No. 06-56090

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL SEPULVEDA, *et al.*,

Plaintiffs-Appellants,

v.

WAL-MART STORES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. CV-04-1003 DSF (Ex)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, amicus states as follows:

The Chamber of Commerce of the United States of America has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is a nonprofit corporation and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Chamber members routinely are named as defendants in litigation in which plaintiffs seek class certification, including certification of injunctive-relief classes under Rule 23(b)(2). Because of its extensive experience in these matters, the Chamber is well-situated to brief this Court on the importance of correctly applying the class certification framework of Rule 23(b). This is an issue that transcends the immediate concerns of the parties to this litigation; indeed, it potentially impacts the companies collectively responsible for a substantial portion of total U.S. economic activity.

Class certification can transform a modest case into one with thousands or millions of claimants and billions of dollars in alleged damages, while depriving

defendants of the opportunity to expose the legal and factual shortcomings of individual claims for liability or damages. Improper class certifications can generate overwhelming pressure on defendants to settle cases, regardless of the merits, because defendants simply cannot "bet the company" on a single jury verdict, even if they believe there is an overwhelming likelihood that they will win a trial on the merits. These concerns are exacerbated when certification is allowed under Rule 23(b)(2), because that provision does not contain the important procedural protections found in Rule 23(b)(3). For these reasons, the Chamber and its members have a strong interest in promoting adherence to the requirements of Rule 23.

In addition, efforts to convert overtime claims, such as those at issue in this case, into sprawling class actions seeking hundreds of millions of dollars in one fell swoop have been increasing, and some district courts are misinterpreting the Rule 23 standards and certifying these classes notwithstanding the highly individualized nature of the claims. The district court in this case, by contrast, correctly applied the governing legal standards to the record before it. It is extremely important to the Chamber and its members that this Court provide guidance so that other district courts will do the same.

The Chamber takes no position on the merits of the underlying action. But the Chamber emphatically agrees with the district court, and appellee Wal-Mart

Stores, Inc., that the class proposed by plaintiffs in this case cannot be certified under Rule 23(b). It files this brief with the consent of all parties.

STATEMENT

Plaintiffs contend that Wal-Mart's assistant managers should be classified as "non-exempt" under California's labor laws. *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 232 (C.D. Cal. 2006). They sought certification of a class "consisting of all assistant managers employed by [Wal-Mart] in California." *Id.* Plaintiffs sought money damages "includ[ing] unpaid overtime wages and wages for missed breaks, as well as penalties for failure to pay overtime, provide breaks, furnish wage and hour statements, pay wages promptly, and maintain payroll records." *Id.* at 245. They also sought "an injunction barring [Wal-Mart] from requiring non-exempt [assistant managers] to work overtime without overtime pay, and requiring [Wal-Mart] to provide meal and rest breaks, provide wage and hour statements, and pay all wages due (including overtime wages) on termination of employment." *Id.* The district court (Fischer, J.) denied the motion for class certification. *Id.* at 233.

With respect to Rule 23(b)(2), which permits class certification where "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" is "appropriate," the court recognized that "'[a] class seeking monetary damages may be certified pursuant to Rule 23(b)(2) where such relief is merely in-

cidental to [the] primary claim for injunctive relief.'" 237 F.R.D. at 245 (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195, *amended by*, 273 F.3d 1266 (9th Cir. 2001)) (second alteration in original). The court further recognized that, under Ninth Circuit precedent, "[t]here is no bright-line rule for determining what damages are 'incidental.' Rather, the Ninth Circuit 'examine[s] the specific facts and circumstances of each case . . . focus[ing] on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.'" *Id.* (citing and quoting *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003)) (alterations in original).

The district court explained that "the damages sought will require highly individualized proof of the duties each [assistant manager] actually performed, the hours spent on those duties, and the overtime hours actually worked." *Sepulveda*, 237 F.R.D. at 246. "That 'the damages sought are not in the nature of a group remedy but are dependent on individual circumstances' suggests that they are not incidental to the injunctive relief sought." *Id.* (quoting *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 427 (S.D. Ohio 2002)). The court also noted that "fewer than half of the putative class members could benefit from the injunctive relief sought," which further "suggest[s] that the damages sought are not incidental to injunctive relief." *Id.* at 245-46 (citing *Elkins*, 219 F.R.D. at 427, and *Zapata v. IBP, Inc.*, 167 F.R.D. 147, 162 (D. Kan. 1996)). Accordingly, the court found "that class certification is inappropriate under Rule 23(b)(2)." *Id.* at 246.

SUMMARY OF ARGUMENT

In this Circuit, class certification under Rule 23(b)(2) is appropriate *only* if the predominant form of relief sought by the class is injunctive or declaratory. *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195, *amended by*, 273 F.3d 1266 (9th Cir. 2001). The district court found that the predominant form relief sought by plaintiffs in this case is monetary, and thus denied plaintiffs' class certification motion. That decision was correct, and should be affirmed.

I. The district court properly concluded that the "highly individualized proof" that would be required to make out plaintiffs' claims for monetary relief establishes that those claims, and not the claim for injunctive relief, predominate in this matter. *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 246 (C.D. Cal. 2006). Where, as here, claims for monetary relief require individualized inquiries into class member claims, the "cohesion and homogeneity" that underlies Rule 23(b)(2) is destroyed and certification under that provision is inappropriate. *Lemon v. Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000).

Contrary to plaintiffs' assertion, their prayer for backpay does not weigh in favor of Rule 23(b)(2) certification: an award of backpay is neither "injunctive" nor "declaratory." Although backpay claims may be considered "equitable" under California law (*Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177-

78 (2000)), they are claims for money *damages* under federal law. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004); *Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1048-49 (N.D. Cal. 2002), *aff'd*, 353 F.3d 765 (9th Cir. 2003). In any event, the Fourth Circuit recently made clear that "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, *even if the relief is equitable in nature*." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (emphasis added).

Moreover, plaintiffs' prayer for punitive damages is wholly inconsistent with certification under Rule 23(b)(2). Due process requires an individualized consideration of the defendant's conduct toward each plaintiff before punitive damages may be awarded. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). Such consideration is at odds with the cohesiveness required of a Rule 23(b)(2) class. *Lemon*, 216 F.3d at 581.

II. The district court also properly found that plaintiffs' claim for injunctive relief does not predominate over the claims for monetary relief because only one of the proposed class representatives and "fewer than half of the putative class members could benefit from the injunctive relief sought." *Sepulveda*, 237 F.R.D. at 245. The majority of class representatives and class members are former employees with no demonstrated desire to return to Wal-Mart's employ. They therefore lack constitutional standing to pursue anything *other* than monetary relief. *City of*

Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). In light of this reality, it cannot be said the injunctive relief sought predominates over the monetary relief sought.

ARGUMENT

Rule 23(b)(2) permits class certification if the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final *injunctive* relief or corresponding *declaratory* relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphases added). Based on the plain language of Rule 23(b)(2), which limits the available relief to injunctions and declarations, the Supreme Court has recognized that there is a "substantial possibility" that actions seeking monetary damages "can be certified *only* under Rule 23(b)(3)." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (emphasis added). The *Ticor* Court did not resolve that issue, however, and thus "[i]t is an open question . . . in the Supreme Court . . . whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue." *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (citation omitted; emphasis in original).

In this Circuit, certification is available under Rule 23(b)(2) where an injunction or declaration is "the predominant form of relief sought by the class," even if the class also seeks monetary relief. *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); *see also* Fed. R. Civ. P. 23, Adv. Comm. Notes to 1966 amend.

(Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages"). "In order to determine predominance, [this Court has] focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit." *Molski*, 318 F.3d at 950.*

Thus, in this Circuit, "[c]lass certification under Rule 23(b)(2) is appropriate *only* where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (emphasis added), *amended by*, 273 F.3d 1266 (9th Cir. 2001). The district court made a finding that the primary relief sought by plaintiffs in this case is monetary, not injunctive. *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 245-46 (C.D. Cal. 2006). Under this Court's

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* The standard announced in *Molski* was modeled on the one set forth in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163-64 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002), *disapproved on other grounds, In re Initial Pub. Offering Secs. Litig.*, No. 05-3349 (2d Cir. Dec. 5, 2006). A majority of the courts of appeals, by contrast, refuse to allow Rule 23(b)(2) certification unless the monetary claims are "incidental" in the sense that they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (emphasis in original); *see also, e.g., Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001). Under the majority standard, this case clearly could not be certified under Rule 23(b)(2) because even if liability could be established, the monetary relief would flow to class members individually rather than to the class as a whole. Indeed, plaintiffs effectively acknowledge as much by invoking (*see* Pls.' Br. 20-21) the burden-shifting framework of *Teamsters v. United States*, 431 U.S. 324 (1977), under which "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* at 361.

well-established caselaw, that finding precludes certification under Rule 23(b)(2). *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986) (monetary relief in Rule 23(b)(2) action proper only where it is "merely incidental to [the] primary claim for injunctive relief"); *see also Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (citing *Probe*). Plaintiffs' various challenges to the district court's finding that their claims for monetary relief predominate are based on a misreading of Rule 23.

I. Highly Individualized Damages Claims Preclude Rule 23(b)(2) Certification

As a matter of California substantive law, resolution of the claims at issue will require the factfinder to "examine, in an individualized fashion, the work actually performed by an employee to determine how much of that work is exempt." *Sepulveda*, 237 F.R.D. at 246. How the employee actually spends his or her time during the course of the work week must be considered "first and foremost." *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 802 (1999); *see also* Cal. Code. Regs. Tit. 8, § 11070, subd. 1(a)(1)(e) (exempt status determined by the work in which the employee is "primarily *engaged*") (emphasis added). Based on a careful analysis of the evidence before it, the district court concluded that the mandated individualized inquiries into the work performed by each putative class member will predominate over "common questions pertaining to Defendant's overall policies and practices." *Sepulveda*, 237 F.R.D. at 247. It therefore properly rejected

plaintiffs' plea that it certify the class under Rule 23(b)(3), which permits certification only when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

The district court correctly rejected plaintiffs' argument that it should nonetheless certify the class under Rule 23(b)(3) based on *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004), a case involving both different facts and California *procedural* law—which is of course inapplicable here. *Kohlrautz v. Oilmen Participation Corp.*, 441 F.3d 827, 830 (9th Cir. 2006) ("A federal court follows federal procedural law and, where it applies, state substantive law"). *Sav-On* dealt with class certification under Section 382 of the California Code of Civil Procedure and did not overrule *Ramirez's* substantive teaching as to what must be established to demonstrate an employee's status as exempt or non-exempt. *Sav-On*, 34 Cal. 4th at 336-37 (acknowledging that "[a]ny dispute over 'how the employee actually spends his or her time,' of course, has the potential to generate individual issues") (quoting *Ramirez*, 20 Cal. 4th at 802). Ultimately, the issue is whether, *under the facts presented in the particular case*, an individualized inquiry into how the employees actually spend their time *predominates* over any common evidence tending to show uniformity of activity.

Under controlling federal law, a district court cannot disregard the individualized inquiry required by *Ramirez* in determining whether class certification is appropriate. *See* 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). And where, as here, the predominant issues *actually in dispute* "pertain to individualized questions," *Sepulveda*, 237 F.R.D. at 249, a district court cannot certify the case for class treatment under Rule 23(b)(3). Unlike in *Sav-On*—where the record made clear that the predominant issue in dispute was *not* the individualized question of what activities each employee engaged in but rather the *common* question of "how the various tasks in which AM's and OM's actually engaged should be classified" (*Sav-On*, 34 Cal. 4th at 331)—here the district court found that there "are relatively few [common issues] that would actually require resolution." *Sepulveda*, 237 F.R.D. at 249. The district court acknowledged that common issues *existed* but properly took its analysis a step further in determining whether common issues *predominated.* In so doing, the district court correctly focused on the proof that would be relevant to the key issue being litigated, that of the exempt status of the assistant managers. It therefore correctly held that common issues do not predominate and refused to certify the class under Rule 23(b)(3). *See also* Fed. R. Civ. P. 23, Adv. Comm. Notes to 2003 amend. (identifying "how the case will be tried" as the crucial inquiry in the certification analysis).

The district court properly rebuked plaintiffs' attempt to achieve certification despite the predominance of individualized issues by invoking Rule 23(b)(2). The Eighth Circuit has recently emphasized that "[a]lthough Rule 23(b)(2) contains no predominance or superiority requirements, class claims thereunder still must be cohesive." *Silzone Heart Valve Prods. Liab. Litig. v. St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("Rule 23(b)(2)'s categorical exclusion of class actions seeking primarily monetary relief, like Rule 23(b)(3)'s predominance requirement, . . . ensures that the class is sufficiently cohesive that the class-action device is properly employed"). But "[a] suit for money damages, even if the plaintiffs seek uniform, class-wide equitable relief as well, jeopardizes [the] presumption of cohesion and homogeneity [underlying (b)(2) certification] because individual claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim." *Lemon v. Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000). The monetary relief sought here not only jeopardizes but destroys the cohesiveness and homogeneity required of a Rule 23(b)(2) class.

The district court found, as a factual matter, that "the damages sought [by the putative class members] will require *highly individualized* proof of the duties each [assistant manager] actually performed, the hours spent on those duties, and

the overtime hours actually worked." *Sepulveda*, 237 F.R.D. at 246 (emphasis added). Although plaintiffs complain that the court made this finding before the parties submitted reports from their damages experts (Pls.' Br. 32 n.12), they nowhere dispute the correctness of the finding itself. And this finding is entirely consistent with the finding that individualized issues predominate:

> Most important among these is whether each individual [assistant manager] actually spent more time working on exempt or non-exempt duties. . . . Other individualized questions include (only for those employees who spent more time performing non-exempt tasks) the amount of overtime pay owed, the number of breaks that have been missed, any expressions of dissatisfaction from Wal-Mart with the work the [assistant manager] was actually performing, and any bias on the part of the [assistant manager] or reason to believe that the [assistant manager] was intentionally focusing on exempt duties. Some of these questions relate to the damages due to each individual [assistant manager].

237 F.R.D. at 247-48.

The "highly individualized proof" that would be required to resolve plaintiffs' claims for monetary relief renders Rule 23(b)(2) certification wholly inappropriate. The Seventh Circuit recently reversed a Rule 23(b)(2) certification where "more than a thousand individual hearings will be necessary in order to determine which members . . . are entitled to relief." *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005). Here, "[p]laintiffs contend that there are approximately 2,750 class members" (*Sepulveda*, 237 F.R.D. at 242); resolving their monetary

claims would involve almost three times the number of individualized hearings than the Seventh Circuit held unacceptable in *Allstate*.

Plaintiffs' principal response is that "claims for back pay are fully consistent with Rule 23(b)(2) because they are equitable in nature." Pls.' Br. 32. But Rule 23(b)(2) does not authorize class actions for *all* "equitable" relief; it applies "only where the primary relief sought is *declaratory* or *injunctive*" (*Zinser*, 253 F.3d at 1195 (emphasis added)), and backpay is neither. The Fourth Circuit recently explained, in no uncertain terms, that "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, *even if the relief is equitable in nature*." *Thorn*, 445 F.3d at 331 (emphasis added). As the court explained, Rule 23(b)(2) certification might be appropriate in cases seeking backpay "not *because* backpay is an equitable form of relief, but because injunctive or declaratory relief predominates *despite* the presence of a request for back pay." *Id.* at 397 (emphases in original); *see also Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006) (explaining that the "equitable relief" sought, which plaintiffs claimed flowed directly from the declaratory and injunctive relief, "might not preclude certification under Rule 23(b)(2), although it likely would be a close call").

While a prayer for backpay might not automatically preclude Rule 23(b)(2) certification (*e.g.*, *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir.

1982)), for purposes of the Rule 23 inquiry, backpay must be treated as a form of *monetary relief* weighing *against*—not in *favor* of—(b)(2) certification. *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) ("That back pay is characterized as a form of 'equitable relief' in Title VII cases, . . . does not undercut the fact that variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class problematic in the damages phase"). Indeed, "Congress 'treated [backpay] as equitable' in Title VII . . . only in the narrow sense that [Title VII] allow[s] backpay to be awarded *together with* equitable relief." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002) (first alteration and emphasis in original). Outside the context of Title VII, backpay is considered a species of legal compensatory damages. *See Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004); *Provencher v. CVS Pharmacies*, 145 F.3d 5, 11 (1st Cir. 1998). Similarly, although backpay claims may be considered "equitable" under California law (*Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 177-78 (2000)), they are claims for money *damages* under federal law. *See Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1048-49 (N.D. Cal. 2002), *aff'd*, 353 F.3d 765 (9th Cir. 2003).

Moreover, plaintiffs seek punitive damages in addition to backpay. Although plaintiffs assert that this claim does not "undermine Rule 23(b)(2) treatment" (Pls.' Br. 35 n.14), the law is otherwise: A prayer for punitive damages is

wholly inconsistent with (b)(2) certification. As the Seventh Circuit has explained, "to win punitive damages, an individual plaintiff must establish that the defendant possessed a reckless indifference to the plaintiff's federal rights—a fact-specific inquiry into *that plaintiff's* circumstances." *Lemon*, 216 F.3d at 581 (emphasis added); *see also Allison*, 151 F.3d at 417-18. Because punitive damages claims are "uniquely dependent on the subjective and intangible differences of each class member's individual circumstances," the Fifth Circuit has held that such claims cannot be certified under Rule 23(b)(2). *Allison*, 151 F.3d at 418.

This aspect of *Allison* is consonant with this Court's decision in *Molski*, which reversed the certification of a Rule 23(b)(2) class asserting claims for treble damages. 318 F.3d at 950-51. While *Molski* held that there is no bright-line rule prohibiting certification of a Rule 23(b)(2) class seeking monetary relief, the Court did not hold that actions seeking *punitive* damages may be certified under Rule 23(b)(2). Indeed, this Court has never expressly permitted punitive damages in a Rule 23(b)(2) class action and has indicated on at least two occasions that to do so would be improper. *See Williams*, 665 F.2d at 929; *Zinser*, 253 F.3d at 1195.

The Supreme Court has noted the substantial due process concerns that Rule 23(b)(2) certification raises in cases involving monetary relief. *Ticor*, 511 U.S. at 121. Those concerns are only heightened where, as here, punitive damages are sought. The Supreme Court has recognized that "punitive damages pose an acute

danger of arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quotation omitted). The Court has further held that due process forbids courts to "punish and deter conduct that bore no relation to the [plaintiffs'] harm." *State Farm*, 538 U.S. at 422. Therefore, before punitive damages may be awarded a court must determine that the unlawful conduct bears "a nexus to the specific harm suffered by the plaintiff." *Id. See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

In cases such as this, due process *requires* an individualized consideration both of the *defendant's conduct* toward each plaintiff and the *amount of harm to each plaintiff* caused by that specific alleged misconduct to ensure that "[t]he precise award [is] based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm,* 538 U.S. at 425. And this, in turn, requires courts to engage in "exacting scrutiny" of the "degree of reprehensibility" of the defendant's conduct toward the plaintiff (*id.* at 418) and the resulting harm to "ensure that the measure of punishment is both reasonable and proportionate." *Id.* at 426; *cf. In re Simon II Litigation*, 407 F.3d 125, 139 (2d Cir. 2005) (vacating a lower court decision to certify a 23(b)(1) class seeking punitive damages as the Court in *State Farm* "made clear that conduct relevant to the reprehensibility analysis must have a nexus to the specific harm suffered by the plaintiff . . . [and that] [h]armful behavior that is not 'correlatable' with class members and the harm

or potential harm to them [is] precluded under *State Farm*"). Such individualized inquiry is completely inconsistent with the cohesiveness required of a Rule 23(b)(2) class.

The district court was therefore entirely correct to conclude that the "highly individualized proof" that would be required to make out plaintiffs' claims for monetary relief establishes that those claims, and not the claim for injunctive relief, predominate in this matter. Accordingly, Rule 23(b)(2) certification was properly denied.

II. Injunctive Relief Cannot Predominate Where A Majority Of The Putative Class Members Lack Standing Even To Seek It

Certification under Rule 23(b)(2) is improper unless reasonable plaintiffs would seek injunctive or declaratory relief "'even in the absence of a possible monetary recovery.'" *Molski*, 318 F.3d at 950 & n.15. Only one of the proposed class representatives and "fewer than half of the putative class members could benefit from the injunctive relief sought." *Sepulveda*, 237 F.R.D. at 245. The remainder of the putative class members not only would not, but *could not*, pursue this suit in the absence of any monetary relief because, as former employees, they stand to gain nothing from an injunction forcing Wal-Mart to treat its assistant managers as non-exempt. Where, as here, most of the class representatives and most of the class members may pursue *only* monetary relief, it simply cannot be said that injunctive relief "predominates."

Plaintiffs object, however, that the district court should have focused on "the start of this lawsuit" when all of the named plaintiffs were "capable of obtaining the full value of injunctive relief." Pls.' Br. 26. This objection simply overlooks the fact that former employees lack Article III *standing* to seek an injunction. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997). And standing must exist not only on the day the complaint is filed, but at every subsequent date in the litigation. *Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988). That fundamental principle of constitutional law cannot be ignored simply because this purports to be a class action. *Ortiz*, 527 U.S. at 831 (Rule 23 "must be interpreted in keeping with Article III constraints") (quotation omitted); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Plaintiffs invoke *Gratz v. Bollinger*, 539 U.S. 244 (2003), for the proposition that a plaintiff may have standing to seek an injunction from which she cannot immediately benefit. Pls.' Br. 30. But there the plaintiff submitted evidence that she would take advantage of the injunction, if issued, in the future. 539 U.S. at 260-62. Here, there is no evidence that any former assistant manager would seek to return to Wal-Mart's employ if a court were to issue the injunction requested by plaintiffs, and certification cannot be sustained based on mere speculation. Al-

though plaintiffs contended that "injunctive relief is just as important as the possibility of monetary damages" (Pls.' Mem. in Supp. of Class Certification at 20), the district court properly declined to certify the class based on the cursory and self-serving statement issued by one former employee who is also a named plaintiff. *Sepulveda*, 237 F.R.D. at 245 ("Sepulveda himself is a former Wal-Mart employee and thus would derive no benefit from the injunction, notwithstanding his statement that his 'purpose in bringing this lawsuit [is] . . . to change Wal-Mart's policy of not paying California Assistant Managers for overtime'") (alteration in original).

The question is not, as plaintiffs suggest, whether Mr. Sepulveda (or any other former employee) has the subjective desire, however irrational, to secure an injunction from which he cannot benefit. Rather, the inquiry under this Circuit's "intent" test turns on whether an objectively *reasonable* plaintiff would seek such an injunction. *Molski*, 318 F.3d at 950 n.15 (a district court should, "'at a minimum,'" satisfy itself that "'even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought'") (quoting *Robinson*, 267 F.3d at 164). No reasonable plaintiff would—or, under our Constitution, could—sue for an injunction that would not affect that plaintiff.

For similar reasons, the proposed class fails the Rule 23(b)(2) requirement that the injunctive relief ordered must be "appropriate . . . with respect to the *class*

as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added); *see Molski*, 318 F.3d at 947 (certification under 23(b)(2) proper only where the defendant has acted "'on grounds generally applicable to the class, thereby making' *broad* injunctive and/or declaratory relief appropriate") (emphasis added). The district court recited the tautology that Wal-Mart "classified [assistant managers] as exempt based on grounds generally applicable to all [assistant managers]" (*Sepulveda*, 237 F.R.D. at 245), but that action does not make injunctive relief "appropriate" with respect to the *class as a whole*. To the contrary, injunctive relief is patently *in*appropriate with respect to those class members no longer employed by Wal-Mart, and the availability and appropriateness of injunctive relief with respect the remainder of the class will necessarily vary based on factual circumstances unique to each plaintiff. *Id.* at 245 ("If each class member were to proceed separately, an injunction might (or might not) issue ordering [Wal-Mart] to reclassify that particular class member as non-exempt based on an individualized analysis of duties performed. In either case, the injunction would not affect the rights of other [assistant managers].").

Plaintiffs complain that if the district court's analysis is sustained, "no employment class could ever be certified under Rule 23(b)(2), because a majority of the class members will always be former employees by the time the class certification motion is heard." Pls.' Br. 27. That is simply not true: A class comprised

only of current employees, or seeking only injunctive relief, would not suffer from the infirmities that the putative class in this case does. Although a class cannot be certified under the circumstances of this case, that merely points up the general inapplicability of Rule 23(b)(2) to actions seeking primarily monetary relief, not any flaw in the way the district court approached the certification decision in this case.

* * *

The Supreme Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Class certification can create "irresistible pressure to settle" (*Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000)) because most defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). When vast numbers of claims are aggregated, "settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002). "These settlements have been referred to as judicial blackmail." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

There is no good reason to exacerbate such problems by allowing plaintiffs to misuse Rule 23(b)(2) to certify classes seeking significant money damages. Rule 23(b)(2) was not designed and is not well-suited for such cases; indeed, as *Ticor* shows, its application to such cases raises serious constitutional concerns. Cases such as this one, where a putative class seeks substantial monetary relief, should be subject to the more stringent requirements of Rule 23(b)(3), which provide additional protections for both defendants and absent class members. *Cf. Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982) (noting the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad," for it cannot be assumed that "'all will be well for surely the plaintiff will win and manna will fall on all members of the class'").

Plaintiffs here cannot meet the requirements for certification under Rule 23(b)(3). That alone should cast serious suspicion on their attempt to fit this case into Rule 23(b)(2). *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) ("That this shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible"). To allow Rule 23(b)(2) to be used under these circumstances would permit plaintiffs to avoid the more stringent requirements of Rule 23(b)(3) simply by including a plea for injunctive relief in their complaint. Indeed, because it is the rare class action that does *not* seek an in-

junction in addition to damages, adopting the theory advanced by plaintiffs in this case would effectively render Rule 23(b)(3) a nullity.

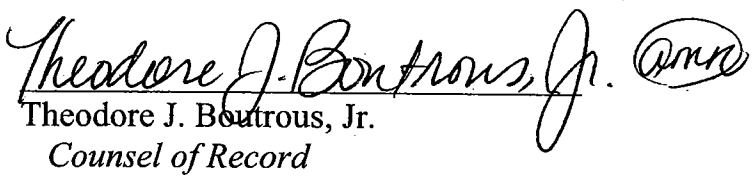
Adherence to the plain terms and structure of Rule 23(b) requires affirmance of the decision below. The reversal urged by plaintiffs, by contrast, would do violence to the Rule, would conflict with decisions of the other Circuits, and would prejudice the rights of the defendant and absent class members.

CONCLUSION

The district court's order denying class certification should be affirmed.

Date: January 8, 2007

Respectfully submitted,



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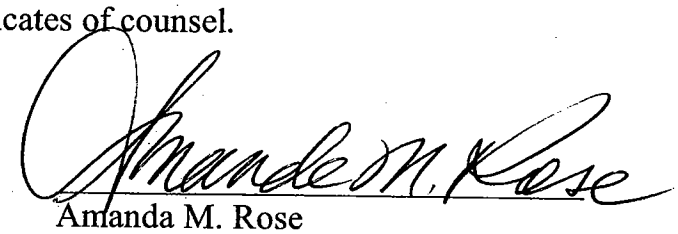

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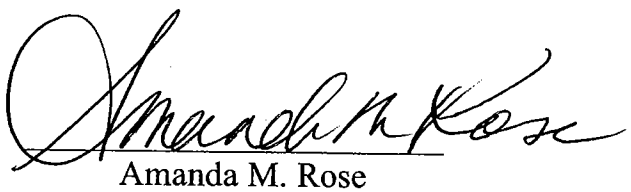

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