NO. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE FAMILY DOLLAR STORES, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the
United States District Court
for the Northern District of Alabama
Concerning *Janice Morgan, et al. v.*
Family Dollar Stores, Inc.
Case No. 7:01-cv-0303-UWC
(U. W. Clemon, C.J.)

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1-1, in addition to the parties and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement of the Defendants-Appellants, which is hereby incorporated by reference into this Certificate, the Chamber of Commerce of the United States submits that the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae:

Chamber of Commerce of the United States

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Dated: March 7, 2005

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the country's largest business federation. Representing an underlying membership of over three million businesses and organizations of every size and kind, the Chamber has a presence in all fifty states and the District of Columbia. As the principal voice of American businesses, the Chamber regularly advocates in both federal and state courts on behalf of its membership on issues of national concern.

Because the Chamber's members are all subject to the Fair Labor Standards Act (FLSA), the Chamber's members have a great interest in the federal judiciary's administration of the collective action provisions in Section 216(b) of the statute. The FLSA contains a highly technical and, at the same time, vague set of rules that are a trap for the unwary employer. Moreover, where collective actions under the FLSA are initiated, these technical and vague rules can lead to cases involving very high monetary stakes. Indeed, FLSA litigation generally and collective actions specifically are among the fastest growing areas of litigation in the United States, involving many thousands of potential plaintiffs and many millions of dollars of potential liability. The Chamber is thus uniquely situated to comment on the need for mandamus review of the district court's decision here.

Simply put, in the Chamber's view, the district court's decision to certify a nationwide collective action for alleged misclassification of and failure to pay

overtime to approximately 1,400 managers of Petitioner, Dollar Stores, Inc., is a regrettable "poster-child" of class action abuse. The district court has taken a FLSA exemption issue that, by its nature, requires a highly individualized inquiry into employee duties and wrongly treated it as a question capable of common resolution. Moreover, the district court has done so by impermissibly prejudging the merits of the exemption question and has done so in the face of conceded differences in duties of individuals within the putative class. And, perhaps worst of all, the district court reached its conclusion that all members of the putative class are "similarly situated" within the meaning of Section 216(b) on the basis of allegedly representative evidence, even though Section 216(b) requires individual participation and precludes representative actions. The district court's approach is unprecedented and turns Section 216(b) on its head.

Because this Court's decision could have vast implications for the national economy and the Chamber's members, the Chamber joins Petitioner's request for a Writ of Mandamus. Pursuant to Federal Rule of Appellate Procedure 29(a), the Chamber sought but was denied consent by Plaintiffs-Respondents, and therefore the Chamber's Motion for Leave to File As Amicus Curiae is filed herewith.

STATEMENT OF THE ISSUE

Whether the district court's decision to certify a nationwide collective action under 29 U.S.C. § 216(b) for alleged misclassification of and failure to pay overtime to approximately 1,400 managers — on the basis of evidence about the duties of only a subset of the members of the putative class and by prejudging the merits of the classification issue — is clear and manifest error that should be corrected by a writ of mandamus?

SUMMARY OF ARGUMENT

I. The decision below is aberrational and a fundamental perversion of Section 216(b). In conducting its Section 216(b) analysis, rather than just rigorously assessing whether putative class members had similar duties, the district court instead engaged in a wholly impermissible prejudgment of whether putative class members had on the merits been misclassified as exempt managers. Moreover, the district court's holding that the misclassification question — which requires a detailed and individualized analysis of each employee's job duties — is susceptible to common resolution conflicts with the overwhelming weight of the case law. Finally, the district court's use of evidence about a subset of the putative class to justify certifying a Section 216(b) class is unprecedented and contrary to reason; it fails to recognize that the purpose of the "similarly situated" inquiry is to determine whether claims are fairly and efficiently adjudicated collectively and thus must be based on evidence about each putative class member who would be included within the collective adjudication. Indeed, the district court's use of evidence about only a subset of the class to certify a larger class turns Section 216(b) on its head, as Congress designed it to preclude representative actions.

II. Review of the district court's aberrational and unsound Section 216(b) ruling cannot and should not await final judgment. A novel ruling of this type is too likely to be seized upon by plaintiffs' counsel in other cases as FLSA collective

action litigation is among the fastest growing areas of litigation in the country. Moreover, it is well-recognized that the grant of class status puts enormous pressure on the defendant to settle, making the likelihood quite low that this collective action ruling will ever be reviewed as part of a final judgment. While Rule 23(f) for this reason allows interlocutory review of such class certification rulings in Rule 23 cases, only mandamus review is available in this case (as Rule 23(f) is not applicable).

ARGUMENT

Under 29 U.S.C. § 216(b), an action may be filed "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," but "[n]o employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party…." In administering this provision, most courts, including this Circuit, have adopted a two-stage inquiry: The first stage — applying a "fairly lenient" standard — determines whether notice may be sent to prospective collective action members; the second stage — employing a more rigorous standard — determines whether the plaintiffs who opted-in are actually "similarly situated" to each other. *Cameron-Grant v. Maxim Healthcare Services, Inc.*, 347 F.3d 1240, 1243 n.2 (11th Cir. 2003). In this case, the district court permitted notice to approximately 11,000 potential plaintiffs, of which 2,560 opted-in and 1,418 currently remain. At stage two, the district court declined to

decertify the action, finding instead that the 1,418 opt-in plaintiffs asserting misclassification claims are "similarly situated" and could properly proceed collectively. This decision is an abuse of discretion and a "clear usurpation of power," and thus should be corrected by writ of mandamus. *Jackson v. Motel 6 Multipurpose, Inc*., 130 F.3d 999, 1004 (11th Cir. 1997).

I. THE DECISION BELOW IS ABERRATIONAL AND A FUNDAMENTAL PERVERSION OF SECTION 216(b).

In declining to decertify this collective action, the court below found that "substantial similarities exist in the job duties of the named and opt-in Plaintiffs." But the Court below did not have before it, and thus did not discuss, evidence about the job duties of each and every putative class member. Rather, based on evidence about only some in the putative class, the court generalized that "most" interview and train new employees, "[m]ost" direct the work of employees in their stores, and "two out of three" supervise fewer than two employees…." Opinion at 3. The court below also found that "most" could not "close the stores" without approval, spent "only a small fraction of their time performing managerial duties" and instead spent "the vast majority of their time on essentially non-managerial duties…." *Id*. at 4-5. Indeed, the court went so far as to hold that "the primary duty of the named and opt-in Plaintiffs is non-managerial." *Id*. at 5. The court then concluded, without explanation, that "Family Dollar's defenses to this action are not sufficiently individually tailored to each plaintiff such that a collective

action is unmanageable." *Id*. at 6. Finally, citing Rule 23 of the Federal Rules of Civil Procedure, the court held that "plaintiffs may rely on representative testimony to establish liability and obtain relief" and that "notions of due process and fairness are not offended by a collective trial in these circumstances." *Id*. at 6, 7. This decision is riddled with clear errors and fundamentally distorts the inquiry required by Section 216(b).

First, in conducting its Section 216(b) analysis, the district court went far beyond conducting the necessary rigorous analysis of the statutory collective action criteria — instead launching into a wholly impermissible prejudgment of whether the putative class members had on the merits in fact been misclassified as exempt managers. The Supreme Court long ago held that a district court has no "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). That settled ruled applies in Section 216(b) cases as well as Rule 23 cases. *See, e.g., Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1106-07 (10th Cir. 2001) (holding that district court's findings were improper where made "in the guise of determining whether plaintiffs were similarly situated"). But, in stark contrast to this settled law, in deciding the "similarly situated" question, the district court here inappropriately reached out and held that the "primary duty of the named and opt-in Plaintiffs is

non-managerial," thus effectively deciding this case on the merits (because the exemption question turns on that distinct "primary duty" issue). This ruling was unnecessary to the resolution of the "similarly situated" question and was thus wholly improper.

Second, the district court's holding that the alleged misclassification in question is susceptible to common resolution is also clear error. Whether an employer has properly treated an employee as exempt is an intensely fact-specific, individualized inquiry based on individual job duties. *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10-11 (1st Cir. 1997) ("an employee's exempt status must instead be predicated on whether his duties and responsibilities meet all of the applicable regulatory requirements"). For this reason, courts routinely hold that exemption cases are *not* susceptible to common adjudication. *See, e.g., Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 220-21 (D. Conn. 2003) (employee classified as exempt refused permission to certify class of allegedly similarly situated employees because commonality depended on individual daily tasks); *Tumminello v. United States*, 14 Cl. Ct. 693, 697 (1998) (certification not appropriate when court must conduct fact-specific inquiry into job duties of each opt-in plaintiff). *See also White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002). Moreover, while finding that "most" members of the putative class had similar duties, the district court's decision here admitted differences in

duties among the named plaintiffs and some of the opt-in plaintiffs. *See* Opinion at 3-5. Those with different duties cannot properly be treated as "similarly situated," as their claims are not subject to common adjudication with the class members with different duties.

Third, in determining that all 1,418 putative class members are "similarly situated," the district court relied on evidence about only a subset of the class to justify certifying a larger class. This also was clear error.

To begin with, there is no doctrinal support for certifying a Section 216(b) class on the basis of evidence about only a portion of the putative class. Cases using so called "representative" evidence trace their lineage to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946), which permitted use of representative evidence to establish back pay for the class as a whole. The reasoning permitting use of representative evidence at the damages stage was (a) that employees could not be expected to maintain records about hours for which they did not expect to be paid and (b) that inferences about the amount of overtime worked by all those similarly situated could be inferred from the amount of overtime worked by some in that homogenous class. *See id.*; *see also Etienne v. Inter-County Security Corp.*, 173 F.3d 1372, 1376 (11th Cir. 1999) (refusing to apply *Mt. Clemens* back wages burden shifting where plaintiff demonstrated only one week's inaccuracy within a year of wage record keeping by employer); *Davis*

v. Food Lion, 792 F.2d 1274, 1276 (4th Cir. 1986) (citing *Mt. Clemens* for the proposition that liquidated overtime back-pay damages may be shown by "just and reasonable inference"). But, until now, no reported decision has allowed use of representative evidence, or other evidence concerning only some members of the putative class, to establish the homogeneity of the class in the first instance. *See, e.g., Basco v. Wal-Mart Stores, Inc.*, 2004 WL 1497709, *6 (E.D. La. 2004) (rejecting use of evidence of seven managers of Wal-Mart stores as establishing similar circumstances for all); *Marsh v. Butler County Sch. Sys.*, 242 F. Supp. 2d 1086, 1093-95 (M.D. Ala. 2003) (where "a plaintiff seeks certification of an FLSA case as a collective action on a theory that similarity is established by virtue of the presence of other FLSA violations," the collective action cannot be maintained because claims cannot establish commonality); *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1272 (M.D. Ala. 2004) ("status as non-exempt cannot be litigated through representative proof…."); *Mike*, 274 F. Supp. 2d at 220-21 (refusing to certify action based on representative evidence); *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (same).

The district court's contrary, aberrational approach is fundamentally flawed. The Section 216(b) inquiry concerns whether named plaintiffs and opt-in plaintiffs claims are sufficiently alike to allow them to be fairly and efficiently adjudicated collectively rather than individually. *See Hoffmann-La Roche Inc. v. Sperling*, 493

U.S. 165, 170 (1989). That inquiry requires an assessment of the claims of *each* putative class member to determine whether the resolution of one class member's claim can be fairly dispositive of all others. *See, e.g., Morisky*, 111 F. Supp. 2d at 498 (determining whether "employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities…"); *Holt*, 333 F. Supp. 2d at 1274-75 ("similarly situated" inquiry requires court to review "the daily tasks of each putative collective action member to determine whether they are similarly situated to the persons identified by Plaintiffs"). While it may be reasonable to infer amounts of overtime worked by members of a homogenous class from the amounts of overtime worked by some in the class, it is not reasonable to infer that the members of a class are in fact homogeneous by reference to evidence about only some within the class. That is, a court cannot determine whether a claim is "similar" to *all* others by comparison to only *some* of the others; such a truncated inquiry fails to answer whether the class as a whole is "similarly situated." Yet that is precisely what the district court here did.

Indeed, the district court's approach turns the policy underlying the opt-in requirement of Section 216(b) on its head. In 1947, Congress restricted collective actions to those in which prospective class members agreed in writing to opt-in, because of "a national emergency created by a flood of suits under the FLSA."

Cameron-Grant, 347 F.3d at 1248 (internal quotations omitted). The Supreme Court described what troubled Congress:

> In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal-to-Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. The relevant amendment was for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and *freeing employers of the burden of representative actions*.

Sperling, 493 U.S. at 173 (emphasis added). In other words, in adopting the opt-in requirement, Congress departed from "the representative" approach followed in Rule 23 cases and determined that Section 216(b) actions required personal participation; representative actions were precluded. *See id*. But by basing its Section 216(b) analysis on evidence about only some within the putative group, and by citing Rule 23 as its answer to due process and fairness of objections raised by Family Dollar, the district court has, in effect, wrongly resurrected the representative actions that Congress intended to abolish in FLSA cases when it adopted the opt-in language of Section 216(b).

II. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS.

Review of the district court's aberrational and unsound Section 216(b) ruling cannot and should not await appeal from final judgment. Indeed, because rulings

of this type create such enormous pressures toward settlement, the district court's ruling likely will never become part of a reviewable final judgment. Yet such a ruling needs to be set aside before other plaintiffs' attorneys can seek to use it as precedent for yet further unwarranted collective actions. Mandamus is thus necessary and appropriate.

A. The Decision Below Is Of Immediate National Significance.

At the outset, it is important to recognize that the decision below has consequences beyond its effects on the parties here. Wage and hour cases — particularly collective actions under Section 216(b) — are among the fastest growing areas of litigation in the country. *See Wage Hour Collective Actions Jumped 70 Percent Since 2000*, DAILY LAB. REP., March 26, 2004.

Statistics provided by the Federal Judicial Center illustrate that in 1992, 1,464 FLSA actions were filed in the federal district courts. *See* Federal Judicial Caseload Statistics, *Table 2.2*. Ten years later, the number of FLSA actions filed had jumped to 3,904. *See id.*; *see also* Federal Judicial Caseload Statistics, *Table C-2* (illustrating that roughly 2,000 FLSA cases in 2000 increased to roughly 3,500 in 2003).

Legal commentators and scholars have taken note of this proliferation of wage-hour suits. *See, e.g.*, Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues* SJ079 ALI-ABA 35, 55 (2004) (noting the "recent

proliferation of employee collective action lawsuits"); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled With Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 206 & n.190 (2003) (class actions increasing under the FLSA); *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits*, DAILY LAB. REP., Dec. 12, 2002 ("recent surge" in FLSA litigation).

This surge in litigation is particularly problematic in the context of exemption classification issues. As commentators have noted, the Department of Labor regulations governing the exemptions are difficult to comport with and to apply. *See, e.g.*, Robert D. Lipman, Allison Plesur, Joel Katz, *A Call for Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 379 (1994) (calling for clearer overtime standards "because they have become so complicated that employees do not understand their rights and employers do not understand their obligations."). Recognizing that need, the Department of Labor invited comment and last year revised the regulations to "simplify, clarify and better organize" overtime exemptions. Final Rule "Defining and Delimiting the Exemptions …", 69 Fed. Reg. 22122, 22125 (April 23, 2004). But, even with the changes, the question of "[w]ho should be eligible for overtime is [still] a hot economic and political issue." *Big Retailers Face Overtime Suits As Bosses Do More "Hourly" Work*, WALL ST. J., May 26, 2004, at B10. *Accord*, Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL's*

Modernization of the Exemptions to the Fair Labor Standards Act, 7 U. PA. J. LAB. & EMP. L. 119, 137 (2004) (describing how complexity of FLSA regulation creates uncertainty and results in economic waste).

Simply put, exemptions issues can still result in high-stakes litigation for employers in spite of their best efforts to comply with functional but highly technical and opaque rules and regulations. Unsound and promiscuous collective action rulings — like the one rendered by the district court here — greatly aggravate this problem. *See As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law*, 170 BNA Lab. Rel. Rep. 145, 152 (2002) (discussing increase in FLSA collective actions and noting several multi-million dollar settlements). Employers fearful of similarly abusive suits will change their business practices to avoid them, preferring inefficient and established practices to more efficient and innovative alternatives. The national economy, consumers, and the Chamber's members will suffer from economic waste and unduly expensive litigation in the process.

B. The Immense Pressures Inherent in Collective Action Certification Require Immediate Review.

Immediate review of the ruling below is therefore necessary and appropriate. Certification decisions, whether denied or granted, are often dispositive of the litigation: A denial of class status can remove the financial incentive for continued litigation; and the grant of class status can effectively force a defendant to settle.

See Rutstein v. Avis Rent-A-Car Systems, Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) ("nothing to be gained by certifying this case as a class action . . . except the blackmail value of . . . coercing the defendant into a settlement"); *In re Diet Drugs Prod. Liab. Litig.*, 93 Fed. Appx. 345, 350 (3d Cir. 2004) ("the pressure to settle that is imposed on the dissatisfied party may be grave and, effectively, unreviewable"); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (discussing the "intense pressure to settle" for defendants against whom a class is certified).

Because of the extraordinary consequences of class certification decisions, the Supreme Court recently promulgated Rule 23(f), which confers upon the courts of appeals sole discretion over whether to review Rule 23 certification decisions on an interlocutory basis. *See* Fed. R. Civ. P. 23(f). By doing so, Rule 23(f) ensures that significant class certification rulings do not escape timely and meaningful appellate review. *See Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 145 (4th Cir. 2001) (purpose underlying Rule 23(f) is to permit interlocutory appeals due to the dispositive nature of certification decisions).

However, Rule 23(f) only applies to class certification rulings under Rule 23 and thus has no direct application to collective action rulings under Section 216(b).

But the rationale of Rule 23(f) — in particular its recognition that class rulings are often dispositive and likely will not be part of a reviewable final judgment — informs why mandamus review should be available in this context: No other remedy is available here. *See In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992) (recognizing no "conceivable alternative remedy" to mandamus where district court abused its discretion).

Indeed, for these reasons, while mandamus is an "extraordinary remedy," *In re BellSouth Corp*., 334 F.3d 941, 954 (11th Cir. 2003), courts have recognized the need for mandamus review in Section 216(b) cases. *See, e.g,. Lusardi v. Lechner,* 855 F.2d 1062, 1064 (3d Cir. 1988). Those precedent are particularly applicable here, as the district court's collective action ruling (that already effectively decides the merits) puts Petitioner under enormous pressure to settle, making review of the district court's unprecedented and perverse ruling as part of a final judgment very unlikely. Further, even if it is reversed by this Court years hence, in the interim, this aberrational decision would have festered and been cited to other courts by plaintiffs' attorneys in other collective action cases. That should be avoided.

CONCLUSION

The Court should grant the petition for a writ of mandamus and instruct the district court to decertify the collective action.

Dated: March 7, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 29(d) and FRAP 32(a)(7)(B). This brief contains 3,355 words.

Dated: March 7, 2005

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Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on March 7, 2005, I caused copies of the foregoing Brief *Amicus Curiae* of the Chamber of Commerce of the United States In Support of Petitioner to be served by Federal Express, overnight delivery on the following counsel:

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