

Nos. 04-16688 & 04-16720

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER,
KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

vs.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

On Appeal From The United States District Court
For The Northern District Of California

**BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS,
COMMUNITIES FOR A BETTER ENVIRONMENT, CONSUMERS
UNION, NATIONAL CONSUMER LAW CENTER IN SUPPORT OF
PLAINTIFFS/APPELLEES/CROSS-APPELLANTS DUKES, ET AL.**

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DISCLOSURE STATEMENT

None of the *amici* has a parent corporation or stock that is owned by a publicly held corporation.

I. INTRODUCTION

All parties have consented to the filing of this brief.

The trial court found that Defendant-Appellant Wal-Mart's extraordinarily-detailed computerized employee records obviate the need for further individualized proof of each class member's potential equal pay and punitive damages relief. *See* June 21, 2004 Order Granting in Part and Denying in Part Motion for Class Certification ("Order") at 69. Wal-Mart, however, contends that the Due Process Clause gives it the absolute right to an individualized damage hearing for each class member which, given the size of the class, would make the proposed class action unmanageable. Wal-Mart Brf. 45-46. Wal-Mart's interpretation of the Due Process Clause is incorrect in principle and inconsistent with courts' long-standing reliance on aggregate techniques for calculating class-wide damages in circumstances similar to those here.

Amici Curiae are public interest organizations that participate in litigation to enforce federal rights in the areas of human rights, antitrust, securities, consumer, and environmental law. If Wal-Mart's contention is accepted, *amici* believe that the effectiveness of class action enforcement in these areas as well as employment discrimination would be severely impaired.

II. AMICI'S STATEMENTS OF INTEREST

The Center for Constitutional Rights ("CCR") is a non-profit legal and educational organization dedicated to advancing and protecting the rights

guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has successfully litigated many important international human rights cases since 1980, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which established that the Alien Tort Claims Act grants federal courts jurisdiction to hear cases seeking compensation and other relief for violations of international law.

Consumers Union (“CU”), publisher of *Consumer Reports*, is a non-profit organization that advances the interests of consumers by providing information and advice about products and services and about issues affecting their welfare, and by advocating a consumer point of view. CU’s income is derived from the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees.

Communities for a Better Environment (“CBE”) is a California non-profit environmental health and justice organization with approximately 20,000 members that seeks to protect and enhance the environment and public health by reducing air and water pollution, and seeks to equip residents impacted by industrial pollution with the tools to inform, monitor, and transform their immediate environment in California's urban areas.

The National Consumer Law Center (“NCLC”) is a national, non-profit research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. NCLC is recognized

nationally as a preeminent expert in consumer credit legal analysis, and has drawn on this expertise to provide information, analysis and market insights to federal and state legislatures, administrative agencies and the courts for nearly 30 years.

NCLC is author of the widely praised sixteen-volume *Consumer Credit and Sales Legal Practice Series* which includes *Consumer Class Actions: A Practical Litigation Guide* (5th Ed. 2002 and 2004 Supp.).

Each *amicus* represents individuals, or is concerned with the rights of individuals, who will be affected by the interpretation of the Due Process Clause as it bears on the availability of class action relief. Each *amicus* also has a strong interest in ensuring that individuals have access to the courts and to the remedies provided by Congress, often available only through class actions.

III. THE DUE PROCESS CLAUSE PERMITS TRIAL COURTS THE DISCRETION IN APPROPRIATE CASES TO RELY ON AGGREGATE PROOF OF DAMAGES WITHOUT THE NECESSITY FOR INDIVIDUALIZED HEARINGS.

Due process requires that a fair balance be struck between vindicating a plaintiff's interest in obtaining a remedy, avoiding an erroneous deprivation of a defendant's property, and "any ancillary interest the [Court] may have in providing the procedure or foregoing the added burden of providing greater protection."

Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (applying balancing test enunciated in *Matthews v. Eldridge*, 424 U.S. 319 (1976) to private litigants); *Hilao v. Estate of Marcos*, 103 F.3d 767, 786-87 (9th Cir. 1996) (applying *Doehr*). Due process "is

flexible and calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (citation omitted); *Newberg on Class Actions* § 10:2 (4th ed. 2002).

This Court in *Hilao* applied the *Doehr/Mathews* balancing test to hold that due process permits statistical sampling in calculating person injury and wrongful death damages for a class of Filipino torture victims, whose injuries were more varied than the purely economic injuries at issue here. 103 F.3d at 785-87; see discussion of *Hilao* *infra* at IV.A; see also Michael J. Saks, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 815 (1992) (aggregation can produce more precise outcomes than case-by-case analysis).

In making its due process contention, Wal-Mart wholly ignores the interest balancing engaged in by the trial court which appropriately gave great weight to the comprehensive nature of Wal-Mart’s computerized employee records that make possible the “extremely accurate” determination of the class’s losses from discrimination. Order at 69-74. The risk of an erroneous deprivation of Wal-Mart’s property violative of its constitutional due process rights is therefore minimal. Wal-Mart has no legitimate argument against determination of economic damages based on its own objective, business records.

Wal-Mart’s interest is “only in the total amount of damages for which it will be liable,” not in how that sum is allocated among individual class members.

Hilao, 103 F.3d at 786; *see also Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 759 (Cal. App. 2004); *Newberg* at § 10:5. On the other side of the balance, the class has an enormous interest in obtaining redress. *Hilao*, 103 F.3d at 786; *cf. Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 563 (1931) (where wrongful conduct “is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief.”).

Moreover, aggregate techniques for calculating damages are critical tools available to courts for the efficient resolution of disputes in appropriate circumstances. *Newberg* at § 10:5. The fundamental purpose of federal class actions is, after all, to promote the efficient enforcement of federal rights where individual litigation is impracticable or too costly. *See, e.g., Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1985) (class actions are an “evolutionary response to the existence of injuries unremedied by [] regulatory action” where, if left to file individual suits, “aggrieved person may be without redress”).

Due process, in short, gives trial courts the discretion to determine if the record in a particular case, such as the instant action, permits reliance upon aggregate techniques in calculating class member damages.

IV. AGGREGATE TECHNIQUES ARE COMMONLY USED TO CALCULATE CLASS-WIDE DAMAGES IN COMPARABLE CLASS ACTIONS.

Wal-Mart’s due process arguments should be viewed through the lens

of courts' long-standing reliance on aggregated damage-calculation techniques in a variety of substantive areas of law. Accepting Wal-Mart's sweeping due process argument will thus impede enforcement of important federal rights. Wal-Mart's arguments should be rejected so that district courts may continue to exercise their discretion in the use of aggregate proofs of damage.

A. Human Rights Actions

In *Hilao*, this Court approved statistical sampling as a means of calculating individual damages on a class-wide, aggregate basis for thousands of Filipino victims of torture, summary execution, and/or "disappearance." 103 F.3d at 782. Conducting individualized damages hearings, as those defendants argued for, was impossible because of the tremendous strain it would have placed on judicial time and resources. *Id.* at 786. In conducting the balancing required by the due process clause, this Court reasoned that even if "probabilistic prediction" of aggregate damages somewhat increases the "risk of error in comparison to adversarial adjudication of each claim," that small increase was outweighed by plaintiffs' substantial interest in obtaining a remedy.¹

¹ Calculating damages based on statistical sampling has been recognized in other types of cases as well. *See, Bell*, 115 Cal.App.4th at 759 (overtime compensation); *Sav-on Drug Stores, Inc. v. Super. Ct.*, 17 Cal.Rptr.3d 906, 918 & n. 6, 923 & n.12 (Cal. 2004) (noting with approval the use of statistical sampling in *Bell* and aggregate techniques in other cases); *see also In re Simon II Litig.*, 211 F.R.D. 86, 150-154 (E.D.N.Y. 2002) (authorizing statistical sampling in mass torts case) *Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242, 1252-56 (Ill. App. 2001)

The balance struck by the trial judge in this case is well within the scope of this Court's holding in *Hilao*. Judge Jenkins anticipated relying on a well-accepted, formula analysis of all of Wal-Mart's business records -- not a sample -- to compute damages. Such a comprehensive aggregate approach is appropriate in this case because individualized hearings would add little to the accuracy of calculating damages.

B. Antitrust Actions

It is a settled practice for courts in antitrust class actions to rely upon class-wide aggregate techniques in calculating individual damages awards without individualized hearings of class member claims.² The Second Circuit stated that:

[I]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by the various courts confronted with the same argument.

In re Visa, 280 F.3d 124, 140 (2d Cir. 2001) (quoting *In re Alcoholic Beverages*

(consumer fraud); *Manual For Complex Litig. – Fourth Ed.*, § 11.493 (use of sampling acceptable in pretrial procedures).

² See *Newberg* at §10:7 n.1 (citing numerous cases); see also *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 29 (N.D. Ga. 1997) (aggregate proof of damages through econometric techniques is appropriate); *In re Potash*, 159 F.R.D. 682, 697 (D. Minn. 1995) (“the fact that the damages calculation may involve individualized analysis is not by itself sufficient to preclude certification when liability can be determined on a class-wide basis.”).

Litig., 95 F.R.D. 321, 327-38 (E.D.N.Y. 1982) and citing other cases).³

In *In re Visa*, plaintiffs sought certification of a class of merchants and trade associations harmed by Visa's and MasterCard's "tying arrangements" whereby merchants had only two options: accept all classes of Visa and MasterCard cards or none at all. *Id.* at 131. This policy forced merchants to accept a class of debit cards with higher per transaction fees than other types of Visa and MasterCard cards. Defendants argued that merchants had the ability to mitigate any damages relating to the higher debit card fee by "steering" any given customer to use other lower fee cards in his or her wallet, thus requiring individualized hearings on damages and rendering the case unmanageable as a class action. *Id.* at 137, 140. The Second Circuit affirmed the district court's finding that damages could likely be calculated using a statistical formula, noting that the district court retained a range of tools to manage individual damages issues that might arise at later stages of the litigation. *Id.* at 141.⁴ Here, as in *In re Visa*, should subsequent

³ Wal-Mart was one of the named plaintiffs in this case, representing a class of approximately 5 million merchants. *See Wal-Mart Stores, Inc. v. VISA USA, Inc.*, -- F.3d --, 2005 WL 15056, *1 (2d Cir Jan. 4, 2005). Apparently Wal-Mart had no argument with the use of class-wide, aggregate techniques to determine individual damages when it itself was a plaintiff. The Second Circuit recently approved a \$3 billion settlement in this case, the largest in the history of antitrust law. *Id.*

⁴ The court noted that the district court had "numerous management tools" at its disposal, including: 1) bifurcating liability and damage trials, 2) appointing a Special Master to preside over individual damages proceedings, 3) decertifying the

proceedings make individual hearings appropriate, the trial court may modify its class certification.⁵

C. Securities Actions

Courts routinely employ class-wide, formula-based techniques to calculate individual damages in securities class actions. *See Newberg* at § 10:8. Class damage determinations generally require using complex statistical models such as the Proportional Trading Model and the Accelerated Trading Model, which yield aggregate damages amounts. These models take into account several factors, such as “[t]he transition probabilities that govern the rate(s) at which shares move from one class of shareholders to another,” and different investor classes’ “relative trading intensities.” John Finnerty & George Pushner, “An Improved Two-Trader Model for Measuring Damages in Securities Fraud Class Actions,” 8 *Stan. J.L.*

class after the liability phase, 4) creating subclasses, or 5) altering the class. *Id.* at 141.

⁵ Similarly, plaintiffs in *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326, 348 (E.D. Mich. 2001), sought certification of a class of consumers and third-party health care benefit providers harmed by the defendants’ alleged agreement to delay the release of cheaper, generic competitors that the proposed class would have switched over to. *Id.* at 343. As did the court below in the instant case, the *Cardizem* court made sure the proposed class definition eliminated the need for individual proofs by excluding from the class individuals whose “brand loyalty” would have prevented them from switching over to the generic substitute. *Id.* at 343. The court went on to reject arguments that plaintiffs’ proposed methodology for aggregate damages calculation was imprecise because it relied on averaging, noting that a degree of imprecision is permitted in calculating aggregate damages, particularly when the methodology is offered in preliminary fashion, as here, as part of a class certification motion. *Id.* at 348.

Bus. & Fin. 213, 218 (2003); *id.* at 230-31 (citing empirical studies showing “that investors trade the common stocks in their portfolios with different intensities,” statistical estimates of which impact damages determinations differently).⁶

Courts regularly approve judgments of aggregate damages awards based on class-wide statistical analyses in securities cases.⁷ Given the large numbers of class members often involved in securities class actions and the correspondingly large number of shares and transactions at issue, requiring individual proofs of damages would imperil enforcement of the nation’s laws against large-scale securities fraud; *cf. Basic v. Levinson*, 485 U.S. 224, 242 (1988) (approving “fraud-on-the-market” theory in order to prevent individualized proof of reliance from impairing class action enforcement of securities laws).

⁶ Statistical models are necessary the large volume of trades and the presence of “street name” trades (which obscure the identity of the security owner), makes precise individual damages determinations infeasible or impossible. Jon Koslow, “Estimating Aggregate Damages In Class-Action Litigation Under Rule 10b-5 For Purposes of Settlement,” 59 Fordham L. Rev. 811, 828 (1991). *See also* Michael Barclay & Frank C. Torchio, “A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation,” 64 Law & Contemp. Probs. 105, 106 (2001).

⁷ *See, e.g., Harmsen v. Smith*, 693 F.2d 932, 945-46 (9th Cir. 1982) (aggregate damages need not be proved to a “mathematical certainty”); *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977) (approving aggregate damages judgment), *aff’d* 444 U.S. 472 (1980); *In re Melridge, Inc. Sec. Litig.*, 837 F. Supp. 1076, 1080 (D. Or. 1993) (aggregate proof of damages by expert appropriate); *see also In re Scorpion Tech., Inc. Sec. Litig.*, 1994 WL 774029, at *4 (N.D. Cal. Aug. 10, 1994) (individual issues regarding damages do not defeat class certification in a securities case); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 434 (N.D. Cal. 1985) (same).

This Court has stated that in securities class actions, because “[t]he amount of damages is invariably an individual question[, it cannot] . . . defeat class action treatment.” *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (affirming class certification). Moreover, denying class certification on manageability grounds because of individual damages issues creates an incentive for “corporations to commit grand acts of fraud.” *In re Memorex Securities Litigation*, 61 F.R.D. 88, 96 (N.D. Cal. 1973). In this case, denial of class certification for lack of manageability would similarly immunize Wal-Mart from Title VII challenges to large-scale discrimination merely because the class is large, a perverse consequence that Congress could not have intended.

D. Consumer Actions

Courts have approved of aggregate techniques for computing class-wide damages in numerous consumer class actions.⁸

⁸ See, e.g., *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (insurance rates); *Smilow v. Southwestern Bell Mobile Sys.*, 323 F.3d 32 (1st Cir. 2003) (cell phone charges); *Roper v. Conserve, Inc.*, 578 F.2d 1106 (5th Cir. 1978) (credit card charges); *Avery*, 746 N.E.2d at 1252-56 (Ill. App. 2001) (failure to pay for original equipment manufacturer parts); *Occidental Land, Inc. v. Super. Ct. of Orange County*, 134 Cal. Rptr. 388, 393 (Cal. 1976) (developer fraud); see also *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (stating, in a 17-million-member class action against banks and tax preparers for RICO violation that “Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues”); *Cf. Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) (“Particularly where damages can be computed according to some formula, statistical analysis, or other easy or essentially

In *Smilow*, the plaintiffs alleged that the defendant's practice of charging customers for incoming cellular telephone calls constituted breach of contract and violation of various state and federal statutes. 323 F.3d at 34-35. The defendant argued that the district court erred in concluding that objective data regarding the plaintiffs' loss could be extracted from defendant's computer system and analyzed through a "mechanical process." *Id.* at 40. The First Circuit credited the district court's determination and stated that class certification should ordinarily not be denied because damages calculation issues arise. *Id.* at 40 n. 8.

In *In re Monumental Life Ins. Co.*, the Fifth Circuit reversed denial of class certification and ordered the use of the plaintiffs' proposed "standardized formulas or restitution grids to calculate individual class members' damages," over defendants' objection. *Id.* at 419. The Fifth Circuit relied on the fact that the relevant variables were objective, and that damages would "flow from liability in much the same manner that an award of backpay results from a finding of employment discrimination." *Id.* at 419 (internal quotations and citations omitted).

As in *Smilow* and *Monumental Life*, Wal-Mart's employment records allow mechanical application of a formula to objective evidence for damages determinations.

mechanical methods, the fact that damages must be calculated on an individual basis is not impediment to class certification.").

V. **AWARDING PUNITIVE DAMAGES ON AN AGGREGATE BASIS IS CONSISTENT WITH DUE PROCESS.**

Contrary to Wal-Mart's argument, *State Farm Mut. Auto Ins. Co. v. Campbell*, Wal-Mart Brf. 47-48, does not warrant reversal. *Campbell*, by its own terms, is consistent with class-wide determination of punitive damages and itself suggests the solution of "inclusion" if all persons are impacted by the same course of reprehensible conduct. 538 U.S. 408, 421 (2003) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)). Inclusion is necessary because "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of *other parties'* hypothetical claims against a defendant." *Id.* at 423 (emphasis added). Without inclusion, there would be risk of multiple punitive damage awards for the same incident because "in the usual case nonparties are not bound by the judgment other plaintiff obtains." *Id.* In a Rule 23(b)(2) class action, such as the instant case, absent class members *are* included and *are* bound by the punitive damages judgment obtained by "some other plaintiff", i.e., the class representative, on behalf of the entire class.

Indeed, class-wide, aggregate determination of punitive damages shields defendants from "expos[ure] to the risk of multiple punitive damages awards flowing from the same incident." *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1091-92 (D. Alaska 2004); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986) (class actions are the "solution" to cumulative punitive damages

awards); Elizabeth Cabraser, *The Effect of State Farm v. Campbell on Punitive Damages in Mass Torts and Class Action Litigation*, SJ035 ALI-ABA 1163, 1165 (2004) (*State Farm* supports aggregation); Semra Mesulam, *Collective Rewards and Limited Punishment*, 104 Colum. L. Rev. 1114, 1143-44 (2004) (proposing punitive damage class as solution to multiple punishments problem). Numerous individual suits against Wal-Mart in different courts, based on the same course of discriminatory conduct makes cumulative punitive damages awards more likely. *See In re Exxon Valdez*, 296 F. Supp. 2d at 1092. Such a result is contrary to the Supreme Court's holding in *State Farm*.

Calculating punitive damages on an aggregate basis therefore does not violate Wal-Mart's due process rights. Consistent with this principle, courts regularly award punitive damages to class members on an aggregate basis in class actions.⁹

VI. CONCLUSION

Calculating individual class member damages on the basis of class-wide, aggregate proof without the necessity of individualized damage hearings is consistent with due process where there is objective loss data that can be readily

⁹ *See, e.g., Hilao*, 103 F.3d at 786 (human rights); *In re Exxon Valdez*, 296 F. Supp. 2d at 1110 (environment); *In re Simon II*, 211 F.R.D. at 100 (mass tort); *Day v. NLO*, 851 F. Supp. 869, 884 (S.D. Ohio 1994) (mass tort); *Kernan v. Holiday Univ., Inc.*, 1990 WL 289505, at *5 (D. Md. Aug. 14, 1990) (employment discrimination case); *Barefield v. Chervron*, 1988 WL 188433, at *4 (N.D. Cal. Dec. 6, 1988) (same).

and accurately analyzed. It is also consistent with the fundamental purpose of Rule 23 class actions to permit individuals with small claims to obtain justice.

Thus, the district court acted well within its discretion when it found that an aggregate approach to damages for the equal pay claims was consistent with Rule 23 and due process.

Dated: January 10, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P.32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached petition is proportionately spaced, has a typeface of 14 points, and contains 3,560 words, according to the counter of the word processing program with which it was prepared.

Dated: January 10, 2005

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