IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

PAUL MICKLE, BRENT BONNSTETTER, STEVE MEDLEY and NORMA CASSIDY	)	
Plaintiffs,	)	
v.	)	Case No. CJ-07-6914 Judge P. Thomas Thornbrugh
WELLMAN PRODUCTS LLC,	)	
Defendant.	)	

UNOPPOSED MOTION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO OKLA. STAT. TIT. 12, § 2023

Respectfully submitted,

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COMES NOW, the Chamber of Commerce of the United States of America (the "Chamber"), and respectfully submits its Motion for Permission to File a Brief as Amicus Curiae in Opposition to the Plaintiffs' Motion for Class Certification Pursuant to OKLA. STAT. tit. 12, § 2023 (the "Motion for Class Certification"). Counsel for Plaintiffs does not object to this Motion.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every geographic region of the country. The Chamber advocates the interest of its members before the courts by,

among other activities, filing amicus briefs in cases implicating issues of vital concern to the nation's business community.

Few issues are of more concern to the nation's business community than those pertaining to class certification. This is an issue that transcends the immediate concerns of the parties to this litigation and potentially impacts the companies collectively responsible for a substantial portion of not only the State of Oklahoma's economic activity, but total U.S. economic activity as well.

Class certification can transform a routine lawsuit into one with hundreds or thousands of claimants and millions of dollars in alleged damages, while depriving the 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 afford to risk a single jury verdict, even if they believe there is an overwhelming likelihood that they will win a trial on the merits. These concerns and others are exacerbated when class certification is inappropriately allowed under OKLA. STAT. tit. 12, § 2023.

As employers, and as potential respondents to charges under the Oklahoma Labor Code, the Chamber's members have a direct and ongoing interest in the issues presented in this case. The Chamber seeks to assist this Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to this case. Accordingly, this brief brings to the attention of the Court relevant matters that the parties have not raised and because of its extensive experience in these matters, the Chamber is well-situated to brief this Court on the concerns of the business community and the

importance of correctly applying the class certification framework of OKLA. STAT. tit. 12, § 2023.

STATEMENT OF THE CASE

This case involves the Defendant, Wellman Products, LLC, ("Wellman") an Ohio limited liability company that operates a manufacturing facility in Catoosa, Oklahoma. At the Catoosa facility, Wellman manufactures clutch and brake components for a variety of vehicles. Plaintiffs in this matter are former Wellman hourly employees who worked at the Catoosa, Oklahoma, facility.

Plaintiffs allege that they were underpaid for labor and/or services rendered to Wellman prior to their scheduled shifts beginning; during their scheduled shifts, subsequent to their scheduled shifts ending; and for time worked both before and after their scheduled shifts that had been edited by Wellman Leads. According to Plaintiffs, this occurred as a result of Wellman's system of "rounding" the time that its employees worked. Plaintiffs allege that Wellman's "rounding" did not adequately compensate them for their time worked because it rounded their time to the next or previous quarter of an hour, thereby depriving the employee of wages.

In reality, and contrary to Plaintiffs' claims, Wellman neither pays its employees based on rounded time, nor rounds employees' time for purposes of paying its employees. Wellman's Etime payroll software rounds employee time for attendance purposes (*i.e.*, was an employee on-time or late). Thereafter, Wellman's Leads and HR department engage in a highly individualized system of checks and balances to ensure that all employees are paid for all time worked. This system includes Wellman's Leads

reviewing employees' hand scan history on a daily basis, and either signing off on the time to be paid as correct or making edits to the time so that employees are paid for all time spent working. The Leads then submit the edited time to HR for payroll. Wellman's employees also play an important role in this process. Wellman has the employees' actual daily time punches printed on their paychecks. Thus, employees are able to discuss with their Leads and HR any discrepancies that they perceive between their pay and the hours they believed they worked. This complex, highly individualized system Wellman uses to pay its employees renders this case inappropriate for class treatment.

Plaintiff Paul Mickle initiated this action by filing an Original Petition for Damages (the "Original Petition") on October 16, 2007. Plaintiff Mickle filed this action on behalf of himself and all similarly situation Wellman Products, LLC ("Wellman") current and former hourly employees. The Original Petition pled causes of action based upon the Oklahoma Protection of Labor Act, OKLA. STAT. tit. 20, §§ 165.1-11, and breach of express and implied contracts.

On January 29, 2008, Plaintiffs filed their First Amended Petition for Damages (the "Amended Petition"). The Amended Petition restated the previously pled causes of action, and added three additional causes of action. The newly added causes of action are Tortious Breach of Contract, Breach of the Employment Contract in Violation of Oklahoma Public Policy, and Common Law Fraud.

Wellman denies Plaintiffs (or the proposed class members) failed to receive all wages due and owed to them. Wellman alleges several affirmative defenses, including the statute of limitations, waiver, and estoppel. *See* Wellman's Answer & Affirmative Defenses, filed herein on 2/19/08. Wellman also asserts that Plaintiffs cannot assert a

claim for breach of contract for violation of public policy as a matter of law, that Oklahoma does not recognize a duty of good faith and fair dealing between an employer and its employees, and finally, because Plaintiffs cannot prove that Wellman defrauded them or their co-workers. *See* Wellman's Motion to Dismiss, filed herein on 2/19/08.

On March 6, 2008, the Court entered its Class Action Scheduling Order setting a class certification hearing for July 9, 2008 at 10:00 a.m. On May 19, 2008, however, Wellman filed its Notice of Removal from Tulsa County District Court, and effectively removed the case from this Court to the United States District Court for the Northern District of Oklahoma. Plaintiffs then filed a Motion to Remand to State Court pursuant to 28 USC 1447(c) on May 21, 2008. On August 20, 2008, United States District Judge Claire V. Eagan issued an Opinion and Order finding no basis for federal jurisdiction and granted the Plaintiff's Motion to Remand. On January 15, 2009, Plaintiffs filed their Motion for Class Certification.

ARGUMENT AND AUTHORITIES

In the State of Oklahoma, class certification under OKLA. STAT. tit. 12, § 2023 is appropriate only if the party seeking certification successfully proves each of the requisite elements for class action. *Harvell v. Goodyear Tire & Rubber Company,* 2006 OK 24, ¶ 10, 164 P.3d 1028, 1032 ("the party who seeks certification has the burden of proving each of the requisite elements for class action."). If the party who seeks certification fails to prove each of the requisite elements, denial of class certification is appropriate. *Mattoon v. City of Norman*, 1981 OK 92, 633 P.2d 735.

Plaintiffs must prove that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. OKLA. STAT. tit. 12, § 2023(A). The four prerequisites are commonly referred to as (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.

In addition to the four section 2023(A) prerequisites, one of the three options listed in subsection 2023(B) must also be met. Plaintiffs in this action are seeking certification pursuant to subsections 2023(B)(3) and 2023(B)(1)(b). Subsection 2023(B)(3) states that an action may be maintained as a class action if:

> 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.

OKLA. STAT. tit. 12, § 2023(B)(1). Subsection 2023(B)(1)(b) provides class certification if the prosecution of separate actions by or against individual members of the class would create a risk of:

> [A]djudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

OKLA. STAT. tit. 12, § 2023(B)(1).

Plaintiffs' Motion for Class Certification should be denied because they cannot satisfy the commonality and predominance requirements of Section 2023. Each instance that Plaintiffs claim that the proposed class members were allegedly shorted wages by Wellman requires specific, individualized proof. In turn, Wellman's ability to show that

it properly paid its hourly employees for each and every minute worked necessarily requires individualized proof. Under these circumstances, certifying Plaintiffs' proposed class will thus rob Wellman and Plaintiffs' class members of their due process rights. Further, certifying this class would set a dangerous precedent that would harm employers in Oklahoma (and elsewhere). Finally, Plaintiffs' proposed class would create a potential for ruinous financial liability by employers. Accordingly, Plaintiffs' Motion for Class Certification should be denied.

I. PLAINTIFFS CANNOT MEET SECTION 2023'S REQUIREMENTS OF "COMMONALITY" AND "PREDOMINANCE."

According to the United States Supreme Court, class certification poses a unique risk of compensating too much or too many or of forcing settlement of unmeritorious claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The court must closely examine each of the requisite elements of the class certification statute, in order to assure that each element is satisfied before certifying the class. If the court fails to do so, great harm can result. This is because "Even ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties . . . ." *Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

Plaintiffs in this matter have failed to meet the "commonality" and "predominance" requirements of OKLA. STAT. tit. 12, § 2023. According to the Oklahoma Supreme Court, for class certification to be proper, "the case must involve questions of law or fact common to the class which predominate over any questions affecting only individual members." *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 10,

689 P.2d 299, 302. The Oklahoma Supreme Court has held that Oklahoma courts may look to federal authority in interpreting the requirements of § 2023 because the statute bears great similarity to Rule 23 of the Federal Rules of Civil Procedure. *Black Hawk Oil Co. v. Exxon*, 1998 OK 70, ¶ 11, 969 P.2d 337, 342-343; *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 5, 689 P.2d 299, 301; *Mattoon*, 1981 OK at ¶ 8, 633 P.2d at 737. Federal and state courts alike have determined that "rigorous analysis" or similar meaningful review of the suitability of a class is required. Because the vast majority of questions of law or fact in this lawsuit affect only individual members of the proposed class, Plaintiffs' Motion for Class Certification should be denied.

A question of fact or law is "common" under Section 2023 only if its "resolution will be applicable to each and every class member and will be dispositive of every class member's claim." *Ysbrand v. Daimler Chrysler Corp.*, 2003 OK 17, ¶ 19, 81 P.3d 618, 627. The "commonality" requirement serves the dual purpose of (1) fair and adequate representation of the interests of absentee members; and (2) practical and efficient case management. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S. Ct. 2364 (1982). Thus, "[c]ertification is improper if the merits of the claim would turn on defendant's individual dealings with each plaintiff." *Harvell*, 2006 OK 24, ¶ 27, 164 P.3d at 1038; Allen Wright, Arthur Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2005).

Class certification should be denied in cases in which individualized determinations of the amount of damages according to each class member would be required. In *Harvell*, the Oklahoma Supreme Court noted:

> This case focuses squarely on a claim for compensatory money damages. A determination of the damages would require individualized

> determinations for each class member of the fees charged compared with the services rendered, to determine whether the fees in fact correlate to the supplies used.

Harvell, 2006 OK 24, ¶ 28, 164 P.3d at 1038-39 (unjust enrichment damages). "In any class action in which both injunctive and monetary relief are sought, where the determination of damages are inherently [of an] individualized nature, class action status is inappropriate." *Id.* at ¶ 28, 164 P.3d at 1038 n. 53.

The concept of "predominance" under Section 2023 is akin to the commonality standard but is far more demanding. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 2250 (1997). Its absence is fatal to class certification. *See, e.g., In re General Motors Corp., "Piston Slap" Products Liability Litig.*, 386 F.Supp.2d 1220 (W.D. Okla. 2005). "Predominance may not be satisfied if it appears that 'each individual claim would have to be examined to ascertain whether there was an injury' to each class member." *Martin v. Hanover Direct, Inc.*, 2006 OK CIV APP 33, ¶ 23, 135 P.3d 251, 257. However, "if there are significant differences in the strength of the claims of the plaintiffs, class litigation would be less desirable." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987). Thus, the trial court must examine and understand the process by which the parties will try to prove or disprove liability in order to determine if a class action is appropriate. *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶¶ 19-27, 9 P.3d 683, 689-91.

The questions of fact common to the class in this case do not predominate over any questions affecting individual members. At issue in this lawsuit is whether individual employees were underpaid as a result of Wellman's process for paying its employees. The defenses and justifications raised by Wellman regarding this issue are

determined by each individual employee's particular situation. Employees are only paid for time in which the employees were actually working. If an employee was not paid, the reason for that is specific to that particular employee in that particular instance.

For instance, if Wellman did not pay an employee for time "on-the-clock" outside the designated shift time, one would have to examine Wellman's Lead's justification for not approving the payment of addition time to that employee. Those reasons include: that employee being outside smoking, in the break room, in the locker room, eating or drinking before or after a shift, or getting ready for that shift. Each of the above mentioned justifications for why Wellman did not pay that particular employee for that particular disputed time is different, not common to all employees, and requiring individualized proof. *See, e.g., Ysbrand v. Daimler Chrysler Corp.*, 2003 OK 17, ¶ 19, 81 P.3d 618, 627.

Additionally, Plaintiffs fail to meet the "commonality" requirement in that different employees were subject to different adjustments based on their individual jobs, departments, shifts, and Leads. After the automated Wellman Etime software accounted for an employee's attendance, that employee's Lead would personally examine the report and edit that employee's time accordingly. Since the Leads are personally recording employees' time and submitting that time to Wellman's HR department for payroll, it cannot be said that all employees at Wellman meet the commonality requirement under OKLA. STAT. tit. 12, § 2023.

If the class is certified as proposed by Plaintiffs, Plaintiffs and Wellman will have to present individualized evidence regarding the specific reasons how each full-time hourly employee's daily time record was recorded, verified, and paid. The evidence will

not be individualized only with respect to each proposed class member. Rather, separate proof must be presented for *each instance* in which each proposed class member clocked in or out beyond the eight hour day in order to determine the specific reason Wellman decided not to pay for more than eight hours per day. As Wellman's corporate representative testified:

> I can't sit here and say you can take a whole group of employees and put them in the same situation and look at it and say this is all cut and dried. There's different reasons somebody may have clocked out late and different reasons somebody may have clocked in early that are looked at to determine. Our employees always come forward if there's an issue with their pay time and time again, saying "Here. You didn't pay me for something I worked" and we address it. [. . .]

Depo. of Don Brown, at 255, ln. 18 to 256, ln. 1 (Ex. A). Some hourly employees clock in early or clocked out late because, among other things, they were smoking or getting a drink, putting on their shoes, talking to co-workers, or getting ready for the shift in the locker room. *Id.* at 233, lns. 15-23 (Ex. A).

Likewise, the amount or extent of damages incurred by each member of the proposed class also will require individualized proof. The amount of damages for each proposed class member depends, in part, on how much time each member claims he or she was not paid for a given day and the rate of pay for each proposed member. Thus, "the success of a claim . . . depends on the particular facts and circumstances of each case . . . ." *Harvell*, 2006 OK 24, ¶ 21, 164 P.3d at 1036 (reversing class certification). In these circumstances, the predominance of common issues under OKLA. STAT. tit. 12, § 2023(B)(3) cannot be established because "predominance may not be satisfied if it appears that 'each individual claim would have to be examined to ascertain whether there was an injury' to each class member." *Martin*, 2006 OK CIV APP 33, ¶ 23, 135 P.3d at

257. *See also KMC Leasing*, 2000 OK 51, ¶ 20, 9 P.3d at 690 ("Although the determination of these [individual] issues goes to the merits of the instant case, their very existence precludes a finding of predominance.").

The issues of commonality and predominance stretch beyond Plaintiffs' alleged statutory claim and into their common law claims. Courts have consistently recognized that claims of breach of contract and fraud often cannot meet the requirements for class certification. "[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Advisory Committee note to FED. R. CIV. P. 23(b)(3). Here, Plaintiffs' common law claims on behalf of the proposed class will hinge on whether Wellman's hourly employees were even justified in relying on statements made in an employee handbook, and if so, the extent to which they relied if at all. Each member of the proposed class could easily have differing testimony on this issue. Certifying the class is therefore inappropriate.

Finally, not only is class certification improper because individualized evidence will be required with regard to each instance in which an hourly employee's time card exceeded eight hours – class certification is improper because the majority of the proposed class members likely did not suffer any injury. "The threat of future harm, not yet realized, is not enough." W. Page Keeton, et al., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984). Many courts have recognized that proving such a case, if possible at all, would extremely difficult. *See, e.g., Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455 (D.N.J. 1998); *In re Bridgestone/Firestone Tires Products Liability Litigation*,

288 F.3d 1012 (7th Cir. 2002). Restricting the class definition to those who in fact have suffered an injury cannot salvage an otherwise invalid class because it sets up a class definition which cannot be applied without resolving a triable issue. *Forman v. Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995) ("Courts are hesitant to certify a class where 'determining a membership in the class would essentially require a mini-hearing on the merits of each case."). Plaintiff's Motion should therefore be denied.

II. CLASS CERTIFICATION WOULD VIOLATE OKLAHOMA EMPLOYERS' DUE PROCESS RIGHTS.

Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have referred to as judicial blackmail"). The United States Supreme Court determined that "certification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand*, 437 U.S. at 476. This is particularly true where the amount of damages allegedly incurred by each class member is relatively small in relation to the potential litigation costs. And, the pressure to settle is intensified when an employer cannot count on having a full opportunity to present evidence that is specific to each class member in its defense, as discussed elsewhere in this brief. Because the certification of a class in this lawsuit could generate perverse and destructive results, this Court should deny Plaintiffs' Motion for Class Certification.

III. CLASS CERTIFICATION IN THIS CASE WOULD SET A DANGEROUS PRECEDENT AND NEGATIVELY IMPACT BUSINESSES EVERYWHERE

If this Court were to certify class action in this matter, it would negatively impact not only Oklahoma businesses, but also businesses located outside the State of Oklahoma that conduct business within the state. By certifying class action in this case, all employers conducting business within the State of Oklahoma that pay its employees in a manner similar to Wellman would be subject to class action lawsuits in the future. This would ultimately be burdensome not only on these businesses, but also on the courts that would be forced to hear the multitude of cases this precedent would create.

Wage and hour cases, such as this lawsuit, 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 TRIAL ADVOC. Q. 16, 20 (2006) ("[c]ollective actions under the FSLA are one of the fastest-growing areas of litigation of any kind"). This trend is expected to continue unabated. Seyfarth Shaw, L.L.P., ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, Jan. 9, 2009 ("The findings in this year's report illustrate that the trend we've analyzed for the past few years continues unabated; there is an explosion in class action and collective action litigation involving workplace issues.").

From an employer's perspective, class certification in a case like the one at issue, would dramatically increase both the risks of litigation and the costs of an adverse verdict. This would also create additional procedural advantages for the Plaintiffs that would make this case more difficult to defend. *See* Simon J. Nadel, *As Overtime Lawsuits Renew FSLA Debate, Attorneys Advise Learning the Wage Law*, DAILY LAB. REP. June 25, 2002, at C-1. Consequently, this would force the employers to settle, thereby allowing the class to obtain substantial settlement leverage from a favorable certification decision. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 THE LABOR LAWYER 311, 315 (2005). This precedent could also lead to plaintiffs trying to entice more employees to join their lawsuit simply to increase their bargaining power.

Class members are often brought into lawsuits which they may not benefit, or worse, may not have wanted to bring in the first place. This happens because under the rules in many jurisdictions, including this one, once a class is certified all potential plaintiffs are automatically included in the class unless the affirmatively "opt out." Ultimately, it is the employers (the Chamber's members) and society that bear these consequences.

If this Court certifies the class proposed by Plaintiffs, this problematic situation will become exponentially worse. This Court needs to affirmatively reject Plaintiffs' attempt to broaden the use of class actions to the detriment of the economy and the American worker.

IV. CLASS CERTIFICATION IN THIS CASES THREATENS EMPLOYERS WITH RUINOUS FINANCIAL LIABILITY

Class certification can transform a lawsuit involving a modest set of individual claims into a considerable lawsuit that threatens an entire company with ruinous financial liability. This case, for example, arises from a plaintiff class that potentially consists of at least 545 individuals to upwards of more than 1200 individuals, including, as Plaintiffs have alleged in their First Amended Petition, damages of up to $5 million dollars. It is undisputable that Section 2023(b)(2) "does not extend to case in which the appropriate final relief relates . . . predominantly to money damages." Advisory Comm. Notes to FED. R. CIV. P. 23. The impact on employers and business has been, and will continue to be, enormous. *See* Karen Sloan, *Class Action Workplace Litigation Hot Item in '08*, NATIONAL LAW J. January 21, 2009 (noting that the top ten wage and hour class action settlements totaled more than $257 million in 2008). A large chunk of this amount consists of attorneys' fees rather than payments to the employees. *See* Mike Orey, *Wage Wars*, BUSINESS WEEK, October 2007 (noting the incredible impact wage and hour class action lawsuits are having on businesses).

This lawsuit, in particular, could adversely impact businesses in Oklahoma. If a class action is allowed to proceed, Oklahoma employers could become subject to class action litigation for almost any statement made to its employees, no matter the context, if employees are allowed to rely upon examples of overtime pay in an employee handbook to create an implied contract. In this time of great economic uncertainty, raising the risk of defending expensive class action litigation ultimately would harm Oklahoma's workers. Plaintiff's Motion for Class Certification should therefore be denied.

CONCLUSION

Erroneous class certification decisions, therefore, impose unique and unwarranted burdens on the litigants, other employers, the courts and society. The Plaintiffs' Motion for Class Certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2009, a true and correct copy of the foregoing instrument was mailed by depositing the same in the U.S. Mail, proper postage thereon fully prepaid, and addressed to:

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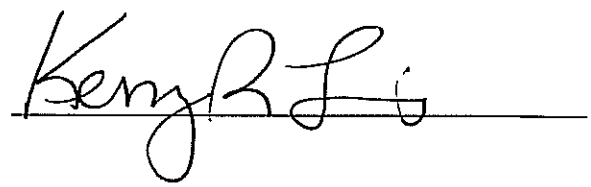

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

PAUL MICKLE, YVONNE AMOS, RUSTY COWAN, BRENT BONNSTETTER) DEBBIE ASH, STEVE MEDLEY AND NORMA CASSIDY,

Plaintiffs,

-vs-

WELLMAN PRODUCTS LLC,

Defendant.

Case No. CJ-07-6914

****

VOLUME II OF THE DEPOSITION OF **DONALD A. BROWN**, produced as a witness on behalf of the Plaintiffs in the above styled and numbered cause, taken on the 15th day of October, 2008, in Tulsa, Oklahoma before me, Dalene Lawrence, a Certified Shorthand Reporter duly certified under and by virtue of the laws of the State of Oklahoma, pursuant to the stipulations hereinafter set forth.

****

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Q Is Wellman claiming that Mr. Mickle scanned in and left the Wellman Catoosa plant premises on any of the days during the week of February 20, 2006?

A Not to my knowledge.

Q Where does Wellman contend that Mr. Mickle was physically located on each of those seven days he scanned in from the time he scanned in up until the time his shift started?

MR. GILMORE: Objection, form.

A Could you please repeat that?

(Whereupon, the previous question was read from the record by the Reporter).

MR. GILMORE: Objection, form.

A Since this was two and a half years ago, I can't say specifically. But most all our employees spend time either outside smoking, in the break room, in the locker room, getting ready for the shift. Having a smoke or a drink before the shift. Getting their shoes to go out there, doing something. So I cannot sit here and tell you where Mr. Mickle was on each one of these occasions. But I can tell you that if Mr. Mickle had thought he wasn't paid, which he had, and the circumstances, he could have came forward and said "I was working and was not paid."

Q Does Wellman know what Mr. Mickle was doing from the time he scanned in on each of these seven days

MR. GILMORE: Objection, form.

A No.

Q Let's now expand the universe from the four named Plaintiffs of Mickle, Bonnstetter, Medley and Cassidy to each and every permanent hourly employee that has worked at Wellman Catoosa since late 2004 up to today. Is there any reason Wellman is claiming that it's not legally obligated to pay those hourly employees from the time when their shift officially ended until they clocked out other than Wellman's claim that those employees were not working during that period of time?

MR. GILMORE: Objection, form.

A Again, I mean, we've got -- repeat that one more time for me before I answer.

(Whereupon, the previous question was read from the record by the Reporter).

MR. GILMORE: Objection, form.

A I can't sit here and say you can take a whole group of employees and put them in the same situation and look at it and say this is all cut and dried. There's different reasons somebody may have clocked out late and different reasons somebody may have clocked in early that are looked at to determine. Our employees always come forward if there's an issue with their pay time and time again, saying "Here. You didn't pay me for something I

worked" and we address it. We have surveys showing employees, previous and current, showing answering questions which I think you guys have seen a copy of. We have labor comments reports. We have everything else showing that. So to sit here and try to say one thing, I can't sit here -- corporate witness or not. I'm giving you the best answer I can give you. And I know it's not what you want to hear. But it's the best I can give.

MR. GILMORE: Just answer.

MR. HIGHTOWER: Objection, completely nonresponsive.

Q Mr. Brown, is there any reason that Wellman is claiming it is not legally obligated to pay any of its permanent employees for time they were clocked in after their shift other than its claim that they weren't working during that period of time? And if your answer is "yes", please tell me what the reasons are.

MR. GILMORE: Objection, form.

A Yes. The reasons would be as I stated before: There's different reasons why people may have clocked in early or clocked out late or clocked whatever that are addressed. If they were working -- if they were working -- they would be paid.

Q Other than they weren't working during the period from when their shift ended till they clocked out,