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March 25, 2016

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Re: No. 15-20078; *EEOC v. Bass Pro Outdoor World, LLC*

Dear Mr. Cayce:

By this letter, which should be filed in this case under Federal Rule of Appellate Procedure 28(j) and Fifth Circuit Rule 28.4, Bass Pro seeks to bring an intervening decision to the Court's attention. Thank you for circulating copies to the panel.

Two lessons follow from *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S. Mar. 22, 2016). First, *Tyson* shows that representative proof cannot be used where, as here, claimants are not similarly situated. *Tyson*'s defendants argued that, under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), representative proof could not be used to prove overtime violations. The Supreme Court disagreed, distinguishing *Wal-Mart* as follows:

> The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not *similarly situated*, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. *By extension, if the employees had brought 1½ million individual suits, there would be little or no role for representative evidence.*

Tyson, slip op. at 14 (emphases added). The EEOC seeks relief for thousands of claimants based on decisions by hundreds of managers in seventy-plus stores over a decade. These claimants are not "similarly situated," *see Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000), so there is no role for the "representative evidence" of a Stage I proceeding. *Cf.* ROA.9703 (allowing "*Teamsters* model of representative proof").

Second, *Tyson* confirms the unmanageability of Stage II proceedings here. Chief Justice Roberts states what the majority implies: Article III prohibits an award to one who has not been injured by defendants' conduct. *See Tyson*, slip op. at 6 (Roberts, C.J., concurring); *see also id.* at 16–17 (majority opinion). The only way to adhere to that principle in this case is to conduct potentially 50,000 individualized Stage II jury trials, rendering it unmanageable.

Respectfully submitted,

s/ Michael W. Johnston
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Counsel for Defendants-Appellants

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