IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. FAMILY DOLLAR STORES OF MISSOURI, INC.,	)	
Relator,	)	
v.	)	NO. SC91869
THE HON. JACK R. GRATE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,	)	
Respondent.	)	

AMICUS SUGGESTIONS IN SUPPORT OF RELATOR'S PETITION FOR A WRIT OF PROHIBITION FILED BY AMICUS CURIAE RETAIL LITIGATION CENTER, INC.

Amicus curiae Retail Litigation Center, Inc. (RLC) is an organization comprised of leading retail companies that employ thousands of persons across Missouri and hundreds of thousands more across the nation. The large size and national scope of RLC member companies make them attractive targets for putative class actions. Leading retailers have watched intently as wage-and-hour class actions, such as the one at issue here, have exploded in number and scope. Once certified, an employee class of plaintiffs can exert tremendous leverage on retailers to settle simply because of the enormous cost of litigation. The 500-member class action certified by the trial court could easily cost millions of dollars to defend, dollars that are forever lost, regardless of the merits or outcome of the lawsuit. In this delicate economic climate, retailers should not be required to defend these class actions, much less the exorbitant settlements the class

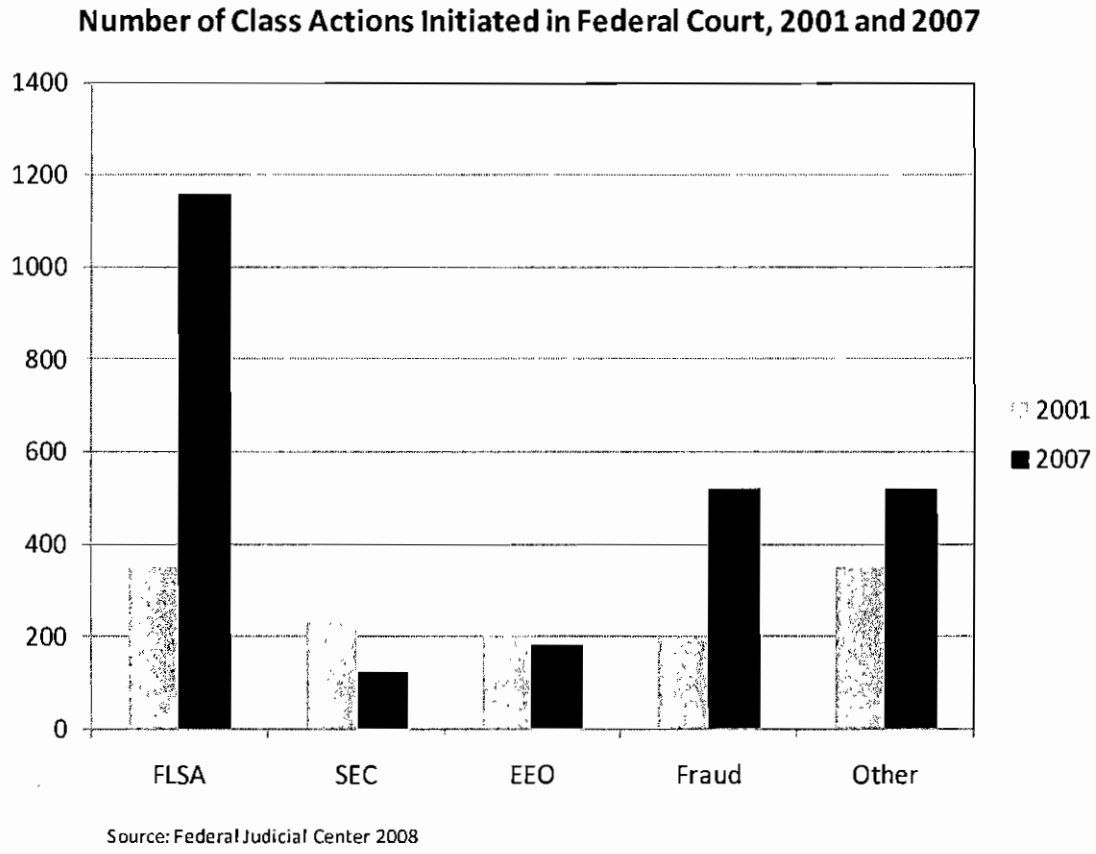
members demand, where, as here, the class should not have been certified in the first place.

This case, in which a Missouri state court judge certified a class based solely on the presumptive truth of the allegations of the petition, presents questions of vital significance to all retailers. All Missouri employers need to understand how their employee-classification categories may intersect with the requirements for maintaining class actions under Missouri law. This case will also give this Court an opportunity to clarify how the recent U.S. Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___ (June 20, 2011), affects class certification requirements in Missouri under Rule 52.08. As set forth more fully below here, RLC urges this Court to issue its preliminary and permanent writ of prohibition and expeditiously resolve the class certification questions in the underlying case.

I. EMPLOYMENT LAW CLASS ACTIONS, ESPECIALLY WAGE AND HOUR LITIGATION, HAVE SIGNIFICANTLY INCREASED OVER RECENT YEARS

Class action lawsuits focusing on alleged violations of wage and hour laws, such as the Missouri Minimum Wage Law, have been exploding in number. *See* Sally Roberts, "Explosion of Class Action Lawsuits Focuses on Wage and Hour Violations," *Business Insurance* (Oct. 5, 2007). The Federal Judicial Center has been monitoring the rapid increase in the number of workplace class action lawsuits. When filed in federal court, these suits typically allege violations of the Fair Labor Standards Act (FLSA). As

the graphic below shows, the number of FLSA class action lawsuits filed nearly quadrupled between 2001 and 2007.



The most recent annual report on workplace class action litigation confirms that "by sheer numbers, wage & hour litigation continued to out-pace all other types of workplace class actions."[1]

As this Court has recognized, the cost of defending class claims creates perverse incentives favoring settlement. "The potential increase in exposure to the defendant and the additional increase in the burden and cost of litigation to all parties may well

[1] Seyfarth Shaw, LLP, Annual Workplace Class Action Litigation Report: 2011 Edition, at 1.

overwhelm the substantive merits of the dispute." *Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo. banc 1995). Near the conclusion of its most recent term, the U.S. Supreme Court echoed these concerns over class settlements divorced from the merits of the dispute, terming them "*in terrorem* settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1752 (Apr. 27, 2011). Wage-and-hour suits, such as this one, are not immune from these risks. The top 10 private wage-and-hour settlements paid or agreed to in 2009 under the Fair Labor Standards Act totaled $363.6 million, a 43.9% increase from 2008.[2]

Missouri is not unfamiliar with large settlements in class action cases, even where both procedural and substantive issues are hotly contested. In *Bachman v. A.G. Edwards, Inc.*, ___ S.W.3d ___ (Mo. App. E.D. May 31, 2011),[3] after the case had been removed to (and remanded from) federal court twice, the trial court certified a class. The defendants sought permission to appeal, which was denied in the Court of Appeals, and this Court denied a writ of prohibition. After incurring five years of litigation costs

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[2] Judy Greenwald, "Top Wage-Hour Class Action Settlements Soared in 2009," Business Insurance (Jan. 25, 2010) (available online at http://www.businessinsurance.com/article/20100124/ISSUE01/301249993, last visited August 8, 2011).

[3] Although this case has a transfer application pending in this Court, *see* Bachman v. A.G. Edwards, Inc., SC No. 91924, the issues on the appeal relate to approval of the class action settlement, not to the underlying propriety of certifying a class.

(including a third removal to (and remand from) federal court), the matter was settled for $60 million.

RLC's retail companies want to limit the risk of being coerced into "*in terrorem* settlements," and wish to have some certainty, *a priori*, regarding the standards for determining when an employee class should be certified. The trial court's order, which assumes as true the plaintiffs' alleged facts relating to class certification, increases the risk significantly for retailers. It is important for this Court to resolve the issue of how much weight a trial court can give to a Petition's alleged facts relating to typicality and predominance in determining whether class certification is appropriate, especially, as here, in the face of controverting record evidence.

II. ISSUING A WRIT OF PROHIBITION IN THIS CASE WILL GIVE THE COURT AN OPPORTUNITY TO ADDRESS RECENT U.S. SUPREME COURT GUIDANCE AND ITS EFFECT ON MISSOURI RULE 52.08

This case will present this Court an important opportunity to give guidance to the lower courts and private parties regarding the interplay between the Supreme Court's interpretation of Rule 23 of the Federal Rules of Civil Procedure in *Wal-Mart Stores, Inc.*, and its Missouri analogue, Rule 52.08. Similarly, it presents an occasion for the Court to elaborate on the evidentiary requirements for class certification in the expanding sector of wage-and-hour class action cases.

A. Rule 23 and Rule 52.08: This Court Should Continue to Follow Instructive Federal Precedent and Apply *Wal-Mart Stores, Inc. v. Dukes* to Rule 52.08.

As this Court has repeatedly held, federal decisions interpreting Rule 23 are instructive regarding the interpretation of Missouri Rule 52.08. *See, e.g., State ex rel. Union Planters Bank v.* Kendrick, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004); *State ex rel. Coca-Cola v. Nixon*, 249 S.W.3d at 858 n.2 (Mo. banc 2008). The Missouri legislature has likewise acknowledged that Rule 23 should be considered alongside Missouri Rule 52.08. *See* Sec. 407.025.3, RSMo. 2000 ("An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 . . .") As the Supreme Court held in *Wal-Mart Stores, Inc.*, the requirements for class certification are not "mere pleading standard[s]. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc.*, slip op. at 10. More significantly, the Supreme Court re-emphasized that class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.*

Consistent with the *Wal-Mart* decision, this Court has required trial courts to perform a rigorous analysis of claims' suitability to class treatment. Where plaintiffs have failed to present sufficient evidence in support of their class claims, this Court has recently reversed trial court class certifications. *See Green v. Fred Weber, Inc.*, 254 S.W.3d 874 (Mo. banc 2008); *State ex rel. Coca-Cola v. Nixon*, 249 S.W.3d 855 (Mo. banc 2008).

Despite the requirement of rigorous analysis and evidence in support of class certification, lax analysis and lower thresholds for class certification persist in Missouri's lower courts. In *Mitchell v. Residential Funding Corp.*, WD70210 ___ S.W.3d ___ (Mo. App. W.D. Nov. 23, 2010), the Court of Appeals for the Western District recently repeated the canard, "For purposes of class certification, we accept the named plaintiffs' allegations as true." This same rule controlled the trial court's class certification here.[4] The Court of Appeals for the Eastern District similarly instructs that courts should "err on the side of class certification." *Wright v. Country Club of St. Albans*, 269 S.W.3d 461, 464 (Mo. App. E.D. 2008). This is a wholly inappropriate standard for class certification.

It is difficult, if not impossible, to reconcile the laxity of the class certification analysis permitted by the lower Missouri courts with the rigorous analysis and evidence required by this Court's prior precedent and the recent *Wal-Mart* decision from the U.S. Supreme Court. This writ proceeding provides this Court with the opportunity to accomplish two important objectives: (1) address the impact of the *Wal-Mart* decision on Missouri courts' interpretation of Rule 52.08; and (2) emphasize to the lower courts that plaintiffs must meet an evidentiary burden to support class certification.

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[4] This rule has been recited in other recent Court of Appeals cases as well. *See, e.g., Plubell v. Merck & Co., Inc.*, 289 S.W.3d 707, 710 n.2 (Mo. App. W.D. 2009); *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 227 (Mo. App. W.D. 2007).

B. Evidence of Similarity Must be Presented Before Certifying a Class of Disparate Supervisory Employees in Wage-And-Hour Cases.

The nature and extent of the evidence required to define a class in wage-and-hour litigation is, as yet, unsettled in Missouri. This Court, consistent with its own precedents, should require plaintiffs who seek class treatment to come forth with specific evidence that would support the commonality of their claims. In *Green v. Fred Weber, Inc.*, 254 S.W.3d 874 (Mo. banc 2008), for example, this Court reversed a trial court's class certification decision because "the trial court plainly lacked an evidentiary basis" for key components of the class definition. *Green*, 254 S.W.3d at 883. Although in Green, the issue was the geographic boundaries of the class, this Court's approach nonetheless underscores the vital significance of evidence to the certification of a class. This matter presents the Court with the occasion to establish the nature and quantum of evidence that is affirmatively required to support a class certification in wage-and-hour litigation under Missouri law. Significantly, the trial court did not consider this evidence in its class certification decision below.

Large retailers operate multiple retail stores in numerous states. Many retail companies with multiple operating locations tailor the working conditions and compensation to the individual needs of on-site managers and on-site locations. Though certain employees may be categorized similarly at a company level, they can have widely varying duties and compensation. In the experience of RLC member companies, such variation within a single class of employee is particularly common at the management and executive level. Simply because those employees may work under a common

classification within a single company does not render each of them the same. As the U.S. Supreme Court acknowledged, jobs "involving managerial responsibilities[] require personal qualities that have never been considered amenable to standardized testing." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988).

Given the wide variation among employees, RLC's member companies fear that class certification will require the "Sisyphean task" of "mini-hearings" that this Court warned of in 2008, with all the expense and uncertainty that will accompany those proceedings. *See State ex rel. Coca-Cola v. Nixon*, 249 S.W.3d 855, 862 (Mo. banc 2008). Permitting class-wide treatment of disparate employees without even considering the evidence of their differences (as the trial court has done here) exposes entire companies to broad and significant liability. Such legal exposure will likely discourage retailers from exercising appropriate discretion about individual employee job duties and compensation. It may also prevent retailers from rewarding innovative employees with promotion and advancement within the company, as the risk of litigation associated with different employee classifications may become too great to bear. Because of the great expense and burdens that are imposed once a large class has been certified, it is especially important that these vital issues are resolved beforehand.

III. CONCLUSION

For the reasons set forth above, *amicus curiae* Retail Litigation Center, Inc., respectfully suggests that this Court should issue a preliminary writ prohibiting the Respondent from certifying this case as a class action under Rule 52.08.

Respectfully submitted,

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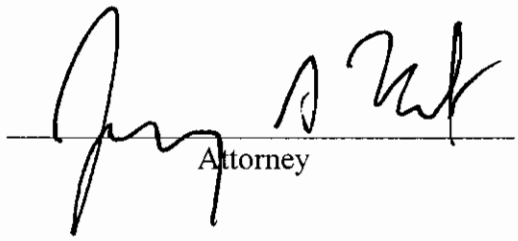

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