4277; Murphy Dep. Ex. 15, R83-9, PID-3992-95.

The district court erroneously found that EEOC did not respond to Kaplan's representativeness argument. Order, R110, PID-5646. EEOC did oppose the argument. In its *Daubert* motion, Kaplan argued that Murphy's data was not representative because Murphy chose to analyze a special subset of data as a "sample" from the larger known population. Motion, R82-1, PID-3644 (comparing Murphy to "plaintiffs [who are allowed] to pick a special subset of the affected localities to test for disparate impact . . ."). Continuing, Kaplan argued that no court should "credit expert evidence that relies on cherry-picked data." *Id.* Citing the purported disparity in failure rates of the 4,670 dataset that Murphy didn't race identify and the race identified dataset that Murphy analyzed, Kaplan claimed, "Murphy makes no showing that his sample is representative of Kaplan's applicant pool, or demonstrates that it was not cherry-picked for convenience, whether intentionally or unintentionally." *Id.* at PID-3645. EEOC responded that Murphy did not "cherry-pick" the data he analyzed and that Kaplan's argument was meritless. *Daubert* Opposition, R93, PID-4412. EEOC explained that the data Murphy analyzed consisted of applicants for whom Murphy had outcome data and matching race identification. *Id.* Moreover, EEOC exposed the false premise underlying the entire representativeness argument – that is, the premise that Murphy "cherry-picked" his data from a known population as a purported sample

rather than analyzing the credit checked applicants for whom he had outcome data and matching race identification. *Id.*

The district court erred when it excluded Murphy's testimony because the applicants in the 1,090 race identified dataset included a larger percentage of Georgia residents and a smaller percentage of Wisconsin residents than the 4,670-person dataset. As Murphy testified, there is no need to adjust his statistical analysis for statehood because Kaplan applicants who lived in Georgia and Wisconsin were subjected to the same credit check criteria as everyone else. Murphy Declaration, R92, PID-4171, ¶20. There is simply no reason to assume that the greater percentage of Georgia residents and smaller percentage of Wisconsin residents in the data analyzed skewed the results.

I. The district court erred when it rejected Murphy's testimony that, even if one removes applicants who were race identified by DMV photo from the database, there is still disparate impact.

The district court also erred when it rejected Murphy's testimony that, even if one removes from the data all applicants who were race identified by DMV photo alone, there is still disparate impact. In its initial order, the district court concluded that the evidence was untimely filed and, therefore, the court would not consider it.[28] In a subsequent order denying EEOC's motion for reconsideration,

[28] Kaplan did not move to strike any portion of Murphy's Declaration.

the court indicated that it had considered the evidence, but rejected it.

The district court erred in concluding that Murphy's analysis of the non-photo dataset was untimely. Kaplan complained that Murphy's December 2012 Declaration was improper because the court issued on order dated October 5, 2012 stating that no further expert reports would be allowed. However, Murphy's Declaration was not a new expert report. It was submitted in response to Saad's new Declaration filed in support of Kaplan's *Daubert* motion and in response to Kaplan's argument that race identification by DMV photo is inherently unreliable.

In its *Daubert* motion, Kaplan challenged, for the firs time, the reliability of race identifying applicants by looking at photographs. As part of Murphy's response, it was appropriate for him to test whether the challenges raised to his analyses would make any difference in the results. When Kaplan asked why Murphy didn't use PeopleSoft, Murphy added PeopleSoft, reanalyzed the data, and showed that it didn't affect his results. Murphy Dep., R83-5, PID-3901-05; Murphy Dep. Ex. 15, R83-9, PID 3992-95. Similarly, when Saad identified coding discrepancies Murphy addressed them, reanalyzed the data, and found no difference in the results. Murphy Dep. Ex. 14, R83-8, PID 3984-89. Therefore, when Kaplan argued in its *Daubert* motion that race identifying applicants by photo is inherently unreliable, Murphy removed those who were identified by photo alone and – just as he had before – reanalyzed the data and found no

difference in the results. Murphy Declaration R92, PID-4170, ¶18; Murphy Declaration Ex. D, R92-4, PID- 4278-80. It was entirely appropriate for Murphy to address Kaplan's challenges in his *Daubert* Declaration.

The district court indicated that it independently rejected Murphy's analysis of the non-photo data because he did not show it was representative of the applicants in the 4,670 dataset. Order, R110, PID-5643. As discussed above, representativeness is not an appropriate measure of reliability here.

Because the district court erred in excluding Murphy's testimony, the court also erred in granting summary judgment to Kaplan.

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached opening brief is proportionally spaced, has a typeface of 14 points, and contains 13,558 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

s/ Kate Northrup

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by e-mail sent by the appellate CM/ECF system.

s/ Kate Northrup

ADDENDUM
Designation of Relevant District Court Documents

Docket No.	Description
1	Complaint Filed by EEOC
13-1	Exhibit 1 Charge of Discrimination
41	Brief in Opposition to Motion to Modify Case Management Order [Doc. No. 37]
44	Reply in Support of Motion to Modify Case Management Order [Doc. No. 37]
51-14	Interrogatory Answers
58	Amended Complaint Filed by EEOC
79	Motion for Summary Judgment Filed by Kaplan
79-1	Brief In Support of Motion for Summary Judgment
80-8	Rogoff Deposition Excerpt
80-10	Nichols Deposition Excerpt
80-11	Seelye Deposition Excerpt
80-12	Seelye Deposition Exhibits
81-7	GIS Statement of Work
81-12	GIS Data Excerpt
81-16	Background Process Report
82-1	Memorandum in Support of *Daubert* Motion
83-1	August 17, 2012 Murphy Report
83-2	Expert Report of Dr. Saad
83-3	Expert Report of Dr. Aamodt
83-5	Murphy Deposition Excerpt
83-6	Letter from Kaplan to EEOC
83-7	Excerpt from November 8, 2012 Murphy Deposition
83-8	Exhibit 14 of November 8, 2012 Murphy Deposition
83-9	Exhibit 15 of November 8, 2012 Murphy Deposition
84	Saad Declaration
92	Murphy Declaration
92-2	Expert Report of Dr. Murphy
92-4	Exhibit D to Murphy Report
92-5	DMV Sample
93	Brief in Opposition to Motion to Exclude Expert Testimony of Murphy [Doc. No. 82]
94	Stern Declaration

94-3	Email Stern to Rowland
95	Murphy Deposition Excerpt
96	Saad Deposition Excerpt
110	Memorandum Opinion and Order Granting Summary Judgment [Doc. Nos. 79, 82]
111	Judgment Entry Granting Summary Judgment [Doc. No. 79]
113	Motion for Reconsideration Filed by EEOC [Doc. No. 110, 111]
115	Declaration of Stern
121	Notice of Appeal Filed by EEOC
127	Memorandum Opinion and Order Denying Reconsideration [Doc. No. 120]