IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc., Appellants, v. MICHELLE BRAUN, on behalf of herself and all others similarly situated, Appellees.	Nos. 32 E.A.P. 2012 Superior Court No. 3373 E.D.A. 2007 (Consolidated with Superior Court No. 3376 E.D.A. 2007)
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc., Appellants, v. DOLORES HUMMEL, on behalf of herself and all others similarly situated, Appellees.	Nos. 33 E.A.P. 2012 Superior Court No. 3376 E.D.A. 2007 (Consolidated with Superior Court No. 3373 E.D.A. 2007)

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., PENNSYLVANIA RETAILERS' ASSOCIATION, AND PENNSYLVANIA FOOD MERCHANTS ASSOCIATION IN SUPPORT OF APPELLANTS WAL-MART STORES, INC. AND SAM'S CLUB

On Appeal from the Order of the Superior Court, entered June 10, 2011, at Nos. 3373 & 3376 E.D.A. 2007, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Philadelphia County, entered November 14, 2007, at No. 3127, March Term 2002, and No. 3757, August Term 2004

[Amici Curiae Counsel Continued On Next Page]

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INTEREST OF *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC was formed to provide courts with retail industry perspectives on significant legal issues and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. The member entities whose interests RLC represents include diverse retailers operating throughout the nation and providing goods and services to tens of millions of people.

The Pennsylvania Retailers' Association is the premier statewide trade association representing retailers throughout the Commonwealth before the General Assembly, the Governor's Office, and numerous departments and agencies. It also works directly with the Pennsylvania Congressional Delegation on issues impacting the retail industry.

The Pennsylvania Food Merchants Association is a statewide trade association that advocates the views of more than 1,100 convenience stores, retail food stores, wholesalers, and consumer product vendors throughout Pennsylvania. Its mission includes representing the retail and wholesale food distribution industry at the state capitol to ensure that legislators understand the industry's point of view on legislative issues.

Collectively, *Amici* represent thousands of large and small retailers that provide employment to millions of workers. Because these businesses often are targets of class action lawsuits, *Amici* have a substantial interest in the development of the law and in ensuring that class action rules and procedures are fair and comport with Due Process. *Amici* submit this brief in support of Appellants Wal-Mart Stores, Inc. and Sam's Club (collectively "Wal-Mart" or "Appellant") and urge reversal of the Superior Court's decision.

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[1] *Amici* submit this brief pursuant Pa. R. App. P. 531(a). Appellants' counsel was provided with a timely copy of and consented to the filing of a brief by *Amici* in support of this appeal.

SUMMARY OF ARGUMENT

Amici address two of the critical issues implicated by this case: (1) the due process rights of all Pennsylvania litigants that are jeopardized by the Superior Court's decision and (2) the practical effects of a Court outcome that allows the Superior Court's decision to stand. First, the Superior Court approved class certification rulings and trial procedures that produced a massive judgment in favor of a class of approximately 187,000 individuals based on the testimony of only six class members and the opinions of "experts" who concededly could not say whether any individual class member in fact formed a contract with Appellant or suffered damages on account of any breach of contract. That result represents an unprecedented expansion of the outer limits on permissible use of "representative" evidence, and it severely abridged Appellant's due process rights. Protecting all litigants' due process rights should be fundamentally important to this Court, as it was to all nine U.S. Supreme Court Justices who uniformly denounced the certification of a plaintiff class for trial in which an analogous Trial by Formula was used. *Wal-Mart Stores, Inc. v. Duke*s, 131 S. Ct. 2541 (2011) ("*Dukes*"). Second, the Superior Court departed sharply from prior legal standards for unilateral contract formation. Its decision has created uncertainty in the law that causes concern to all employers that do business in Pennsylvania. If this Court allows the Superior Court's decision to remain law, it will put these businesses at a competitive disadvantage and, ultimately, will hurt the hourly workers whom these businesses employ.

Amici urge reversal of the Superior Court and a confirmation by this Court that retail employers and all other Pennsylvania litigants are entitled to a fair adjudication of their controversies and judicial protection of their constitutional due process rights.

ARGUMENT

I. THE CLASS CERTIFICATION RULINGS AND TRIAL PROCEDURES IMPLEMENTED BELOW CONTRADICT WELL-ESTABLISHED LAW.

The Superior Court's decision approving the trial court's class certification rulings and trial procedures threatens all future Pennsylvania litigants' constitutional rights. Although no state has an obligation to adopt federal class action rules, all state courts have an *absolute* obligation to interpret and apply their class action rules in a way that does not sacrifice litigants' state and federal due process rights. Under the Pennsylvania Constitution, courts also must ensure that their decisions "neither abridge, enlarge nor modify the *substantive* rights of any litigant." Pa. CONST. art. V, § 10(c) (emphasis added).

The trial court's class certification and trial procedure decisions that the Superior Court affirmed here, however, lessened the substantive burdens of proof that plaintiffs normally bear to prove the elements of their claims and abridged Appellant's substantive and due process rights.[2] This Court should reverse the Superior Court's decision and rule that the trial court should not have certified the class in the first place—because the many material dissimilarities among class members indicated both that plaintiffs had no reliable mechanism to prove the requisite breach of contract elements for all class members, and also that no manageable class trial could be held that did not abridge Appellant's substantive and due process rights. The Court also should hold that the trial court permitted plaintiffs to use "representative" testimony that was not in fact "representative" and denied Appellant the opportunity to present a full defense to plaintiffs'

[2] As chronicled in detail by Appellant, the Superior Court affirmed the trial court rulings: certifying plaintiffs' class; denying Appellant's post-discovery motion to decertify the class; limiting the number of witnesses Appellant could call at trial; denying Appellant's motion for a directed verdict at the close of plaintiffs' case; entering judgment against Appellant; and denying Appellant's post-trial motion for judgment notwithstanding the verdict (in which Appellant argued, *inter alia*, that the prior class certification rulings were improper, that plaintiffs had not proven the claims of the class, and that the trial procedures infringed upon Appellant's federal and state due process rights).

claims.

The procedures used in the trial court that the Superior Court approved do not even approach any that this Court previously has endorsed. They amount to the very same Trial by Formula that the U.S. Supreme Court denounced in *Dukes*. Appellant's comprehensive analysis of *Dukes* and the case law from Pennsylvania courts (which *Amici* incorporate herein by reference) provide compelling support for a conclusion by this Court that the Superior Court's decision approved class certification rulings and trial procedures that violate Pennsylvania law. When evaluating the legal validity of those rulings and procedures, *Amici* submit that the Court also should consider decisions by other federal and state courts that further support a conclusion by this Court that the Superior Court's decision should not be allowed to stand.

A. Federal Class Action Law Supports Reversal Of The Superior Court.

Federal courts have routinely rejected the very same sort of class certification rulings and trial procedures endorsed by the Superior Court here. This Court should find that case law persuasive and hold that plaintiffs' class never should have been certified (or, in the very least, should have been decertified before trial), and that the procedures used at trial unlawfully abridged Appellant's substantive and constitutional rights.

1. Federal Case Law Is Highly Instructive To The Issues On Appeal.

As a preliminary matter, the Court should reject Appellees' position that *Dukes* is "irrelevant" and that it and other federal cases should be ignored because they involve the Federal Rules of Civil Procedure ("FRCP") rather than the Pennsylvania Rules of Civil Procedure ("PRCP"). *See* Appellees' Opp. to Pet. for Review.

In addition to the fact that this Court has regularly looked to federal law when

interpreting the Commonwealth's class action rules,[3] the Court should find federal law especially salient here because the state laws relevant to its decision are essentially identical to their federal counterparts. The commonality and predominance prerequisites to class certification are the same in all material respects under state and federal rules, and this Court's interpretation of these state prerequisites has consistently been on par with federal courts' interpretation of FRCP 23. *Compare* Pa. R.C.P. Nos. 1702, 1708, *with* FRCP 23(a)(2) & (b)(3).[4] The Pennsylvania constitutional limitations on courts' authority to interpret and apply class action rules also are the same as the federal Rules Enabling Act's limitations on federal courts' authority. *Compare* Pa. Const. art. V, § 10(c) *with* 28 U.S.C. § 2072. *See also* Pa. R.C.P. Class Actions, Explanatory Cmt. 1977 ("Many desirable approaches to class action problems involve substantive rather than procedural solutions" that "are beyond the power of" courts to "solve" through manipulation of the class action procedural rules.). In addition, the Pennsylvania and federal constitutional due process provisions, which this Court has held to be "coextensive," equally limit courts' authority to interpret and apply rules of civil procedure, including class action procedure, and guarantee all defendants the right to present a full defense to the claims brought against them. *Compare* Pa. CONST. art. I § 9, *with* U.S. CONST. amend. XIV § 1; *id.* amend. V, cl. 3.[5]

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[3] *See, e.g., McMonagle v. Allstate Ins. Co.*, 460 Pa. 159, 164-65, 331 A.2d 467, 470 (1975) (recognizing the "obvious relevance of federal practice under Rule 23").

[4] *Compare also Samuel Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 22 (Pa. 2011) ("The critical inquiry for the certifying court is whether the material facts and issues of law are substantially the same for all class members," so that "'proof as to one claimant would be proof as to all' members of the class") (citation and quotation omitted), *cert. denied*, 2012 WL 2368701 (U.S. Jun. 25, 2012), *with Dukes*, 131 S. Ct. at 2551-52 ("What matters...is not the raising of common questions...but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation," so that resolving "an issue that is central to the validity" of one class member's claim will resolve that issue as to all class members' claims) (quotation and citation omitted; emphasis in original).

[5] *See also Com., Dep't of Transp. v. Taylor*, 576 Pa. 622, 534 n.6, 841 A.2d 108, 115 n.6 (Pa. 2004) (holding that state and federal due process rights are coextensive); *Commonwealth v. Devlin*, 460 Pa. 508, 513-14, 333 A.2d 888, 891 (1975) ("In our adversary system of justice, it is axiomatic

Finally, both this Court and the U.S. Supreme Court have been unwavering in their enforcement of each of the above-described constraints on courts' ability to manipulate class action rules, consistently denouncing any that abridge a litigant's substantive or due process rights. *See, e.g.*, *Basile v. H&R Block, Inc.*, 2012 WL 3871504, at *6, 8-9 (Pa. Sept. 7, 2012) (holding that class resolution of plaintiffs' claims was inappropriate and that no court may alter the class action device to achieve "substantive ends" and that "'aggregating distinct individual claims into a class obscures differences among class members in ways that engender substantive consequences'" that are beyond the power of the judicial branch) (quoting Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach To Regulating Class Actions*, 59 Vand. L. Rev. 995, 1010 (May 2005))); *Dukes*, 131 S. Ct. at 2556 (rejecting trial procedure where a liability and damages outcome for a "representative" subset of the class would be extrapolated to the class as a whole, since Wal-Mart had the right "to individualized determinations" of its defenses to liability and damages on each putative class member's individual claim). *See also Samuel Bassett*, 34 A.3d at 22 (Saylor, J., dissent) ("[E]ven assuming judicial lawmaking is appropriate to facilitate collectivized litigation, there can be no legitimate dispute that substantive changes are well beyond the contemplation of the class action provisions presently reposited in our Civil Procedural Rules.") (citation omitted).

Given the extensive parallels between the relevant Pennsylvania laws and their federal counterparts, the Court should deem federal case law especially pertinent here.

2. Federal Case Law Endorses This Court's Reversal Of The Superior Court

Federal case law provides compelling support for reversal of the Superior Court's

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that a party is entitled to a fair hearing"; "[i]t has been a long-standing tenet of Pennsylvania jurisprudence that 'the law of the land' in Article I, Section 9 is synonymous with 'due process of law'"; both "Federal Due Process...and the State 'law of the land' provision" guarantee "fundamental fairness of that hearing"; and "the State Constitution is violated" if defendant is "substantially denied" its ability to present a defense.) (citation omitted).

decision—both because it approved the trial court's class certification rulings despite an insufficiency of evidence to establish commonality and predominance, and because it approved trial procedures based on insufficient "representative" or other evidence from plaintiffs and a denial of Appellant's right to present a full defense to plaintiffs' claims.

Specifically, plaintiffs relied at trial on purportedly "representative" evidence from only *six* of approximately 187,000 class members who testified that they were "pressured" to skip rest breaks and work off-the-clock. Whether evidence from such a minuscule percentage (approximately 0.003%) of *any* class can ever be sufficient to support a class-wide verdict on liability and damages, it cannot be here where myriad material dissimilarities in the class precluded the ability of evidence from a class subset to serve as reliable evidence for the claims of the class as a whole. The class as a whole is comprised of current and former employees in different departments at different stores working under thousands of different supervisors. To the extent any actually were denied the paid rest breaks that Appellant endeavored to provide, that result could have been based on myriad different reasons, including that the employee may have forgotten to "clock out" for the rest break, deliberately chose not to "clock out," or simply voluntarily chose to skip the rest break—because he or she had fallen behind in work for a variety of reasons, such as socializing during paid work hours or because he or she wanted to finish work and leave early. None of these reasons would have given rise to liability by Appellant, even assuming Appellant was contractually bound to provide any paid rest breaks (which plaintiffs never proved for any class member at trial).

The significant material dissimilarities among the members of the class were most pointedly illustrated by the testimony of nine former and current employees who held positions that met the class definition (hereinafter, "Appellant's Witnesses") (the most the trial court

would permit at trial), who, contrary to plaintiffs' six witnesses, *never* missed a rest break nor worked off-the-clock (or, if they ever did, did so voluntarily and without management knowledge). In short, not only did plaintiffs present too few witnesses to represent the class numerically, their "representative" testimony itself was not in fact "representative." The trial court therefore never should have certified the class.

In addition, the trial court allowed plaintiffs to establish the elements of breach of contract for the entire class based on the six plaintiffs' "representative" testimony and their "experts" who extrapolated from limited data to speculate as to class-wide missed breaks, off-the-clock work, and damages. Since neither plaintiffs nor their experts presented evidence of actual contract formation, breach, or damages for any of the approximately 99.99% absent class members, and since the Appellant's Witnesses conclusively disproved those elements for nine others, the trial court effectively allowed plaintiffs to prove class-wide claims through a Trial by Formula that relieved plaintiffs of their substantive burden of proof and abridged Appellant's substantive and due process rights. The trial court's decision to block the introduction of evidence from additional current and former employees who had experiences like the nine Appellant's Witnesses who disavowed ever missing a rest break or working off-the-clock further sacrificed Appellant's due process rights by preventing it an opportunity to mount a full defense to plaintiffs' claims.

Based on the above, the Superior Court should have reversed the trial court's class certification rulings and trial procedures. Its decision affirming them is inconsistent with the decisions by an overwhelming number of other courts that have rejected the propriety of class certification based on trial procedures like those used here. Indeed, above and beyond the highly apposite *Dukes* ruling (addressed comprehensively in Appellant's brief), a veritable legion of

federal court decisions support reversal of the Superior Court.[6]

The recent *In re Bank of Am. Wage & Hour Empl't Litig.*, 2012 WL 4463285, at *6-8, 11, 13-14 (D. Kan. Sept. 27, 2012) ("*BoA*")—a consolidated multi-district class action involving, *inter alia*, off-the-clock and rest break claims under California law—is particularly instructive. Like Appellant, the employer there had a formal policy that provided for paid rest breaks and prohibited all off-the-clock work, and it produced testimony from class members that they had never worked off-the-clock or been denied any rest breaks. And, just like plaintiffs here, the *BoA* plaintiffs relied on a small subset of class members (less than 0.003%), who testified that they felt "intense pressure" to skip breaks and to work off-the-clock, which they attributed to their employer's budgetary constraints, understaffing, and an initiative to eliminate overtime pay. Plaintiffs also relied on the "expert" testimony of Dr. Martin Shapiro—the same "expert" on whom plaintiffs rely here—who analyzed employees' computer transaction data for two months of the multi-year class period, compared that data to their clock-in/out times, and found that approximately 90% of the class had conducted transactions when not "clocked in." That data, he concluded, showed systematic, forced "off-the-clock" work. The *BoA* trial court rejected that testimony and denied class certification.

First, as to plaintiffs' off-the-clock claims, the court reasoned that liability would vary

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[6] In addition to the cases discussed in detail below, *see also, e.g.*, *Camilotes v. Resurrection Health Care Corp.*, 2012 WL 4754743, at *1, 14 (N.D. Ill. Oct. 4, 2012) (decertifying meal break claims since employer could not lodge adequate defense if representative testimony were used, given that whether and why plaintiffs did or did not take breaks varied, such that any "representative" testimony "would not, in fact, be representative"); *Briggins v. Elwood TRI, Inc.*, 2012 WL 1699856, at *1, 18-21 (N.D. Ala. Mar. 29, 2012) (decertifying off-the-clock claims because employer had right to present individual scan-in records belying off-the-clock work on certain days and to "question and impeach" individuals on what they did post-scan-in, such as visiting cafeteria, smoking, socializing, etc.); *accord Taylor v. Pittsburgh Mercy Health Sys., Inc.*, 2012 WL 1739821 (W.D. Pa. May 16, 2012); *Green v. Harbor Freight Tools USA, Inc.*, 2012 WL 3563977 (D. Kan. Aug. 17, 2012); *McClean v. Health Sys., Inc.*, 2012 WL 607217 (W.D. Mo. Feb. 23, 2012); *Rosales v. El Rancho Farms*, 2012 WL 292977 (Jan. 31, 2012), *reconsid. denied in relevant part*, 2012 WL 2684979 (E.D. Cal. July 6, 2012); *Corwin v. Lawyers Title Ins. Co.*, 2011 WL 3346824 (E.D. Mich. Aug. 1, 2011).

from class member to class member, because—just as in this case—there were dissimilarities in the class evinced by the conflicting testimony from plaintiffs and defendant. The court held that those dissimilarities precluded common evidence from proving the claims of all class members. *BoA,* 2012 WL 4463285, at *14, 16-17, 19, 22. Second, the court held that Dr. Shapiro's testimony was "substantially flawed," and that, even if accepted, it would be insufficient to support liability. This conclusion was based on reasons essentially identical to those argued by Appellant here, including that Dr. Shapiro's analysis could not account for the "myriad" possible reasons *why* class members worked off-the-clock, including that they voluntarily did so for reasons that would not give rise to employer liability. In denying certification of plaintiffs' off-the-clock claims, the court "join[ed] *the vast majority of [federal] district courts that have denied certification* on predominance grounds in factually analogous contexts." (Emphasis added).[7] Finally, as to plaintiffs' rest break claims, the court denied certification because the tiny fraction of class members from whom plaintiffs provided testimony (akin to the percentage provided by plaintiffs here) belied any widespread or systematic pattern of missed rest breaks. The court reasoned that even if some plaintiffs had missed breaks, the evidence was insufficient to show that they had done so *involuntarily* so as to trigger employer liability (just as no such evidence establishes employer liability here).

Likewise compelling is *Espenscheid v. DirectSat USA, LLC*, 2011 WL 2009967, at *7 (W.D. Wis. May 23, 2011), *reconsid. denied*, Slip op. at 2-4, 5 (W.D. Wis. Feb. 16, 2012), where the [trial] court decertified two wage law classes before trial, reasoning that post-initial certification events had shown that individuals' experiences were insufficiently similar to

[7] *See BoA*, 2012 WL 4463285, at *17-19 (citing, *inter alia, Burkhart-Deal v. CitiFinancial, Inc.*, 2010 WL 457122 (W.D. Pa. Feb. 4, 2010); *Brickey v. Dolgencorp, Inc.*, 272 F.R.D. 344 (W.D.N.Y. 2011); *Flores v. CVS Pharm., Inc.*, 2010 WL 3656807 (C.D. Cal. Sept. 7, 2010); *Mateo v. V.F. Corp.*, 2009 WL 3561539 (N.D. Cal. Oct. 27, 2009); *Koike v. Starbucks Corp.*, 2008 WL 7796650 (N.D. Cal. June 20, 2008), *aff'd*, 378 F. App'x 659 (9th Cir. 2010)).

maintain a finding that common issues predominated or that a representative trial could be managed without impinging on defendants' due process rights. The court held that plaintiffs' proposed use of "representative proof" to demonstrate class-wide claims would not be fair, even though all class members were employed under the same policies, because the evidence showed variation in class members' experiences under those policies. That variation, the court reasoned, meant that plaintiffs' proposed "representative" proof would not be "representative" at all.

Further support for reversing the Superior Court's decision may be found in *Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009), which affirmed a district court's denial of class certification to plaintiffs' claims for denied wages that were premised on alleged breaches of plaintiffs' employment agreements, based on the Eleventh Circuit's reasoning that even if the employer's "culture" encouraged off-the-clock work in violation of those agreements, differences in class members' experiences meant that individual, not common, proof would be required to establish each class member's claim and precluded the viability of class resolution of their claims. Likewise, in *Mwantembe v. TD Bank, N.A.*, 268 F.R.D. 548, 560-61 (E.D. Pa. 2010), the court denied class certification of breach of contract claims brought under Pennsylvania law on the grounds that proving "reliance and causation" depended on the individualized facts and circumstances of each putative class member, meaning that no common, aggregated evidence could establish plaintiffs' claims on a class-wide basis.

The Court should consider this large body of federal law, in addition to the cases Appellant provides, and conclude that the clear weight of authority supports reversal here.

B. Other States' Case Law Further Supports Reversal Of The Superior Court.

Cases from other states also have rejected class certification and trial procedures that, like the "Trial by Formula" here, risked relieving each plaintiff of the burden of proving each element

of their claim and denying defendant its Due Process right to defend against those claims.

A Washington appellate court, for example, reversed a lower court's plan for trial on plaintiffs' breach of contract claims in *Sitton v. State Farm Mutual Auto. Ins. Co.*, 116 Wash. App. 245, 257, 63 P.3d 198, 206 (Wash. App. 2003), even though "Washington courts favor a liberal interpretation" of state class certification rules and "resolve close cases in favor of allowing or maintaining the class." The court held that the lower court's trial plan would "allow[] the jury to make a damages award without requiring *individual* claimants to establish causation and damages or providing [defendant] the opportunity to show it had a reasonable justification for denying *individual* claims," which would have "eliminated" the elements of plaintiffs' substantive claims, contrary to due process. (Emphasis added).

A New Jersey appellate court ruled similarly in *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 28, 54, 851 A.2d 799, 809, 824 (NJ App. Div. 2004), and it decertified plaintiffs' breach of contract claims despite the state's "liberal" class action rules. The court reasoned that the elements for contractual liability could not be proven with common evidence; that "calculation of the aggregate amount of damages d[oes] not absolve the plaintiffs from the duty to prove individual harm"; and that "[w]hile obstacles to calculating damages may not preclude class certification...the issue [wa]s not the calculation of damages but whether or not class members *have* any claims *at all*." (Quotation omitted; emphasis added).[8]

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[8] *See also, e.g., Brinker Rest. Corp. v. Superior Ct.*, 53 Cal.4th 1004, 1051-52, 273 P.3d 513, 544-45 (2012) (holding certification of off-the-clock claims premised on employees' work during meal breaks improper because employer liability hinged on proof that it knew or should have known of such off-the-clock work (just as Appellant's liability should be contingent here), and plaintiff's only evidence was "anecdotal" testimony about a "handful of individual instances in which employees worked off the clock"—which the court held was insufficient to support their allegation of "systemic" employer "pressure" causing off-the-clock work (like plaintiffs allege here)); *Sultan v. Medtronic, Inc.*, 2012 WL 3042212, at *2 (C.D. Cal. July 23, 2012) (following *Brinker*, proposed break class not certified where there were "no sources of common proof...on the question of *why* breaks were not taken"; the reasons "employees fail to take breaks can be manifold": they "could

The foregoing decisions demonstrate that even courts in states with class action rules analogous to, or more liberal than, Pennsylvania recognize the imperative of not allowing manipulation of procedural rules so as to alter litigants' substantive rights or sacrifice defendants' due process rights. This Court should do so as well.

II. A DECISION ABIDING THE SUPERIOR COURT'S NEW CONTRACT STANDARDS WOULD HARM BOTH EMPLOYERS AND EMPLOYEES.

The Superior Court's decision also portends harmful practical effects on Pennsylvania retailers and other businesses, as well as the workers they employ. The Superior Court approved unilateral contract formation legal standards and procedural rules facilitating employee class actions that may have long-term negative results extending far beyond the parties to the instant suit. This Court should reverse the Superior Court's decision to prevent those results.

As a threshold matter, there can be no doubt that the Superior Court's decision represents a radical change in Pennsylvania contract law. Despite the fact that Pennsylvania law does not require private employers to provide paid rest breaks for its hourly workers, Appellant endeavored to do so. But the trial court entered a judgment holding Appellant contractually liable for contractual breach based on its policies that expressed a mere intent to provide such breaks. That judgment was awarded to a class of approximately 187,000 members based on the testimony of only *six* members and speculation from experts—none of whom could say whether any individual class member actually was offered a contract obligating Appellant to provide rest breaks, whether any class member actually relied so as to form a contract, or whether any class member actually suffered damages as a result of any breach of such contract. In short, the result of Appellant's decision to endeavor to provide paid rest breaks to its employees, above and

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have forgotten, wanted to finish assignments, were not hungry, did not want to leave the premises, [or] wanted to leave early"; and, unlike the *Brinker* rest break class, employer's policy "by itself [wa]s insufficient" to show liability) (emphasis added); *accord Jiminez v. Allstate Ins. Co.*, 2012 WL 1366052, at *15 (C.D. Cal. Apr. 18, 2012).

beyond those required by law, has been a massive liability and monetary judgment against Appellant—substantiating the old saw that "no good deed goes unpunished."

The Superior Court affirmed the trial court outcome, agreeing that employers can be contractually bound to provide paid rest breaks merely by expressing an *intent* to provide such breaks to otherwise at-will employees. That decision contradicts prior Pennsylvania law, under which claims for breach of unilateral employment contracts—based on provisions in employer handbooks or policies (as plaintiffs allege here)—require proof of an employer "offer" that was "intentional, definite in its terms, and communicated," plus proof of consideration by an employee "accepting" the offer (such as by detrimentally "relying" on it). *Stumpp v. Stroudsberg Mun. Auth.*, 540 Pa. 391, 396, 658 A.2d 333, 335-36 (1995); *Morosetti v. Louisiana Land & Exploration Co.*, 522 Pa. 492, 492, 564 A.2d 151, 152-53 (1989). Here, however, the Superior Court held that plaintiffs could establish both offer and acceptance without any actual proof of either as to any individual class member. The Superior Court acknowledged that Pennsylvania law requires plaintiffs to prove both offer and acceptance to show a contract's existence, but it eliminated those rules for plaintiffs who congregate in a class. It effectively held that proof of a contract's existence is unnecessary since a class-wide employment contract can be presumed, as long as an expert says a "reasonable person" would presume one. If that wholesale modification of Pennsylvania contract law remains, the negative effects will be extensive.

Approval of the Superior Court's new contract standards would likely trigger an increase in class action filings in Pennsylvania courts, since it would encourage employees at other companies to file claims analogous to those here. The resulting increase in court filings not only will further clog state court dockets and tax the resources of the already overly-burdened state court system, but it will place Pennsylvania employers at an increased risk of costly class

litigation. Small businesses with limited resources may be hit especially hard. Many of *Amici*'s members lack the resources to vigorously oppose class lawsuits or to take the chance that an adverse jury verdict, based on the type of scant proof permitted here, would put these businesses' very existence at risk.

In addition, under the Superior Court's new contract standards, all Pennsylvania private employers may find themselves parties to unilateral contracts with their employees obligating them to ensure paid rest breaks, simply because these employers expressed an intent to do so in writing. Prudent employers will engage counsel to review—and potentially revise—their policies and handbooks in response to the new law (which may entail a significant expenditure for some small businesses). To ensure that they are not obligated beyond their means, employers may even remove all written provisions regarding rest breaks (and possibly other discretionary benefits). In addition to restricting flexibility in the types of benefits Pennsylvania employers can provide to employees without undue risk, the perverse, long-term effect of the Superior Court's decision may be the elimination of the very paid rest breaks that it strove to cement.

None of these results are necessary, and all can be avoided by this Court's correction of the Superior Court decision here.

CONCLUSION

This litigation raises serious concern among *Amici*'s members—both for the practical effects it may have on Pennsylvania employers and employees, and for the threat it poses to litigants' constitutional rights. Affirming the Superior Court's decision would set precedent that extends to all future litigants—ranging from large retail employers like Appellant, to smaller businesses, union representatives, and individual employees. It should be of uniform importance to this Court's Justices, just as it was to all nine U.S. Supreme Court Justices in *Dukes*, to ensure

the protection of all these litigants' due process rights. The Superior Court's decision does not do so. This Court should reverse that decision and ensure such protection now.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on this day, October 22, 2012, two (2) copies of the foregoing were served on the persons listed below by first class mail pursuant to Pa. R.A.P. 121.

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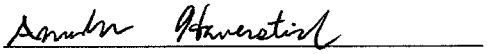
By: 

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