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* CONSUMERS UNION, NATIONAL CONSUMER LAW CENTER, CENTER FOR CONSTITUTIONAL RIGHTS, AND COMMUNITIES FOR A BETTER ENVIRONMENT IN OPPOSITION TO FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

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

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I. INTRODUCTION

The petition for rehearing en banc should be denied because the panel opinion correctly rejected Wal-Mart's contention that the Due Process Clause gives Wal-Mart the absolute right to an individualized damage hearing for each class member. That claim is inconsistent with the long-standing reliance of courts on aggregate techniques for calculating class-wide damages in class actions generally, as well as in employment discrimination cases in particular.

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

II. UNDER THE DUE PROCESS CLAUSE, TRIAL COURTS HAVE 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 protections." *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) (applying *Doehr*).

Applying the *Doehr/Matthews* balancing test, this Court held in *Hilao v. Estate of Marcos* that due process permits statistical sampling in calculating personal injury and wrongful death damages for a class of Filipino torture victims, injuries more varied than the purely economic injuries at issue here. 103 F.3d 767, 786-87 (9th Cir. 1996). *See* discussion of *Hilao infra* at III.D.

Wal-Mart's due process contention wholly ignores the interest balancing engaged in by the trial court, which appropriately gave great weight to Wal-Mart's "extraordinarily sophisticated" computerized employee records that make possible the accurate determination of the class's losses from discrimination. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 180 (N.D. Cal. 2004). Further, Wal-Mart's petition for rehearing nowhere acknowledges the ample protections which the district court's certification order provided for Wal-Mart at any subsequent damages phase, *id.* at 172-73, and which the panel opinion ratified. *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1241-42 (9th Cir. 2007).[1]

III. AGGREGATE TECHNIQUES ARE COMMONLY USED TO CALCULATE CLASS-WIDE DAMAGES IN CLASS ACTIONS ENFORCING FEDERAL RIGHTS.

Wal-Mart's due process arguments should be viewed through the lens of the long-standing reliance by courts on aggregated damage-calculation

[1] Moreover, as the district court noted, damages are secondary to the class-wide injunctive and declaratory relief at the heart of this class action. 222 F.R.D. at 172 (discussing *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

techniques in a variety of substantive areas of law.

A. 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 has 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 VisaCheck/Mastermoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001) (quoting *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327-38 (E.D.N.Y. 1982) and citing other cases).[3]

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[2] *See* 3 NEWBERG ON CLASS ACTIONS §10:7 n.1 (4th ed. 2006) (citing numerous cases). *See also In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 29 (N.D. Ga. 1997) (holding that 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.").

[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.*, 396 F.3d 96 (2d Cir. 2005). Apparently Wal-Mart had no argument with the use of class-wide, aggregate techniques to determine individual damages when it itself

In *In re Visa*, plaintiffs sought certification of a class of merchants and trade associations harmed by Visa's and MasterCard's "tying arrangements" that forced merchants to accept debit cards with higher per-transaction fees than other types of Visa and MasterCard cards. 280 F.2d 124, 131 (2d Cir. 2001). Defendants argued that merchants had the ability to mitigate any damages relating to the higher debit card fee, thus requiring individualized hearings on damages and rendering the case unmanageable as a class action. *Id.* at 137, 140. The Second Circuit, however, affirmed the use of a statistical formula, noting that the district court – as here – retained tools to manage individual damages issues that might arise at later stages of the litigation. *Id.* at 141.[4]

B. Securities Actions

Courts routinely employ class-wide, formula-based techniques to calculate individual damages in securities class actions. *See* 3 NEWBERG ON CLASS ACTIONS § 10:8 (4th ed. 2006). Class damage determinations in such cases generally require using complex statistical models. *See* John Finnerty & George

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was a plaintiff. The Second Circuit 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 "a number of 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 class after the liability phase, 4) creating subclasses, or 5) altering the class. *Id.* at 141.

Pushner, *An Improved Two-Trader Model for Measuring Damages in Securities Fraud Class Actions*, 8 Stan. J.L. Bus. & Fin. 213, 218 (2003). Finnerty and Pushner cite empirical studies showing "that investors trade the common stocks in their portfolios with different intensities," statistical estimates of which impact damages determinations differently.[5] *Id.* at 230-31

Courts regularly approve judgments of aggregate damages awards based on class-wide statistical analyses in securities cases.[6] Given the large numbers of class members involved in many 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

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[5] Statistical models are necessary because the large volume of trades and the presence of "street name" trades (which obscure the identity of the security owner), make 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).

[6] *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, 815 (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.*, No. C 93-20333 RPA, 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).

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).

C. Consumer Actions

Courts have approved of aggregate techniques for computing class-wide damages in numerous consumer class actions.[7]

In *Smilow v. Southwestern Bell Mobile Sys., Inc.*, for example, the plaintiffs alleged that the defendant's practice of charging customers for incoming cellular telephone calls constituted a breach of contract and the violation of various state and federal statutes. 323 F.3d 32, 34-35 (1st Cir. 2003). 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

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[7] *See, e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (insurance rates); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003) (cell phone charges); *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978) (credit card charges); *Occidental Land, Inc. v. Super. Ct.*, 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 by computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is not impediment to class certification.").

court's determination and stated that class certification should ordinarily not be denied because damages calculation issues arise. *Id.* at 40 n.8. As in *Smilow*, Wal-Mart's employment records allow mechanical application of a formula in order to generate objective evidence of damages.

D. 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. 103 F.3d at 782. 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 the plaintiffs' substantial interest in obtaining a remedy.[8] *Id.* at 786. This case, therefore, is well within the scope of this Court's holding in *Hilao*.

IV. CONCLUSION

The petition for rehearing en banc should be denied. The panel opinion correctly held that an aggregate approach to damages for the equal pay

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[8] Calculating damages based on statistical sampling has been recognized in other types of cases as well. *See Bell v. Farmers Ins. Exchange,* 115 Cal. App. 4th 715, 759 (Cal. Ct. App. 2004) (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 Manual For Complex Litig.* § 11.493 (4th ed.) (use of sampling acceptable in pretrial procedures).

claims was consistent with Rule 23 and the Due Process Clause.

Dated: March 27, 2007

Respectfully submitted,

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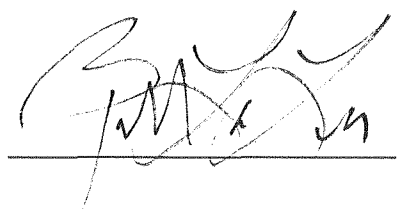
CERTIFICATE OF COMPLIANCE

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 1, 132 words, according to the counter of the word processing program with which it was prepared.

Dated: March 27, 2007



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PROOF OF SERVICE

I hereby certify that on this 27th day of March, 2007, I caused two copies of the foregoing document:

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