No. 07-12398-DD & 07-13061-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANICE MORGAN AND BARBARA RICHARDSON, ET AL.,
Appellees,
v.
FAMILY DOLLAR STORES, INC.,
Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 7:01-cv-0303-UWC

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

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No. 07-12398-DD & 07-13061-DD
Morgan v. Family Dollar Stores, Inc.

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 of America submits that the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae:

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Dated: August 6, 2007

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (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 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 FLSA. 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 district court's decision here.

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 Dollar Stores, Inc., and the court's methodology for conducting the liability trial, are a regrettable "poster-child" of collective action abuse. The district court took 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 reached its conclusion that all members of the putative class are "similarly situated" for certification and liability purposes 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 Appellant's request to reverse the district court. 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 erred in its unprecedented decision, which will fuel the trend of improperly filed abusive collective action FLSA suits, to refuse to decertify and then to conduct a trial of 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 small subset of the members of the putative class.

SUMMARY OF ARGUMENT

I. The decision below, resulting in the largest jury verdict in Alabama in 2006, is a fundamental perversion of Section 216(b), will encourage the proliferation of improper collective actions, will clog courts' dockets, subject employers to costly litigation, and force them into wasteful business routines.

A. Section 216(b) and its enactment history demonstrate that collective actions were to be limited in circumstance and scope. The twin constraints of the opt-in and "similarly situated" provisions prohibit representative actions under the guise of collective actions and actions involving class members with disparate duties. It is incumbent upon courts rigorously to police these limits.

B. The district court ignored both of these constraints in its certification and merits adjudications.

1. The district court erroneously relied on representative evidence to certify the class, and then compounded that error at the liability stage. 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; to the contrary, courts have rejected 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. That is because a Section 216(b) 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. 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, turning the policy underlying the opt-in requirement on its head.

This fundamental flaw in the Section 216(b) certification analysis was then magnified at the liability stage. Having made a determination erroneously based on representative evidence that members of the class are similarly situated, the court did nothing to ameliorate it at the liability stage. Instead, the court further narrowed down that sample to determine liability. The court thus conducted a trial in a Section 216(b) case as if it were a Rule 23 class action, thereby departing even further from the statute and its intent and effectively eliminating restrictions on collective adjudication, in direct contravention of the statute.

2. The district court also disregarded the "similarly situated" standard, thereby expanding the scope and availability of collective actions. The "similarly situated" test, through its three prongs, aims to ensure that collective actions are limited to those employees whose claims are sufficiently alike to allow them to be adjudicated collectively rather than individually. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The district court erred in its application of these standards.

First, as to disparate employment settings, collective actions are inappropriate where, as here, plaintiffs have different responsibilities and different scheduled hours, work under different supervisors, in different locations, and have allegedly been denied overtime compensation for different reasons. The district court was wrong in suggesting otherwise.

Second, as to individualized defenses, as the regulations make clear and the caselaw recognizes, the determination of a managerial exemption is intensely fact-specific and requires careful factual analysis of the full range of the employee's job duties and responsibilities. 29 C.F.R. § 541.103 (2007). Thus, courts routinely hold that exemption cases—such as this one—are *not* susceptible to common adjudication.

Third, as to fairness to employers and manageability of the litigation, notions of fairness are offended by collective adjudication where, as here, the "similarly situated" inquiry would require a fact-specific, case-by-case inquiry by the Court. Moreover, contrary to the district court's analysis, Rule 23(b) cases counsel against certification where, as here, the required individualized determinations render collective treatment inefficient for courts and unfair to employers (who may be forced into premature settlements).

3. The court's explanation for its certification decision is contrary to both Section 216(b) and the exemption provision of the FLSA regulation. Instead

of analyzing whether employees' duties are similar for purposes of certification, the court switched to the merits of the exemption defense. The court adopted an "independent authority" standard and held that the plaintiffs were similarly situated because they were not "responsible for the total operation of their stores." R. 367-4. This standard is contrary to precedent, which holds that the managerial exemption applies even where employees' discretion is limited by corporate policies and review. It is also inconsistent with the economic realities of operation of national corporations, which routinely impose limitations on local managers' discretion. The decision thus undermines the law on exemption and imposes an unfair burden on large employers.

II. The district court's failure to observe statutory limits on collective actions is of immediate national significance because wage and hour cases, particularly collective actions, are among the fastest growing areas of litigation in the country. Since 2000, wage and hour claims have increased by 120 percent. This trend is especially prominent in the Eleventh Circuit. The increase has been driven by uncertainties in regulations, as well as financial and strategic incentives to file Section 216(b) collective actions. The district court's erroneous approach will only worsen a litigation frenzy that is already out of control.

ARGUMENT

Because the FLSA collective actions have risen dramatically, courts should be particularly careful about observing the limits that Congress imposed on such actions. The decision below, resulting in the largest jury verdict in Alabama in 2006, 16 ALA. L. WEEKLY No. 6 (Feb. 9, 2007), is unprecedented in its approach to both certification of the collective action and to adjudication on the merits. It should be reversed.

I. THE DISTRICT COURT'S APPROACH UNDERMINES EXPLICIT LIMITATIONS THAT SECTION 216(B) IMPOSES ON COLLECTIVE ADJUDICATION OF EMPLOYEE CLAIMS

Under 29 U.S.C. § 216(b), an action may be filed (1) "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," but (2) "[n]o employee shall be a party plaintiff . . . unless he gives his consent in writing to become such a party." Thus, there are two distinct clauses imposing limits on collective actions: one requires affirmative opt-in of claimants, and the other requires a claimant to show that he/she is "similarly situated" to all others. As the text of the statute and its enactment history demonstrate, these clauses prohibit both representative actions under the guise of collective actions and collective actions by class members with disparate duties. By disregarding both limitations, the decision below impermissibly expands the scope of Section 216(b) collective actions, further contributing to their improper

proliferation.

A. The Statute And Congressional Intent Demonstrate That Section 216(b) Prohibits Representative Actions And Actions Involving Class Members With Disparate Duties

Section 216(b) was enacted in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, the Court held that an employer was responsible for paying an employee from "portal-to-portal"—*i.e.*, from the moment he arrived at work until the time he left, including the time it took to get to and from the time clock to his actual job site. *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 469 (3d Cir. 1994). Such a construction of the FLSA raised the specter of "virtually unlimited liability" for employers, *id.*, and resulted in "a national emergency created by a flood of suits under the FLSA." *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (internal quotation marks omitted).

Congress responded by enacting of the 1947 Portal-to-Portal Act, pt. IV, § 6, 61 Stat. 84, 87, 88 (1947):

> 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*.

Hoffmann-LaRoche, 493 U.S. at 173 (emphasis added; internal citation omitted).

Senator Donnell's remarks confirm Congress' aim to eliminate representative actions by enacting the opt-in provision:

> Obviously, Mr. President, this is a wholesome provision, for it is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later [on] have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.

93 Cong. Rec. 2177, 2182 (1947) (Statement Sen. Donnell).

The Portal to Portal Act thus sought to "prevent large group [FLSA] actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit." *Cameron-Grant*, 347 F.3d at 1248 (quoting *Arrington v. NBC, Inc.*, 531 F. Supp. 498, 501 (D.D.C. 1982) (internal quotation markers and alterations omitted)). Guided by the language of the statute and the legislative history, courts in turn have recognized that the opt-in provision prohibits what is permitted under FRCP 23—representative actions. *Id*; *see also Arrington*, 531 F. Supp. 502 (noting that the opt-in requirement "seek[s] to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit").

Section 216's "similarly situated" provision further limits collective actions to those employees whose claims are sufficiently alike to warrant collective adjudication. Most courts, including this Circuit, have adopted a two-stage inquiry to administer this provision. 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 opt-in plaintiffs are actually "similarly situated" to each other. *Cameron-Grant*, 347 F.3d at 1243 n.2. The "similarly situated" test focuses on (1) the disparate factual and employment settings of the individual plaintiffs, (2) the extent to which various defenses available to the defendant are individual to each plaintiff, and (3) the practical and procedural fairness of trying the case individually, as opposed to collectively. *See, e.g.*, *Hipp v. Liberty Nat'l Life Ins.*, 252 F.3d 1208, 1219 (11th Cir. 2001). *See generally* 7B Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1807 (Supp. 2007).

In short, Section 216(b) of the FLSA limits the circumstances and scope of collective actions. It requires individual participation and prohibits representative actions. It requires similarity for participation and prohibits adjudication of disparate claims. It imposes each of these requirements in order to prevent collective action abuse.

B. The District Court's Certification And Adjudication Of This Collective Action Is Inconsistent With Section 216(b) And Will Spur Further Proliferation Of Improper Collective Actions

1. The District Court's Reliance On Representative Evidence In Determining That All Of Class Members Are "Similarly Situated" And Conducting A Liability Trial With Just A Few Representative Plaintiffs Undermines Section 216(b)'s Opt-In Requirement

The district court's decision is such an abuse. It erroneously relied on representative evidence to certify the class, and then compounded that error at the liability stage, resulting in an unfair trial that was inconsistent with statutory commands.

At the certification stage, in determining that all 1,418 putative class members were "similarly situated," the district court relied on evidence about only a subset of the class to justify certifying a larger class. Such reliance on representative evidence is contrary to the policy behind the opt-in requirement, which limits the scope and availability of collective actions by "ensur[ing] that only those plaintiffs with a truly vested interest in the outcome of an overtime suit actually proceed with the action." *Hyman v. WM Fin. Servs., Inc.*, No. 06-CV-4038 (WJM), 2007 WL 1657392, at *6 (D.N.J. June 7, 2007).

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. Even *Anderson*, 328 U.S. 680, which permitted use of representative evidence to establish back pay for

the class as a whole, and which spurred the enactment of Section 216(b), is inapplicable here. In *Anderson*, the Court reasoned that it could rely on representative evidence at the damages stage because (a) employees could not be expected to maintain records about hours for which they did not expect to be paid and (b) 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. *Id.*; *see also Etienne v. Inter-County Sec. 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). *Anderson* in no way suggested that representative evidence could be used to establish class homogeneity.

Indeed, 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. Rather, the courts have consistently rejected such approaches. *See, e.g.*, *Basco v. Wal-Mart Stores, Inc.*, No. Civ. A. 00-3184, 2004 WL 1497709, at *6 (E.D. La. July 2, 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 v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 220-21 (D. Conn. 2003) (refusing to certify action based on representative evidence); *Smith v. Heartland Auto. Servs., Inc.*, 404 F. Supp. 2d 1144, 1153-54 (D. Minn. 2005) ("type and quality of managerial duties performed by various plaintiffs will be squarely at issue on the consideration of the merits," which "weighs heavily against the action continuing as a collective one").

The district court's contrary, aberrational approach is fundamentally flawed and exposes employers to actions outside the statutory scope. 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*, 493 U.S. at 170. 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 v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (determining whether "employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities"). When the district court compared only

some putative plaintiffs, it failed to determine properly whether the class as a whole is similarly situated.

Such reliance on representative proof illegitimately broadens the scope of the action by means of an inference that "any time an employer has two or more employees who allegedly were not being paid the overtime they claimed they were due, the employees would be similarly situated and be allowed to proceed with a collective action." *Marsh*, 242 F. Supp. 2d at 1094. Even if plaintiffs are similarly situated, an individual plaintiff "has no independent right to represent such individuals." *Cameron-Grant*, 347 F.3d at 1249.

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. The district court's approach turns the policy underlying the opt-in requirement on its head. Indeed, by basing its Section 216(b) analysis on evidence about only some within the putative group, the district court has resurrected the

representative actions that Congress intended to abolish when it adopted Section 216(b).

This fundamental flaw in the Section 216(b) analysis at the certification stage was then magnified at the liability stage. Having made a determination erroneously based on representative evidence that members of the class are similarly situated, the court did nothing to ameliorate it at the liability stage by, for example, inquiring into individual circumstances of employees. Instead, the court, having assumed that all class members are similarly situated based on a small sample at the certification stage, further narrowed down that sample to 7 employees out of 1,400 to determine collective liability. The court thus conducted a trial in a Section 216(b) case as if it were a class action, thereby departing even further from the statute and its intent.

This Court has made clear that section 216 "is a fundamentally different creature than the Rule 23 class action," as it requires the "active participation" of each plaintiff. *Cameron-Grant*, 347 F.3d at 1248–49; *Hipp*, 252 F.3d at 1216. Thus, where representative proof was used erroneously for certification and then further relied on at the adjudication the very purpose of collective actions is undermined: "To determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of *each* employee's job responsibilities" and "whether *each* employee was properly

classified as exempt;" thus, these cases "*cannot be litigated* through representative proof." *Holt*, 333 F. Supp. 2d at 1271-72 (emphases added; internal quotation marks omitted)). *See also England v. New Century Fin. Corp.*, 370 F. Supp. 2d 504, 511 (M.D. La. 2005) ("[I]ndividual inquiries must predominate in this case because of the different locations, managers, and factual situations involved at each location."). Indeed, it is "oxymoronic" to use representative evidence device "in a case where proof regarding each individual plaintiff is required to show liability." *Bayles v. Am. Med. Response of Colo. Inc.*, 950 F. Supp. 1053, 1065 (D. Colo. 1996). Accordingly, courts have held that use of representative proof, such as here, is inappropriate to establish liability. *See, e.g.*, *Reich v. So. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (testimony of 54 employees on behalf of 3,368 plaintiffs in an FLSA collective action was insufficient to support a judgment for the entire collective because the members of the collective were from "a variety of departments, positions, time periods, shifts, and staffing needs"); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (noting that the court "found no case . . . holding that one employee can adequately represent 244 employees holding a variety of positions at different locations").

The district court's conversion of a Section 216(b) action into a representative adjudication is directly contrary to Congress' "crucial policy decision" to eliminate class-action type treatment of FLSA claims, *De Asencio v.*

Tyson Foods, Inc., 342 F.3d 301, 311 (3d Cir. 2003). If allowed to stand, the ruling below will prompt plaintiffs' lawyers to file collective action lawsuits on behalf of individuals who have no statutory right to be class members. By sanctioning use of representative evidence, the district court all but eliminated the statutory prohibition on representative actions.

2. The District Court Disregarded The "Similarly Situated" Standard, Thereby Improperly Expanding The Scope And Availability Of Collective Actions

The district court also improperly disregarded the "similarly situated" standard. The "similarly situated" test aims to ensure that collective actions are limited to those employees whose claims are sufficiently alike to allow them to be adjudicated collectively rather than individually. *Hoffmann-La Roche*, 493 U.S. at 170. "[P]laintiffs bear the burden of demonstrating a reasonable basis for their claim of classwide discrimination." *Hipp*, 252 F.3d at 1219 (internal quotation marks omitted). "[U]nsupported assertions that FLSA violations were widespread" are insufficient. *Haynes v. Singer Co.*, 696 F.2d 884, 887 (11th Cir. 1983). Similarities must extend "beyond the mere facts of job duties and pay provisions." *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1314 (M.D. Ala. 2002). Otherwise, "it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse." *Id.* The district court

ignored these standards, thereby expanding the scope and availability of collective actions beyond statutory boundaries.

Disparate Employment Settings. The employment setting prong of the "similarly situated" test is not satisfied where plaintiffs had "different responsibilities and different scheduled hours . . . work under different supervisors, . . . in [different] locations, and have allegedly been denied overtime compensation for [different reasons]." *Reed v. Mobile County Sch. Sys.*, 246 F. Supp. 2d 1227, 1233 (S.D. Ala. 2003); *see also Saxton v. Title Max of Ala., Inc.*, 431 F. Supp. 2d 1185, 1189 (N.D. Ala. 2006) (similar analysis). Varying amounts of discretion exercised by plaintiffs also counsel against finding that they are "similarly situated." *Epps v. Oak Street Mortgage LLC*, No. 5:04-CV-46-DC-10GRJ, 2006 WL 1460273, at *6 (M.D. Fla. May 22, 2006). In this case, as shown by Defendants-Appellants, discovery revealed that plaintiffs' duties varied widely, Appellants' Br. at 39-42, which the district court ignored. *Holt*, 333 F. Supp. 2d at 1274 (When the parties have conducted extensive discovery, "it is appropriate to carefully consider submissions of the parties with respect to collective action allegations.").

Individualized Defenses. As the regulations make clear and the caselaw recognizes, the exemption determination is intensely fact-specific and requires "careful factual analysis of the full range of the employee's job duties and

responsibilities." *Cooke v. Gen. Dynamics Corp.*, 993 F. Supp. 56, 59-61 (D. Conn. 1997); *see* 29 C.F.R. § 541.103 (2007) ("A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case."); *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, because "[t]o determine which employees are entitled to overtime compensation under the FLSA depends on an individual, fact-specific analysis of each employee's job responsibilities under the relevant statutory exemption criteria." *Holt*, 333 F. Supp. 2d at 1271-72 (internal quotation marks omitted); *Tyler v. Payless Shoe Source, Inc.*, No. 2:05-CV-33F(WO), 2005 WL 3133763, at *5–7 (M.D. Ala. Nov. 23, 2005) (same). Those with different duties, as is true of many employees here, cannot properly be treated as "similarly situated" for the purpose of exemption defense.

Unfairness To Employers/Lack of Manageability. Notions of fairness are offended by collective adjudication where, as here, the "similarly situated" inquiry "would require a fact-specific, case-by-case inquiry by the Court." That inquiry, "at the very least," would require ascertaining "each employee's average daily job duties, the number of other employees supervised, and the classification of each

employee as exempt or non-exempt for the time period in question." *Id.* at *7. Thus, where "[t]he exempt or non-exempt status of potentially hundreds of employees would need to be determined on a job-by-job, or more likely, an employee-by-employee basis . . . collective treatment [is] improper." *Morisky*, 111 F. Supp. 2d at 499 (footnote omitted); *see also Wombles v. Title Max of Ala., Inc.*, No. 303CV1158CWO, 2005 WL 3312670, at *6 (M.D. Ala. Dec. 7, 2005) (collective treatment would "undermine, rather than promote, judicial efficiency"). Courts have thus emphasized that an "individualized analysis of overtime compensation runs directly counter to 'the economy of scale envisioned by' collective treatment of substantially similar employees." *Saxton*, 431 F. Supp. 2d at 1189 (citing *Home v. United Servs. Auto Ass'n*, 279 F. Supp. 2d 1231, 1237 (M.D. Ala. 2003)).

Contrary to the district court's analysis, Rule 23(b) cases do not support certification here. For example, this Court has concluded that "litigating [] plaintiffs' claims as class actions no matter what the cost in terms of judicial economy, efficiency, and fairness runs counter to the policies underlying Rule 23(b)(3)." *Andrews v. AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996). As Judge Easterbrook has explained, courts "should think of market models rather than central-planning models" when considering certification, because even though the individualized approach looks "inefficient," it "produces more information, more

accurate prices, and a vibrant, growing economy." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *Newton v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("Because injury determinations must be made on an individual basis in this case, adjudicating the claims as a class will not reduce litigation or save scarce judicial resources.").

Courts have also emphasized the serious effect that inappropriate class certifications have on a defendant industry: "[T]here is nothing to be gained by certifying this case as a class action; nothing, that is, except the blackmail value of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys.*, 211 F.3d 1228, 1240 n.1 (11th Cir. 2000); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims."). As Judge Posner has underscored, "[w]ith the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international . . . industry" is liable. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

If this Court upholds the ruling below, it will condemn the well-established and functional approach for collective adjudication adopted by many district courts within this Circuit. Doing so would promote inefficient adjudication that is unfair

to employers, leading to even more improper wage and hour lawsuits in this Circuit. *See infra*, at 26.

C. The District Court's Explanation For Its Decision Is Contrary To Both Section 216(b) and The Exemption Provision Of The FLSA Regulation

The district court's reasons for proceeding with collective adjudication do not withstand scrutiny. Instead of analyzing whether employees' duties are similar for purposes of certification, the court switched to the merits of the exemption defense. The court adopted an "independent authority" standard and held that plaintiffs are similarly situated because they are not "responsible for the total operation of their stores." R. 367-4. This standard is without precedent, confuses the merits determination with the antecedent certification decision, allows circumvention of Section 216(b) principles, thereby subjecting employers to liability where none is contemplated by the statute, and undermines efficient functioning of national businesses.

First, the district court should not have interjected a merits based inquiry into the procedural inquiry for collective action. The Supreme Court long ago explained the impropriety of intermingling such questions. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

Second, as Defendants-Appellants explain (Appellants' Br. at 34-36), the regulations are clear that the key to managerial status is whether an employee has

the power to *recommend* a particular action. 29 C.F.R. § 541.100(a)(4) (2007); *id.* § 541.105; *id.* § 541.106(b). The district court erred in thinking otherwise.

Third, the district court's erroneous approach is especially problematic for large employers that operate in multiple locations. Until now, it has been well-established that nationwide employers do not lose their exemption from paying overtime to their employees by using "district management" and "corporate practices" to oversee individual store managers, and thereby limit and guide their discretion. The district court's contrary construction of the FLSA exemption is at odds with these widespread practices and in great tension with principles of good corporate governance (and the concerns of other laws such as Title VII).

Exemption for management (under the FLSA) encompasses supervision subject to corporate guidelines, constraints and review. As courts have observed, "we believe that the manager of a local store in a modern multi-store organization has management as his or her primary duty even though the discretion . . . may be limited by the company's desire for standardization and uniformity." *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 619 (8th Cir. 1991) (agreeing with "other courts"); *Mims v. Starbucks Corp.*, No. H-05-0791, 2007 WL 10369, at *3 (S.D. Tex. Jan. 2, 2007) (same). The fact that plaintiffs "had to adhere to company policies, record completed tasks on checklists, and were subject to performance reviews conducted through a monthly inspection by" their nationwide employer "does not alter" the

conclusion that their primary duty is management. *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1115 (9th Cir. 2001); *McAllister v. Transamerica Occidental Life Ins.*, 325 F.3d 997, 1001 (8th Cir. 2003) ("Just because McAllister was required to follow detailed manuals does not mean that she did not exercise discretion and independent judgment."). As courts have explained, "[i]t is virtually impossible to conceive of a free standing business location without a 'manager.' Title Max, could not, and did not, manage by remote control." *Bosch v. Title Max, Inc.*, No. CIV.A.03-AR-0463-S, 2005 WL 357411, at *9 (N.D. Ala. Feb. 7, 2005); *see also Thomas v. Jones Rests.*, 64 F. Supp. 2d 1205, 1213 (M.D. Ala. 1999) ("[t]he Clanton Sonic, like any restaurant, would undoubt[e]dly have failed" if someone, like the plaintiff, an on-site manager, had not performed the required tasks). Thus, "[c]ourts have routinely rejected [] arguments" that one is not a manager where the "discretion was strictly limited by corporate policies, and [employee] was closely supervised by the district manager." *Jackson v. Jean Coutu Group USA, Inc.*, No. CV206-194, 2007 WL 1850710, at *5 (S.D. Ga. June 26, 2007).

Emphasizing the "overwhelming and well-reasoned precedent holding that retail store managers . . . are exempt," a district court in this judicial circuit has explained that the fact that "[s]tore managers' need to exercise their discretion within the guidelines established by [a nationwide employer] does not undermine the importance of Plaintiffs' managerial duties or the discretion itself." *Posely v.*

Eckerd Corp., 433 F. Supp. 2d 1287, 1303-04 (S.D. Fla. 2006). Thus, "well-defined policies" are "insufficient to negate" the finding that in-store managers are exempt; "[e]nsuring that company policies are carried out constitutes the very essence of supervisory work." *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (internal quotation marks omitted).

There is no rational reason to eliminate the managerial exemption just because discretion is circumscribed by either company practices or supervision. Courts have recognized that the existing *modus operandi* of national corporations not only presupposes limited discretion of managers, but that it is an economically efficient arrangement that promotes good corporate governance. As the Second Circuit emphasized in its often-quoted statement, applicable to many industries, including retail:

> The economic genius of the Burger King enterprise lies in providing uniform products and service economically in many different locations and that adherence . . . to a remarkably detailed routine is critical to commercial success [and that such] can make the difference between commercial success and failure.

Donovan v. Burger King Corp., 675 F.2d 516, 521-22 (2d Cir. 1982); *Jackson v. Advance Auto Parts, Inc.*, 362 F. Supp. 2d 1323, 1335 (N.D. Ga. 2005) (citing *Donovan,* 675 F.2d at 521-22); *Donovan v. Waffle House, Inc.*, No. C81-609A, 1983 WL 2108, at *9 (N.D. Ga. Sept. 26, 1983) (same); *Posely*, 433 F. Supp. 2d at 1301-02 (retail pharmacy chain) (same); *Murray*, 939 F.2d at 619 (gas

station/convenience store) (same); *Gilliam v. Montgomery Ward & Co.*, No. 96-1210, 1997 WL 429454, at *7 (4th Cir. July 31, 1997) (unpublished) (same). These economic considerations are directly applicable to Family Dollar Stores as well as to all other similarly situated businesses.

The ruling below is contrary to the existing judicial consensus and economic realities. It undermines the law on exemption and imposes unfair burden on large employers. It should be rejected.

II. THE DECISION BELOW IS OF IMMEDIATE NATIONAL SIGNIFICANCE AS WAGE-HOUR LAWSUITS AND COLLECTIVE ACTIONS ARE PROLIFERATING

The decision below has consequences well beyond its effect on the parties here. Although the size of the verdict is itself significant, the rulings in this case illustrate how FLSA collective actions have transcended statutory bounds and have invited a further flood of improper lawsuits that will inundate courts' dockets. Courts should carefully police the limits that Congress imposed on FLSA collective actions. Rulings such as the one below will lead to numerous other lawsuits, the surge of which is aided by the ambiguity of complex regulations and by the many features of the statutory scheme that make such suits attractive to plaintiffs' lawyers.

Wage and hour cases — particularly collective actions under Section 216(b) — are among the fastest growing areas of litigation in the country. *See* Kris

Maher, *Workers are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J., June 5, 2006, at A2; Stephen Franklin, *Workers Long for Overtime: Employers See More Suits Alleging They Failed to Pay for Extra Hours*, HOUS. CHRON., July 24, 2006, at 1 (experts say wage and hour cases are "the nation's fastest-growing legal battlefront"); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435, 455 (2007) (noting the "recent proliferation of employee collective action lawsuits"); John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 No. 3 TRIAL ADVOC. Q. 16, 20 (2006) ("[c]ollective actions under the FLSA are one of the fastest-growing areas of litigation of any kind").

The significance of the rise in FLSA claims and collective actions is illustrated and underscored by comparison to data about employment discrimination suits over the same time period. FLSA suits have increased by 230 percent since 1990, and by 120 percent since 2000 alone. In Fiscal Year 2006, 4,207 FLSA actions were filed in the federal district courts, up from 1,935 in FY 2000 and 1,257 in FY 1990. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES Table 4.4 (2006); *see also* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2001, 2006) (reporting that roughly 1,900 FLSA cases in 2000 increased to roughly 4,400 in 2006). And, from 2001 to 2004, the

number of FLSA collective actions filed in district courts nearly tripled, from 397 to 1,076. Amy I. Stickel, *FLSA Suits Take Flight: Other Types of Employment Cases Stay Grounded*, COUNSEL TO COUNSEL, Mar. 2005, at 17.

As FLSA cases have increased, employment discrimination suits have in contrast decreased, falling 32 percent since 2000. In FY 2006, only 14,353 discrimination cases were filed, down from 21,032 in FY 2000. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES Table 4.4 (2006). *See also id.*, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2001, 2006). FLSA collective action cases have now consistently outpaced discrimination class actions in the number of filings each year for several years. *See* Nancy Montwieler, *Wage-Hour Class Actions Surpassed EEO In Federal Courts Last Year, Survey Shows*, DAILY LAB. REP., Mar. 22, 2002, at C-1.

The rise of the FLSA suits has been particularly notable in the Eleventh Circuit. *See* Mary Shedden, *Overtime Lawsuits A Budding Industry*, TAMPA TRIB., Feb. 6, 2007, at 1. In the 12 month period ending September 30, 2006, 2,881 private labor suits were filed in the Eleventh Circuit alone, 700 more than in any other circuit. STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-3 (2006). There were over 330 federal overtime claims filed in this Circuit's district courts in 2006, nearly four times the number of cases filed during that year in New York, California, and

Texas combined. *Id.* In 2004, more than half of the 1076 FLSA collective actions filed in federal district courts were filed in this Circuit's district courts, where plaintiffs' lawyers are making a "cottage industry" of this type of claim. Allan H. Weitzman & Elena J. Voss, *In FLSA Litigation, It's All About the Plaintiff's Attorney's Fees*, 12 No. 1 H.R. ADVISOR 2 (2006).

These trends are in part a reflection of the fact that the Department of Labor ("DOL") regulations governing the exemptions are difficult to comport with and to apply. *See, e.g.*, Victoria Roberts, *Attorneys Explore Reasons for Surge In Wage and Hour Lawsuits, Offer Strategies*, DAILY LAB. REP., Dec. 12, 2002, at C-1 ("the FLSA is a complex law that is tricky for employers to apply"). To be sure, the DOL recently revised the regulations to "simplify, clarify and better organize" overtime exemptions. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22125 (Apr. 23, 2004). But those changes did little to clarify which workers qualify for overtime, and so employers remain vulnerable to lawsuits. *See, e.g.*, Franklin, at 1 ("Experts say the increase in overtime lawsuits across the country resulted from a lack of clarity in federal law . . . . [M]any say the revisions only muddied the water and invited litigation."); Maher, *supra* at A2 ("many experts say the [revised] rules have had little impact on curbing litigation").

Judicially-created standards for applying Section 216(b) have already provided strong encouragement for the filing of lawsuits about compliance with these vague and technical standards. Certification standards in Section 216(b) cases at stage one are less demanding than in class actions under Rule 23, thus allowing notice to be sent to potential plaintiffs before a court has made a conclusive determination about the propriety of a collective action. *Hoffman-La Roche*, 493 U.S. at 170-72; Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 The Lab. Lawyer 311, 315 (2005) (noting that "some courts grant notice based on nothing more than the allegations contained in a well-pled complaint.").

Driven by the possibility of huge fees and the advantages that section 216(b) provides, plaintiffs' lawyers have not surprisingly made FLSA cases their "claim du jour." Simon J. Nadel, *As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law*, DAILY LAB. REP., June 25, 2002, at C-1. Coupled with the fact that the FLSA puts the burden on employers to prove that an exemption to minimum wage and overtime requirements applies, *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 625 (11th Cir. 2004), there is significant pressure on employers to settle, even in marginal cases, before the class expands and expensive classwide discovery begins. Lampe & Rossman, *supra*, at 315.

The district court's decision here makes an increasingly problematic situation exponentially worse. It eliminates all remaining limitations on Section 216(b) collective actions, thus allowing the very kind of representatives actions that Section 216(b) was enacted to prevent. This Court needs to affirmatively reject that approach so that the FLSA litigation explosion is not improperly fueled further to the detriment of the economy and the American worker.

CONCLUSION

The Court should reverse the judgment of the district court on its denial of decertification and remand for a new trial.

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 6,657 words.

Dated: August 6, 2007

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