Nos. 551 & 552 E.A.L. 2011

IN THE

Supreme Court of Pennsylvania, Eastern District

MICHELLE BRAUN, on behalf of herself and all others similarly situated,

Plaintiff/Appellee,

v.

WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc.,

Defendants/Appellants.

DOLORES HUMMEL, on behalf of herself and all others similarly situated,

Plaintiff/Appellee,

v.

WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc.,

Defendants/Appellants.

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Consolidated Appeals from the Order of the Superior Court of Pennsylvania, at Nos. 3373, 3376 EDA 2007, Decided June 10, 2011, Affirming the Orders of the Court of Common Pleas of Philadelphia County, Bernstein, J., Dated November 14, 2007, at 3127, March Term, 2002

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INTEREST AND IDENTITY OF *AMICUS CURIAE*

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

This is just such a case. DRI members have broad experience in defending against class actions in a variety of contexts. Plaintiffs in many of these cases, as in this one, propose overbroad classes and then offer novel statistical formulas and dubious expert opinions that gloss over individualized differences in proof and deprive defendants of their right to present individuated defenses. Imposing liability on a defendant through such procedures runs afoul of basic due process principles. It also intensifies the already enormous pressure on other defendants to settle class action suits quickly, regardless of the merits of the complaint. DRI submits this brief to underscore the limits that due process principles place on class action certification and adjudication, and to illustrate the profound practical consequences—in Pennsylvania and elsewhere—if this Court were to approve the "trial by formula" approach advanced by plaintiffs and adopted by the trial court.

INTRODUCTION

The trial court permitted a sprawling class of 186,979 former and current Wal-Mart employees who worked in 139 different locations, over a period of nearly eight years, to proceed as a single unit. The named plaintiffs claimed that Wal-Mart breached alleged contracts with all class members by depriving them of rest breaks and directing them to work off-the-clock. Under settled Pennsylvania law, each plaintiff's claim required proof that he or she actually relied upon Wal-Mart's alleged promises of benefits, and that he or she actually missed rest breaks and worked off-the-clock at the direction of one or more supervisors. In turn, Wal-Mart was entitled to defend against each plaintiff's claim by disputing those allegations.

Those individualized factual issues should have precluded both class certification and class adjudication. The varied circumstances of each plaintiff's employment situation mean that there is no common evidence that could possibly prove the claims of all plaintiffs. Nonetheless, the trial court certified the class, and then compounded its error by conducting a trial that relieved the plaintiffs of their burden to prove their claims and deprived Wal-Mart of its right to defend itself. The result was a staggering $187 million judgment against Wal-Mart based on nothing more than the testimony of a few current and former employees who could not remotely speak to the unique circumstances of every other class member, supplemented by unreliable statistical extrapolations and speculative generalizations about Wal-Mart's corporate culture.

That judgment cannot stand for the reasons set forth in Wal-Mart's brief. DRI fully supports those arguments, and submits this brief to highlight two points that further confirm vacatur is warranted.

First, the judgment in this case violates fundamental due process principles. A basic constitutional requirement of due process is that civil liability cannot be imposed on a defendant who is not allowed his or her day in court. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *Lyness v. Commonwealth*, 529 Pa. 535, 542, 605 A.2d 1204, 1207 (1992). The decisions below effectively abrogate this fundamental guarantee by lifting the plaintiffs' burden to prove their factually distinct claims and depriving Wal-Mart of any opportunity to dispute critical factual issues unique to each plaintiff's claim. Whatever efficiencies class actions may yield, the Pennsylvania Rules of Civil Procedure cannot be construed or applied in a manner that would permit such a result, in derogation of minimum due process protections.

Second, the judgment below, if upheld by this Court, will invite class action litigation from across the country—both meritorious and not—to move into the Commonwealth. Although this is the rare class action that went to trial, the vast majority of class actions do not, because class certification exerts extreme pressure on defendants to settle. Unless vacated, the judgment in this case will reinforce the notion that even non-meritorious class actions should be settled by defendants as quickly as possible to avoid the risk of an unfair trial and crippling liability. It will at the same time further incentivize the nationwide plaintiffs' bar to generate such suits—and bring them in Pennsylvania. Relieved of the burden of actually proving

their clients' claims at trial, and virtually assured of recovery through settlement, class action attorneys will find the Commonwealth an irresistible draw.

To rectify *these* due process violations and deter future abuses of the class action procedure, the decision of the Superior Court should be reversed and the trial court's judgment vacated.

ARGUMENT

I. THE DECISION BELOW CONTRAVENES DUE PROCESS BY RELIEVING PLAINTIFFS OF THEIR BURDEN TO PROVE THEIR INDIVIDUAL CLAIMS.

Due process forbids imposition of civil liability on a defendant unless that party has the opportunity to be heard, to put the plaintiff to his or her proof, and to present all available defenses. *See, e.g.*, *Lindsey*, 405 U.S. at 66. The judgment below contravenes that principle on a grand scale. The 186,979 plaintiffs in this case asserted contract claims that inescapably required individualized proof. The trial court nevertheless certified the class, and then sustained judgment against Wal-Mart based upon unwarranted and unsupportable generalizations drawn from the testimony of just a handful of former employees and expert witnesses. This is precisely the sort of "trial by formula" that the United States Supreme Court recently rejected in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). It should be rejected in this case as well, and largely for the same reasons.

A. Due Process Precludes Class Adjudication of Claims That Require Individualized Proof.

The "fundamental requisite" of due process of law is the "opportunity to be heard" before liability is imposed. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339

U.S. 306, 314 (1950); *Lyness*, 529 Pa. at 542, 605 A.2d at 1207.[1] This principle prevents courts "from denying potential litigants use of established adjudicatory procedures," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), and in particular requires that the defendant be afforded "an opportunity to present every available defense" to a claim. *Lindsey*, 405 U.S. at 66 (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Commonwealth v. Devlin*, 460 Pa. 508, 514, 333 A.2d 888, 891 (1975). The most basic "defense" available to any defendant in this regard is to demand that the plaintiff produce evidence to carry the burdens placed upon him or her by law as a prerequisite to recovery. *See, e.g.*, *Williams*, 549 U.S. at 353-54; *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 455 (1985). If the due process clause stands for anything, after all, it is that a defendant will not be held liable on a claim if the plaintiff is unable to prove up the elements of the cause of action under applicable law. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966).

These protections apply with equal vigor, and indeed must be even more jealously guarded, in the class action context. While class action procedures exist to permit class-wide findings on issues relating to claims and defenses, they cannot be applied in a manner that would substantively alter any plaintiff's burden to prove his or her claim or restrict the defendant's ability to present all available defenses.

[1] *See* U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law ...."); *accord* Pa. Const. art. 1, § 1; *R. v. Commonwealth, Dep't of Pub. Welfare*, 535 Pa. 440, 461, 636 A.2d 142, 152 (1994).

E.g., *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *see also, e.g.*, *Sacred Heart Health v. Humana Military Healthcare*, 601 F.3d 1159, 1176 (11th Cir. 2010). A class action is just a procedural device; it cannot change the parties' substantive rights. Yet, the very nature of class litigation heightens the risk that, by virtue of the aggregation of plaintiffs and claims into a single proceeding, a defendant will be prevented from offering defenses applicable to only a subset—or only one—of the claims or plaintiffs. *See, e.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 101-02 (2009) (hereinafter, Nagareda, *Class Certification*); Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1070 (2005).

That is why courts must be, and have been, particularly vigilant in tailoring class proceedings to avoid lowering any individual plaintiff's burden of proof or hindering the defendant's ability to challenge individual claims. The United States Supreme Court made precisely this point in *Wal-Mart*, warning against the use in the class action context of "trial by formula" procedures that allow plaintiffs to satisfy their burden without offering the individual proof of liability required by their claims. 131 S. Ct. at 2561. Courts of appeals have similarly disapproved, as inconsistent with due process, trial plans that would resolve many individual plaintiffs' claims through adjudication of only a few "bellwether" cases, without requiring the non-represented plaintiffs to prove their individual claims, *In re Chevron USA, Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997), or would allow for liability to be calculated on individual claims by "[r]oughly estimating the gross damages to

the class as a whole," *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008). State courts have repeatedly reached the same conclusion. *E.g.*, *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1254 (Fla. 1996) (striking down consolidation statute that would prevent defendants from mounting defenses to particular claims).[2] Indeed, this Court itself recently held, interpreting the Pennsylvania Rules of Civil Procedure, that class adjudication is inappropriate where one element of plaintiffs' claim "require[d] a uniquely individualized, factual assessment." *Basile v. H&R Block, Inc.*, No. 37 EAP 2011, 2012 WL 3871504, at *4 (Pa. Sept. 7, 2012).[3]

The requirement of individualized proof cannot be done away with, as the Superior Court seemed to imply, merely because class action procedures are to be interpreted "liberally" to promote the convenience of the parties and judicial economy. *Braun v. Wal-Mart Stores, Inc.*, 2011 Pa. Super. 121, 24 A.3d 875, 893, 938 (2011). No other court—in Pennsylvania or elsewhere—has held that plaintiffs may "amalgamate ... disparate claims in the name of convenience" when doing so would "abridg[e] the substantive rights of any party," including the fundamental

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[2] *See also, e.g.*, *Smith v. Illinois Cent. R.R.*, 860 N.E. 2d 332, 342 (2006) (reversing certification order where "[p]roof of proximate causation and damages will be highly individualized"); *Lawrence v. Philip Morris USA, Inc.*, No. 2011-574, 2012 WL 3570271, at *3-6 (N.H. Aug. 21, 2012) (reversing certification order where extent of class members' disqualifying knowledge required highly individualized determination).

[3] In *Basile*, this Court held that certification was not appropriate where the presence of a confidential relationship, a necessary element of the class plaintiffs' breach of fiduciary duty claim, could only be shown through individualized proof. *Basile v. H&R Block, Inc.*, No. 37 EAP 2011, 2012 WL 3871504, at *6 (Pa. Sept. 7, 2012).

rights guaranteed by due process. *Sacred Heart*, 601 F.3d at 1176 (internal citation omitted). To the contrary, courts have routinely recognized that "convenience and economy must yield to a paramount concern for a fair and impartial trial." *Sw. Refining Co. v. Bernal*, 22 S.W. 3d 425, 437 (Tex. 2000) (internal citation omitted). Indeed, the Superior Court's suggestion that these concerns should be ignored because "determin[ing] liability as to each individual class member" in this case would be in "derogation of class certification [rules]," *Braun*, 2011 Pa. Super. 121, 24 A.3d at 950, has it exactly backwards. Rules of civil procedure may not "transgress[] ... constitutional restrictions." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Thus, even if class adjudication were permitted by the rules in this case (which it is not), that would not justify violating the Constitution by lowering the plaintiffs' burdens to prove their claims or abrogating Wal-Mart's right "to present every available defense." *Lindsey*, 405 U.S. at 66 (internal citation omitted); *see also, e.g.*, *Chevron*, 109 F.3d at 1020; *cf. Wal-Mart*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims").

None of this is to say, of course, that due process necessarily forbids class certification whenever one element of a claim requires individual proof, or is potentially subject to a unique defense. But it does mean, at the very least, that due process absolutely precludes class-wide adjudication of those issues or defenses that require individualized proof. *See, e.g.*, *McLaughlin*, 522 F.3d at 231-32. When individualized issues are present, therefore, a court cannot enter final judgment

based on only a single trial with a select set of "bellwether" plaintiffs or through some other form of "trial by formula," relying on generalizations drawn from evidence applicable to only some parties and extrapolated to the class as a whole. *See, e.g.*, *Chevron*, 109 F.3d at 1020; *see also Basile*, 2012 WL 3871504, at *6. In short, individualized issues must be addressed individually.

B. The Decision Below Violated Due Process by Permitting Class Adjudication of Claims That Required Individualized Proof.

The judgment below plainly transgressed these constitutional bounds. The class in this case comprises nearly 187,000 plaintiffs, each of whom alleges that Wal-Mart breached contractual obligations owed to him or her personally. Each of these claims requires highly fact-intensive determinations on issues of contract formation and contract breach—issues that could not be tried in a single, common proceeding. Because these two issues, if not others as well, were not susceptible of class-wide adjudication, final judgment could not be entered unless and until these issues were adjudicated individually.

1. Issues of Contract Formation in This Case Required Individualized Proof.

There can be no real doubt that the issues of contract formation in this case required individual proof.[4] It is hornbook law, in Pennsylvania and elsewhere, that a unilateral contract (or any other) cannot be formed without an actual "meeting of the minds." *See, e.g.*, *Morosetti v. La. Land & Exploration Co.*, 522 Pa. 492, 495,

[4] The plaintiffs alleged that Wal-Mart formed a "unilateral contract" with each class member, through notices in its employee handbook and elsewhere, obliging Wal-Mart to comply with policies set forth in the handbook. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 898.

564 A.2d 151, 153 (1989). "[T]he intention of the parties … is the ultimate guide." *Price v. Confair*, 366 Pa. 538, 542, 79 A.2d 224, 226 (1951); *see also Martin v. Capital Cities Media, Inc.*, 354 Pa. Super. 199, 216, 511 A.2d 830, 839 (1986). Only when each of the parties actually intended to form an agreement, as indicated by conduct consistent with that intent, will a binding contract be recognized. *E.g.*, *Morosetti*, 522 Pa. at 495, 564 A.2d at 153.

When (as here) the alleged "contract" consists of policies set forth in an employee handbook, this standard requires proof that the employee received and understood the handbook to constitute a contractual offer, and then actually relied on that offer in performing subsequent work. "[U]nilateral contract doctrine requires that the employee prove that the promise alleged was communicated to him or her under circumstances that the employer should have known would induce reliance, and that the employee reasonably relied on the promise to his or her detriment." *Darlington v. Gen. Elec.*, 350 Pa. Super. 183, 203, 504 A.2d 306, 316 (1986), *overruled on other grounds by Clay v. Advanced Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (1989); *see also Vincent v. Fuller Co.*, 400 Pa. Super. 108, 115, 582 A.2d 1367, 1371 (1990), *reversed in part on other grounds*, 532 Pa. 547, 616 A.2d 969 (1992). In other words, without proof that the employee "specifically relie[d] upon ... language" in the handbook setting forth a particular policy, no unilateral contract can be recognized. 19 Richard A. Lord, *Williston on Contracts* § 54:42 (4th ed. 2012).[5]

[5] Other states follow the same rule, holding that reliance is critical to determining whether an employee has accepted an employer's alleged offer to form a unilateral

This proof must, by necessity, be individualized in nature. There is simply no way to determine whether an individual employee did or did not view a handbook as a contractual offer, and if so whether the employee did or did not then actually rely on the policies in the handbook in performing work for the employer, absent *some* evidence of the specific circumstances surrounding the employee's acceptance of the handbook, subjective understanding of the policies contained therein, and subsequent conduct. *See, e.g.*, *Price*, 366 Pa. at 542, 79 A.2d at 226 (to determine whether a contract has been formed, courts must "take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement.").

That is particularly true in this case. No generalized, class-wide proof could allow the jury to conclude that *each* of the 186,979 class members took action on the basis of Wal-Mart's alleged representations regarding its employment policies. Different class members doubtlessly had varying levels of awareness of the policies and continued to work at Wal-Mart for varying reasons. This is borne out by the six current and former Wal-Mart employees who testified on the plaintiffs' behalf. Of these six, only one described the policies in question as relevant in any way to her decision to work at Wal-Mart. *See* Pet. for Allocatur at 3 (citing record). There is no

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contract. *See, e.g.*, *Sniecinski v. Blue Cross & Blue Shield of Mich.*, 666 N.W. 2d 186, 195 n.9 (Mich. 2003) (it is "the employee's action or forbearance in reliance upon the employer's promise" that "constitutes sufficient consideration to make the promise legally binding"); *see also, e.g.*, *Shaffer v. Regions Fin. Corp.*, 29 So. 3d 872, 881 (Ala. 2009) (same); *Oross v. Good Samaritan Hosp.*, 751 N.Y.S. 2d 580, 581 (N.Y. App. Div. 2002) (same); *Prescott v. Farmers Tel. Co-op, Inc.*, 516 S.E. 2d 923, 926 (S.C. 1999) (same); *Holmes v. Union Oil Co. of Cal.*, 760 P.2d 1189, 1194 (Idaho Ct. App. 1988) (same).

reason to believe—and no basis to find—that any of the remaining 186,973 class members, much less all of them, relied upon the policies as a basis to become or remain employed at Wal-Mart. Only with some form of individualized, employee-by-employee inquiry could the requisite reliance and "meeting of the minds," as necessary to prove a unilateral contract, be proven for each class member.

The Superior Court's contrary suggestion—that formation of a unilateral contract could be established merely by evidence that Wal-Mart communicated its handbook policies to employees and that a "reasonable employee" would have understood and relied on those policies as a contractual offer, *Braun*, 2011 Pa. Super. 121, 24 A.3d at 886-87, 939-45—reflects a fundamental misunderstanding of governing contract law. Contracts are not formed with hypothetical "reasonable" employees. Rather, a contract arises only when the employer communicates an offer to an individual employee, and *that employee* then manifests acceptance through actual reliance. *See, e.g.*, *Vincent*, 400 Pa. Super. at 115, 582 A.2d at 1370-71; *see also, e.g.*, *Royal Ins. Co. v. Beatty*, 119 Pa. 6, 9-12, 12 A. 607, 607-08 (1888) (finding no contract formed where party had knowledge of offer but did not manifest acceptance). While the "reasonableness" of the employee's reliance may be relevant to the analysis insofar as a unilateral contract will not be recognized if the employee's reliance were objectively unjustified (meaning the employer had no reason to expect an offer had been made or would be relied upon), it is the subjective understanding of the employee, as manifested by his or her actual conduct, that

governs whether a contract can be recognized *vel non*. *See, e.g.*, *Darlington*, 350 Pa. at 203, 504 A.2d at 316.[6]

In short, the issues of contract formation in this case required individualized proof regarding each class member's subjective understanding of the handbook policies, as indicated by his or her particular response. Yet, the lower courts held that contracts could be recognized, and judgment entered against Wal-Mart, based on nothing more than generalizations drawn from the understanding and conduct of a few "bellwether" class members and a hypothetical "reasonable employee." *Braun*, 2011 Pa. Super. 2011, 24 A.3d at 939-45. That "decision fail[ed] to account for the inherently discrete and subjective aspects" of contract formation. *Basile*, 2012 WL 3871504, at *6. The plaintiffs were not required to adduce any individualized evidence on these issues, and Wal-Mart had no opportunity to cross examine class members or otherwise dispute their allegations. Depriving Wal-Mart of its "opportunity to present every available defense," *Lindsey*, 405 U.S. at 66 (internal citation omitted), on the issue of contract formation—indeed, refusing to allow it to exercise the most basic and essential defense of demanding that the

[6] Nor could the trial court properly presume without individualized inquiry that, simply because the class members continued to work for Wal-Mart, they relied on the company's rest break and off-the-clock policies. *Braun*, 2011 Pa. Super. 2011, 24 A.3d at 939-45. The mere fact that an employee keeps working after learning about a policy does not prove reliance unless there is evidence that the company's policies "*caused him* to continue employment." *Vincent*, 400 Pa. Super. at 115, 582 A.2d at 1371 (emphasis added). Even assuming that each class member knew of Wal-Mart's policies (a doubtful assumption), each still had to prove that he or she continued working in reliance on the policies, and Wal-Mart had a right to contest that critical fact as to each class member.

plaintiffs produce evidence to carry their burdens of proof—plainly violated Wal-Mart's constitutionally guaranteed due process protections.

2. Issues of Contract Breach in This Case Required Individualized Proof.

Individualized proof was also necessary in order to show that any of the contracts allegedly formed in this case had been breached.[7] To establish a breach of contract, in Pennsylvania and elsewhere, a plaintiff must show that the defendant violated a particular contractual obligation owed to the plaintiff, causing some form of harm. *See, e.g.*, *McShea v. City of Phila.*, 606 Pa. 88, 97, 995 A.2d 334, 340 (2010). Proof that the defendant violated obligations owed to others, or even engaged in a "pattern" of violations, will not suffice. *See, e.g.*, *Farabaugh v. Pa. Turnpike Comm'n*, 590 Pa. 46, 77, 911 A.2d 1264, 1283 (2006). Only if the defendant acted (or failed to act) in derogation of specific duties owed to the plaintiff can liability be imposed. *See id.*; *see also, e.g.*, *McShea*, 606 Pa. at 97, 995 A.2d at 340.

Proof of contract breach must, in other words, be individualized. Whether and how the defendant's conduct affected the plaintiff, and if it violated a contractual obligation owed to that plaintiff, simply cannot be determined without evidence regarding the particular circumstances surrounding the alleged breach, including the plaintiff's own conduct and response. *See Gorrill v. Icelandair/Flugleidir*, 761 F.2d 847, 853 (2d Cir. 1985) ("[T]he merits of a claim

[7] The plaintiffs alleged that, in breach of policies set forth in the employee handbook and elsewhere, Wal-Mart required employees to forgo rest breaks and work off-the-clock, without additional payment. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 885.

alleging breach of an employment contract" must be resolved considering "the totality of facts giving rise to the claim."); *see also Sacred Heart*, 601 F.3d at 1177-78 (discussing affirmative defenses that depend on plaintiff's actions in response to conduct allegedly constituting breach). The plaintiff must show, after all, not only that the defendant breached a contractual duty, but also that the breach impacted the plaintiff and caused him or her demonstrable and individual harm. *See McShea*, 606 Pa. at 97, 995 A.2d at 340.

The need for individualized proof of breach is clear in this case. While the plaintiffs relied on statistical analyses of Wal-Mart's records in an attempt to show that class members did not take promised breaks or worked off-the-clock, that evidence—even if accepted as fully accurate—did not and could not establish that Wal-Mart was responsible for those occurrences. It is, for example, undisputed that Wal-Mart employees often did not swipe out when they went on break, and in many circumstances employees may have skipped breaks voluntarily, or worked off-the-clock on their own accord. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 932, 949; *see also In re Wal Mart Emp. Litig.*, 711 N.W. 2d 694, 696-98 (Wis. Ct. App. 2006) (affirming denial of class certification because the defendant was entitled to examine individual plaintiffs as to whether their swipe records were accurate). To establish an actionable breach of contract by Wal-Mart, the plaintiffs were required to prove not only that an employee had failed to take a rest break or worked off-the-clock, but that the employee had done so *because* Wal-Mart directed him or her to do so. The only way to make this showing would be through evidence concerning each

individual class member's work history and reasons (if any) for allegedly failing to take a break or working off-the-clock.

The Superior Court apparently assumed this evidentiary gap could be filled by proof that Wal-Mart was aware of a "pattern" of missed breaks and off-the-clock work. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 939, 944. But, even if true, that proof still would not address the critical issue of whether Wal-Mart's central management actually *directed*, as a matter of company-wide policy, that employees should skip breaks or work without compensation, such that the policy might be presumed to have been applied to all class members. This case is, in this regard, precisely analogous to *Wal-Mart*: There, the Supreme Court held that evidence suggesting that the company had given too much discretion to its managers—allegedly resulting in a "pattern" of gender discrimination—was insufficient to hold the company liable to a class of female employees because there was no proof of an affirmative company-wide policy directing or encouraging such discrimination. 131 S. Ct. at 2554-56. Likewise, the evidence here did not indicate that Wal-Mart advanced any *policy* to encourage, much less require, employees to miss their breaks or work off-the-clock, such that managers could be found to have applied the policy to each employee.[8] *See id.* at 2554-56.

The issues of contract breach in this case, like the discrimination claims in *Wal-Mart*, required individualized proof, and were not susceptible to "classwide

[8] In fact, the evidence indicated that the company went to great lengths to *discourage* employees from skipping breaks or working off-the-clock. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 898-900.

resolution ... in one stroke." *Id.* at 2551; *see also Basile*, 2012 WL 3871504, at *6. In particular, it was inappropriate in this case—again, as in *Wal-Mart*—to subject Wal-Mart to "trial by formula," allowing the plaintiffs to satisfy their burdens of proof through generalizations drawn from anecdotal testimony and statistical analyses that did not and could not speak to the experiences of the members of the class, either as a whole or individually. 131 S. Ct. at 2561.[9] This approach deprived Wal-Mart of its right to present its defenses and thus violated due process.[10]

* * *

The "trial by formula" plan adopted by the trial court and approved by the Superior Court forced Wal-Mart to defend against thousands of contract claims while denying it any ability to challenge the basic facts critical to individual issues of formation and breach. Such a proceeding did not, and could not have hoped to, produce a measure of liability that bears any relation to the actual experience of the

[9] These improper generalizations also infected the damages calculations: The jury assessed damages against Wal-Mart for every time an employee allegedly did not take a break; however, for the reasons discussed above, there was no evidence that in each of these circumstances—or, indeed, in any—the failure to take a break was actually attributable to Wal-Mart, as opposed (for instance) to the employee's voluntary conduct. *Braun*, 2011 Pa. Super. 121, 24 A.3d at 949. Wal-Mart thus found itself in the same position as the defendant in *Williams*, with "no opportunity to defend against the charge [against it], by showing ... that the ... victim was not entitled to damages." 549 U.S. at 353-54.

[10] *See also, e.g.*, *Sacred Heart*, 601 F.3d at 1176 (finding certification inappropriate on due process grounds where defendant may have breached contract with some individual class members but not with others); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W. 3d 548, 560-61 (Tex. App. 2002) (reversing class certification order where the trial plan called for use of "statistical evidence [that would] preclude any individual inquiry in the presence of the jury regarding the formation of each alleged contract [between the defendant and its at-will employees] or the varied circumstances surrounding each employee's missed breaks or off-the-clock work").

186,979 class members. Using procedural rules in this manner, to deny a defendant the opportunity to defend itself in court, infringes upon the most basic due process protections guaranteed by the Constitution. The decision below must be set aside.

II. ENFORCING THE REQUIREMENTS OF DUE PROCESS IS ESSENTIAL TO DETER ABUSE OF THE CLASS ACTION DEVICE.

This case not only implicates how trial courts will rule on particular class certification motions; it also may distort the frequency and ultimate outcome of class action disputes. Unless this Court vacates the judgment—which imposes enormous liability without the basic safeguards of a fair trial—it will underscore to future defendants that litigating a class action through trial is too risky, even when the plaintiffs' claims lack merit.

It is well established that "[a] district court's ruling on the certification issue is often the most significant decision rendered in ... class-action proceedings." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Class certification "dramatically affects the stakes for defendants" because the aggregation of claims into a single action "creates insurmountable pressure on defendants to settle, whereas individual trials would not." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also*, *e.g.*, Nagareda, *Class Certification*, *supra*, at 99 ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial."); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) (hereinafter, Nagareda, *Aggregation*) ("[T]he *overwhelming majority* of actions

certified to proceed on a class-wide basis ... result in settlements.") (emphasis added); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1276 (2002) (explaining class certification's "serious impact on settlement dynamics").

Empirical studies have consistently confirmed what courts and commentators know to be true. For example, the Federal Judicial Center found in a 2005 study that approximately 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005).[11] A subsequent study found that *every* certified class action in its (smaller) sample terminated in a settlement. Emery G. Lee III & Thomas G. Willging, Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11-15 (2008).[12] Studies of class actions in state courts find similarly high settlement rates. See, *e.g.*, Hilary Hehman, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation* 23 (2010) ("Eighty-nine percent of certified cases ended in settlement, as compared to only 15% in cases with no certification.")[13]; Steven S. Gensler, *The Other Side of the CAFA Effect: An Empirical Analysis of Class Action Activity in the Oklahoma State Courts*, 58 U. Kan. L. Rev. 809, 840 (2010) ("Out of the eighty cases that were class

[11] *Available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/$file/classgde.pdf.

[12] *Available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa1108.pdf/$file/cafa1108.pdf.

[13] *Available at* http://www.courtinfo.ca.gov/documents/classaction-certification.pdf.

certified, a total of fifty-nine (74%) resulted in a settlement, with twelve still pending.").

This intuitively obvious settlement pressure exists even when plaintiffs' claims are frivolous. As Justice Ginsburg has observed, because "a class action can result in potentially ruinous liability," "[a] court's decision to certify a class ... places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) (internal quotation marks omitted); *see also, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) ("[E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial ...."). The U.S. Congress expressed similar concerns in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, observing that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage," which "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous law suits." S. Rep. No. 109-14, at 20 (2005); *see also id.* at 21 ("[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.").

The Seventh Circuit illustrated how this dynamic operates in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). There, the plaintiffs' claims were far from strong: Indeed, the defendant had lost only one of the first 13 individual trials. *Id.* The defendant therefore could reasonably predict that, if class certification were denied, it would be forced to pay damages in approximately 25 of the 300 cases. *Id.* Assuming that each prevailing suit would result in $5 million in damages, the defendant could estimate its total potential exposure to be $125 million. *Id.* But, if class certification were granted, the defendant would suddenly face claims, not just by the individual plaintiffs who filed suit, but by all class members—5,000 strong. The defendant would thus have a one-in-thirteen chance of owing $25 billion—"and with it bankruptcy." *Id.*; *see also* Nagareda, *Aggregation*, *supra*, at 1881-82 (providing similar example). As the Seventh Circuit concluded, the defendant "may not wish to roll these dice" and "will be under intense pressure to settle." *Rhone-Poulenc Rorer*, 51 F.3d at 1298.

In this case, Wal-Mart made the rare choice to seek its day in court. What Wal-Mart received, however, was an unfair trial that resulted in a deeply unfair $187 million judgment owed to nearly 187,000 plaintiffs who did not prove their claims. Unless vacated, this judgment will send a clear message to plaintiffs' counsel and defendants alike: Even if a putative class does not have meritorious claims, and even if the putative class members' claims arise from disparate circumstances, with a few expert witnesses and creative statistical analysis, class certification is possible. And with certification comes overwhelming settlement

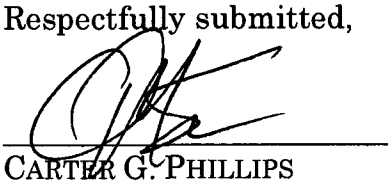
leverage that few defendants will be able to resist. This should be of particular concern following the Supreme Court's decision in *Wal-Mart*, which clarified that trial-by-formula is not allowed in the federal courts. The whole point of *Wal-Mart* was to eliminate this fundamental unfairness in the federal system of justice. Because the federal system is no longer available, plaintiffs' attorneys will try to bring non-meritorious class actions such as this in state courts. If the trial court's approach is affirmed, Pennsylvania risks becoming a haven for frivolous class action suits.

This is not to say that the class action procedure should be disfavored. Far from it: When properly structured, a class action can promote the just and efficient resolution of claims. But it must be recognized that improperly certified class actions pose unique and severe risks of thwarting justice by coercing a settlement under the threat of an unfair trial and massive damage awards. These dangers underscore the importance of construing the rules of civil procedure to guard against the abuse of the class action device and to ensure that basic requirements of due process are not sacrificed in the interests of efficiency. As the Fifth Circuit has counseled, a class action's "bite should dictate the process that precedes it." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007), *abrogated on other grounds by Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011). Applied here, Wal-Mart was entitled to substantially more process than it was accorded, and therefore the decision below should be set aside.

CONCLUSION

For these reasons, and those stated in Wal-Mart's brief, the decision of the Superior Court should be reversed and the judgment vacated.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

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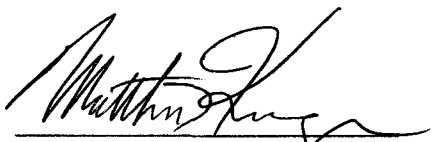

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