No. 107910

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PAUL MICKLE, ET AL.

Plaintiffs/Appellees,

vs.

WELLMAN PRODUCTS, LLC,

Defendant/Appellant.

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Appeal from the District Court of Tulsa County, Oklahoma,
Case No. CJ-2007-6914, The Honorable P. Thomas Thornbrugh Presiding,
Sustaining Plaintiff's Motion for Class Certification

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INDEX

STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

OKLA. STAT. tit. 12, § 2023 2

STATEMENT OF THE CASE 2

OKLA. STAT. tit. 40, §§ 165.1-11 4

ARGUMENT AND AUTHORITIES 4

I. THE DEVELOPMENT OF CLASS ACTION LITIGATION IN OKLAHOMA. 4

FED.R.CIV.P. 23 5

56 OKLA. L. REV. 289 (2003) 5

56 OKLA. L. REV. 326 (2003) 5

OKLA. STAT. tit. 12, § 2023 4

American Tort Reform Association, 2007/2008 JUDICIAL HELLHOLES 5

American Tort Reform Association, 2009/2010 JUDICIAL HELLHOLES 30 (2010) 5

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 5

Steven S. Genser, *Civil Procedure: Class Certification Procedure and the Predominance Requirement* 5

Deborah R. Hensler et al., CLASS ACTION DILEMMAS 58-63 (2000) 5

Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435, 455 (2007) 5

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) 6

Kris Maher, *Workers Are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J., June 5, 2006, at A2 5

John P. McAdams, & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 TRIAL ADVOC. Q. 16, 20 (2006) 5

Simon J. Nadel, *As Overtime Lawsuits Renew FSLA Debate, Attorneys Advise Learning the Wage Law*, DAILY LAB. REP. June 25, 2002, at C-1 6

NEWBERG ON CLASS ACTIONS (4th ed.), § 1:1 4

Mike Orey, *Wage Wars*, BUSINESS WEEK, October 2007 6

Seyfarth Shaw, L.L.P., ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, Jan. 12, 2010 6

Karen Sloan, *Class Action Workplace Litigation Hot Item in '08*, NATIONAL LAW J. January 21, 2009 6

II. THE OKLAHOMA LEGISLATURE'S RESPONSE – THE COMPREHENSIVE LAWSUIT REFORM ACT - AMENDED SECTION 2023 TO ENSURE A RIGOROUS ANALYSIS PRIOR TO ANY CLASS CERTIFICATION.

A. Section 2023 prior to Amendment. 7

OKLA. STAT. tit. 12, § 2023 7-8

B. The gate-keeping provisions of the amended Section 2023. 8

Herman Const. Co. v. Wood, 1912 OK 800, 128 P. 309 8

Tom Dolan Heating Co. v. Public Service Co., 1971 OK 8, 480 P.2d 280 8

OKLA. STAT. tit. 12, § 2023 8-9

C. This Court must review the record de novo to determine whether Plaintiffs have proven they are entitled to a class action under § 2023. 9

Cuesta v. Ford Motor Co., 2009 OK 24, 209 P.3d 278 9

Harvell v. Goodyear Tire & Rubber Co.,
2006 OK 24, 164 P.3d 1028 9

Mahan v. NTC of America,
1992 OK 8, 832 P.2d 805 10

NBI Services, Inc. v. Ward,
2006 OK CIV APP 20, 132 P.3d 619, 623 10

Neil Acquisition, LLC v. Wingrod Inv. Corp.,
1996 OK 125, 932 P.2d 1100 10

OKLA. STAT. tit. 12, § 2023(C)(2) 9

III. A DE NOVO REVIEW OF THE RECORD DEMONSTRATES PLAINTIFFS HAVE NOT SATISFIED THE RIGORS OF SECTION 2023. 10

Black Hawk Oil Co. v. Exxon Corp.,
1998 OK 70, ¶ 12, 969 P.2d 337 10

Caraway v. *General Motors Corp.*,
102,223 (Okla. Sup. Ct. Opinion filed Sept. 26, 2006) 10-11

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 11

Coopers & Lybrand v. Livesay,
437 U.S. 463, 98 S. Ct. 2454 (1978) 11

Eisen v. Carlisle & Jacquelin,
417 U.S. 156, 94 S. Ct. 2140 (1974) 11

General Telegraph Co. of the Southwest v. Falcon,
457 U.S. 147, 160, 102 S.Ct. 2364 (1982) 11

In re Hydrogen Peroxide Antitrust Litigation,
552 F.3d 305 (3rd Cir. 2009) 11

KMC Leasing, Inc. v. Rockwell-Standard Corp.,
2000 OK 51, 9 P.3d 683 10

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3rd Cir. 2001) 11

5 MOORE'S FEDERAL PRACTICE ¶ 23.84[2][a] (3d ed. 2003) 11

A. The record fails to establish that Plaintiffs' statutory claims are appropriate for class treatment. 12

Reynolds v. Advance Alarms, Inc.,
2009 OK 97, __ P.3d __, (Dec. 15, 2009) 12

B. The record fails to establish that Plaintiffs' breach of express and/or implied contract claims are appropriate for class treatment. 13

Commander Properties Corp. v. Beech Aircraft Corp.,
164 F.R.D. 529 (D. Kan. 1996) 14

Johnson v. Nasca,
1990 OK CIV APP 87, 802 P.2d 1294 14

Miner v. Mid-America Door Co.,
2003 OK CIV APP 32, ¶ 33, 68 P.3d 212 15

George L. Blum, Annot., *Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship*, 17 A.L.R.5th 1 (1994) 15

C. The record fails to establish that Plaintiffs' claims of tortious breach of contract are appropriate for class treatment. 15

City of Tahlequah v. Lake Region Elec. Coop., Inc.,
2002 OK 2, 47 P.3d 467 15

Eisen v. Carlisle & Jacquelin,
417 U.S. 156, 94 S. Ct. 2140 (1974) 15

Martin v. Johnson,
1998 OK 127, 975 P.2d 889 16

Mason v. Okla. Turnpike Auth.,
115 F.3d 1442 (10th Cir. 1997) 16

D. The record fails to demonstrate that Plaintiffs' fraud claims are appropriate for class treatment. 16

Bunch v. K-Mart Corp.,
1995 OK CIV APP 41, 898 P.2d 170 16

E. The record does not support the inclusion of temporary workers. 17

Yukako Ono, *Why Do Firms Use Temporary Workers?*,
Chicago Fed Letter (Mar. 1, 2009) 17

F. The trial court's order is deficient. 17

Caban v. Installation & Serv. Techs., Inc.,
No. 08-CV-1689, 2009 WL 4730537 (M.D. Fla. Dec. 4, 2009) 18

Keota Mills & Elevator v. Gamble,
2010 OK 12 18

Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, LLC,
408 B. R. 90 (Bankr. S.D. Tex. 2009) 18

OKLA. STAT. tit. 12, § 2023 17-19

29 U.S.C. § 206 19

29 U.S.C. § 207 19

29 U.S.C. § 216 19

IV. THE TRIAL COURT'S ORDER GRANTING CERTIFICATION REPRESENTS A DEPARTURE FROM ESTABLISHED LAW IN "GAP PERIOD" LITIGATION. 20

Babineau v. Federal Express Corp.,
576 F.3d 1183 (11th Cir. 2009) 20-21

Basco v. Wal-Mart Stores, Inc.,
216 F. Supp. 2d 592 (E.D. La. 2002) 20, 22-23

Cornn v. United Parcel Service, Inc.,
No. C03-2001, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005) 20-21

Cutler v. Wal-Mart Stores, Inc.,
927 A.2d 1 (Ct. App. Md. 2007) 20, 23-24

Martin v. Hanover Direct, Inc.,
2006 OK CIV APP 33, 135 P.3d 251 25

CONCLUSION 25

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits its *Amicus Curiae* brief opposing the trial court's granting of Plaintiffs' Motion for Class Certification (the "Certification Order"). Pursuant to OKLA. STAt. tit. 12, Supreme Court Rule 1.12, a written consent to the filing of this brief is filed contemporaneously with the filing of this brief.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Chamber is the world's largest business federation. It represents 300,000 direct members (including over 400 Oklahoma businesses) and indirectly represents an underlying membership of 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 test 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

Plaintiffs assert a class action of employees and temporary workers seeking pay for "gap periods" – those times after they have "clocked in" but prior to the beginning of the shift and those times after the end of the shift but before they "clock out." The Chamber respectfully submits that the core liability issue is whether a particular employee performed *authorized* work during a gap period for which that employee was not compensated. As numerous cases across the country have held, this issue cannot be resolved class-wide or based upon a common timekeeping system. The core liability issue can be resolved only when the trier of fact determines whether each and every individual employee, on any given day, performed authorized work during a gap period for which he was not compensated.

Defendant Wellman Products, LLC (Wellman) operates a manufacturing facility in Catoosa, Oklahoma. (Tr. 53, 54). Plaintiffs are former Wellman hourly employees. (Tr. 181, 224, 282, 299).

Wellman operates on shifts, using a loud buzzer to signify the hard ending of the prior shift and the hard beginning of the next shift. (Tr. 74, 78, 391-92). Employees are paid for their assigned shift. Employees are also paid for working outside their shift, if authorized by Wellman. (Tr. 188, 272-73). Employees use a hand-scanner located at the entry to the building to "clock in" when they arrive and "clock out" when they leave[1]. (Tr. 57, 368-71, R. 1339 (Def. Ex. 62)). That recorded time is the starting point for determining an employee's pay as it demonstrates the employee was present on that day between those times. The clock in and clock out times are automatically rounded to fifteen-minute increments by payroll software called Etime. (Tr. 61-64). These times are then provided to the shift's "lead" to conduct an individualized review of the time shown to ensure that each employee is paid for all authorized work time. (Tr. 103, 453). The lead makes any necessary modifications and forwards the time cards to Human Resources to process payroll based upon the reviewed time entries. (Tr. 103). No employee is paid without his or her time for each and every shift having gone through this process, including the lead's review. (Tr. 453).

Employees are allowed to be on Wellman's premises both before and after their scheduled shift. (Tr. 394-5). Wellman's facility has four different areas where employees can spend time during gap periods: two employee break areas, an employee bathroom with lockers and showers, and a designated courtyard smoking location. (Tr. 369, 392-95). There

[1] A hand scanner is one of several types of electronic methods available to employers to track employees' attendance and timekeeping. The differences in technology from the historical "punch clock" to today's hi-tech methods of recording attendance, time, etc. are of no consequence to the issues at hand. Wellman could have used any number of systems and coupled that system with a payroll rounding software and manual review by an employee's lead. The question remains the same: can a court properly certify a class when liability is established only upon proof of exceptions to the employer's system of attendance and time-keeping? The Chamber submits it cannot.

is substantial evidence in the record that employees were on Wellman premises during gap periods, performing various non-work-related activities. (Tr. 268-70, 392-95).

Plaintiffs brought this action under four legal theories: violation of the Oklahoma Protection of Labor Act, OKLA. STAT. tit. 40, §§ 165.1-11, breach of express and/or implied contracts, tortious breach of contract, and common law fraud. (First Amended Petition, R. 9). Plaintiffs moved that this matter be certified as a class action. On December 9, 2009, the trial court entered an order certifying the following class:

> All present and former hourly employees, whether employed directly by Wellman or through a temporary or employment agency, who have provided labor and/or services to Wellman Products LLC at its Catoosa, Oklahoma manufacturing facility from the time it began operations in late 2004 through [July 2, 2009].

(R. 1296).

The Chamber submits that certification of this class conflicts with Oklahoma's recently-amended class certification statute, the record, and the plethora of cases from other jurisdictions which have rejected class treatment on similar facts.

ARGUMENT AND AUTHORITIES

I. THE DEVELOPMENT OF CLASS ACTION LITIGATION IN OKLAHOMA.

"Historically and under modern jurisprudence, a class action is a nontraditional litigation procedure that permits a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class, 'when the question is of common or general interest to persons so numerous as to make it impracticable to bring them all before the court.'" NEWBERG ON CLASS ACTIONS (4th ed.), § 1:1. Like the federal courts, Oklahoma has had several statutes governing class actions. Class action law has evolved over time, from its beginnings in equity to codification of law. In 1984, Oklahoma adopted OKLA. STAT. tit. 12,

§ 2023. In so doing, the Legislature borrowed heavily from and advised that instruction could be found in the federal counterpart, FED.R.CIV.P. 23. Steven S. Genser, *Civil Procedure: Class Certification Procedure and the Predominance Requirement*, 56 OKLA. L. REV. 289 n. 15 (2003).

Class action litigation often faces criticism, and Oklahoma is not immune. In fact, Oklahoma's lenient, pre-reform class certification procedures were recognized as encouraging forum shopping for class action claims with dubious substantive merit.

> Class action critics complain that, under current practice, class plaintiffs shop to find the state courts with the least demanding certification standards. At this point [2003], Oklahoma can be viewed as a less demanding jurisdiction.

Id. at 326. *See also* Deborah R. Hensler et al., CLASS ACTION DILEMMAS 58-63 (2000) (discussing "hot states" for class action filings). The American Tort Reform Association for several years included Oklahoma as one of the jurisdictions on its annual "watch list" of risky jurisdictions. *See, e.g.*, American Tort Reform Association, 2007/2008 JUDICIAL HELLHOLES.[2]

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); John P. McAdams, & Michael A. Shafir,

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[2] The enactment of the Comprehensive Lawsuit Reform Act has removed Oklahoma from the watch list. *See* American Tort Reform Association, 2009/2010 JUDICIAL HELLHOLES 30 (2010) (Oklahoma recognized for its enactment of the most comprehensive tort reform law in the United States in 2009).

Parent Company Liability Under the Fair Labor Standards Act, 25 TRIAL ADVOC. Q. 16, 20 (2006). This trend is expected to continue unabated. Seyfarth Shaw, L.L.P., ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT, Jan. 12, 2010.

For an employer, class certification dramatically increases both the risks of proceeding with a defense and the costs of an adverse verdict. Certification also creates additional procedural advantages for the plaintiffs that make this case and similar cases 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. As a result, employers often feel forced to settle, 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). 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). Class certification transforms a lawsuit involving a modest set of claims by individuals into a considerable lawsuit that can threaten a defendant with ruinous financial liability and sets a chilling procedural precedent for business and commerce in general.

Finally, despite any perceived or real benefits to class members, there is growing concern over large attorney fees awards especially in relation to the recovery obtained. A large portion of class settlements are designed to pay class counsel, rather than compensate the class member. *See* Mike Orey, *Wage Wars*, BUSINESS WEEK, October 2007 (noting the incredible impact wage and hour class action lawsuits are having on businesses).

II. THE OKLAHOMA LEGISLATURE'S RESPONSE – THE COMPREHENSIVE LAWSUIT REFORM ACT - AMENDED SECTION 2023 TO ENSURE A RIGOROUS ANALYSIS PRIOR TO ANY CLASS CERTIFICATION.

After years of debate in the courts and among legal scholars, the Oklahoma Legislature altered the course of Oklahoma class action litigation when it amended § 2023 to require a rigorous level of scrutiny to any certification decision.

A. Section 2023 prior to Amendment.

Prior to the 2009 amendments, Section 2023 consisted of sections A – E. Under § 2023(A), Plaintiffs must prove: (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)(1)-(4). These four prerequisites are commonly referred to as (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.

Additionally, one of the options listed in subsection 2023(B) must be satisfied prior to class certification. Plaintiffs in this action sought 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:

> [t]he 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. The matters pertinent to this finding include: . . .

OKLA. STAT. tit. 12, § 2023(B)(3). 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:

> adjudications 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).

B. The gate-keeping provisions of the amended Section 2023.

The amendments to § 2023 reveal the Oklahoma Legislature's intent to heighten the court's gate-keeping function. The changes to § 2023 include:

- defining what must be in a class certification order ("An order entered on or after November 1, 2009, that certifies a class action shall define the class and the class claims, issues or defenses, and shall appoint class counsel under subsection F of this section.") (§ 2023(C)(1));
- declaring that all class certification orders "shall be subject to a de novo standard of review by any appellate court reviewing the order" (§ 2023(C)(2));
- creating a new section limiting class membership (§ 2023(D)(3));
- providing procedural mechanisms and safeguards for the settlement of class claims (§ 2023(E));
- creating an entirely new section requiring the trial court designate class counsel and providing the factors for that court to consider in making such a determination (§ 2023(F)); and
- including a section to guide the courts as to the question of attorneys' fees, (§ 2023(G)).

The 2009 legislative amendments reflect a distinct change to Oklahoma's public policy regarding class actions. *See, e.g., Tom Dolan Heating Co. v. Public Service Co.*, 1971 OK 8, 480 P.2d 280, 281 ("The term 'public policy' has been said to mean the law of the state as found declared in its constitution, its statutory enactments and its judicial records."); *Herman Const. Co. v. Wood*, 1912 OK 800, ¶ 3, 128 P. 309 ("The public policy of a state is determined by its Constitution, its statutes, and the decisions of its courts. The statutes in the main make the public policy of the state. The wisdom or lack of wisdom of any policy is for

legislative determination, over which the courts have no jurisdiction, except in so far as any statute violates a constitutional provision.")

The public policy of the State of Oklahoma for class certification orders issued after November 1, 2009, requires that no class be certified unless the court finds the requirements of § 2023 have been satisfied.

C. This Court must review the record de novo to determine whether Plaintiffs have proven entitlement to a class action under § 2023.

Until late last year, appellate courts reviewed a trial court's order certifying or declining to certify a class action under an abuse of discretion standard. *See, e.g., Cuesta v. Ford Motor Co.*, 2009 OK 24, ¶ 7, 209 P.3d 278, 282. In other words, appellate courts affirmed the trial court's decision regarding the request for class certification unless the trial court "base[d] its decision on an erroneous conclusion of law or where there [was] no rational basis in evidence for the ruling." *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 9, 164 P.3d 1028, 1032. In the absence of a clearly erroneous conclusion of law or any rational basis in evidence, the appellate courts were required to give great deference to the decisions of the trial courts.

Effective November 1, 2009, the Oklahoma Legislature revised Section 2023(C), in part, to require appellate courts to apply a de novo standard of review of an order granting or denying a motion for class certification. Section 2023(C)(2) now states:

> 2. The order described in paragraph 1 of this subsection shall be subject to a de novo standard of review by any appellate court reviewing the order.

OKLA. STAT. tit. 12, § 2023(C)(2) (emphasis added).

A de novo review "means that no deference is accorded the trial court decision: 'An appellate court claims for itself plenary, independent, and non-deferential authority to re-examine a trial court's legal rulings." *NBI Services, Inc. v. Ward*, 2006 OK CIV APP 20, ¶ 9, 132 P.3d 619, 623 (quoting *Neil Acquisition, LLC v. Wingrod Inv. Corp.*, 1996 OK 125, 932 P.2d 1100, 1103 n. 1). "*The de novo standard of review is utterly nondeferential because it ascribes absolutely no weight to a lower tribunal's findings.*" *Mahan v. NTC of America*, 1992 OK 8, ¶ 2, 832 P.2d 805 (Opala, concurring) (footnote omitted) (emphasis in original).

The trial court's class certification order was entered after the effective date of these amendments. This Court must therefore scrutinize the full record under a de novo standard to independently determine whether certification is warranted under the expanded requirements of Section 2023. Indeed, this may be among the first opportunities the appellate court has to apply the de novo standard to its review of a trial court's order on a motion for class certification.

If this Court cannot, from its de novo review, satisfy itself that Plaintiffs have met each and every burden under § 2023, this Court must reverse the class certification order.

III. A DE NOVO REVIEW OF THE RECORD DEMONSTRATES PLAINTIFFS HAVE NOT SATISFIED THE RIGORS OF SECTION 2023.

The Oklahoma Supreme Court has stated that an inquiry into the merits of the actions should not be made when deciding whether a class action should be certified. *See, e.g., Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶ 12, 969 P.2d 337. This rule, however, is honored more in the breach than the observance. In *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, 9 P.3d 683, 689-91, the Oklahoma Supreme Court found that it must examine the process by which the parties will try to prove or disprove liability and damages in order to determine if a class action is appropriate. *See also Caraway* v. *General*

Motors Corp., 102,223 (Okla. Sup. Ct. Opinion filed Sept. 26, 2006) ("we do not agree that the only matter appropriate for a trial court's examination is a plaintiff's allegation.").

Other jurisdictions likewise have expressed the shortcoming of drawing an impenetrable wall around examining the merits when determining the need for a class action. In *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009), the Third Circuit stated that "[a] class certification decision requires a thorough examination of the factual and legal allegations." *Id.* at 309 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3rd Cir. 2001)). Indeed, the court "must resolve all factual or legal disputes relevant to class certification, ***even if they overlap with the merits***—including disputes touching on elements of the cause of action." *Id.* at 307 (emphasis added).

The genesis of the "no merits" rule for examining class certifications, the U.S. Supreme Court decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140 (1974), does not require the Court to ignore the merits. *Eisen* simply restricts a court from expanding the Rule 23 certification analysis to include an *ultimate* decision on the merits. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996); 5 MOORE'S FEDERAL PRACTICE ¶ 23.84[2][a] (3d ed. 2003). As the Supreme Court itself stated in a *post-Eisen* case, "sometimes it may be necessary for the [district] court to probe behind the pleadings before coming to rest on the certification question." *General Telegraph Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364 (1982); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S. Ct. 2454 (1978) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (internal quotation marks omitted)).

A review of the record and legal theories asserted in this case demonstrates that the complained-of actions arise not from the use of Wellman's time-keeping process (from hand scanner through individual review) but from allegations arising outside of this process during the gap periods. Simply stated, liability cannot be established based upon any common set of facts. **On the contrary, liability may be established only upon individualized proof, employee by employee, of an exception to the common time-keeping practice.** In a case where core liability is proven through exceptions rather than commonality, class treatment is inappropriate.

A. The record fails to establish that Plaintiffs' statutory claims are appropriate for class treatment.

The misapplication of an Oklahoma statute affects all Oklahoma citizens. The misapplication of the Protection of Labor Act affects those entities represented by the Chamber – Oklahoma employers. The trial court's certification of the class is erroneously premised on an assumption that a valid claim exists under the Protection of Labor Act.

Plaintiffs assert they should be paid for all of the time they are "clocked in" at Wellman. Even if Plaintiffs claim they should have been paid for all time *worked* during gap periods, Plaintiffs are incorrect on Oklahoma law. In Oklahoma, an employee is entitled to be paid for time which is *authorized or permitted* to be worked.

The Oklahoma Protection of Labor Act gives employees no right to compensation for unauthorized work. In *Reynolds v. Advance Alarms, Inc.*, 2009 OK 97, _____ P.3d _____, the Oklahoma Supreme Court rejected the argument that an employer is required to pay an employee for unauthorized work performed during lunch time. The Court, after reviewing the comprehensive statutory scheme of the Act, found that "there is no language in § 165.7 which explicitly or implicitly articulates a policy regarding work time or lunch breaks." *Id.*

at ¶ 12. Similarly, § 165.8 "neither explicitly nor implicitly articulates a work-time or lunch-break policy." *Id.* at ¶13. Nor does § 199, read alone or with the related statutes, require employers to pay for unauthorized work. *Id.* at ¶¶ 17-18. The Court concluded that Oklahoma does not have a clear and well-defined policy requiring an employer to pay wages to the employee for work performed during the lunch break "***without the employer's permission***." *Id.* at ¶ 20 (emphasis added). Plaintiffs therefore have no legally cognizable claim for compensation for work that was not authorized by Wellman leads.

Plaintiffs focus only on the first two steps of Wellman's time-keeping system (*i.e.*, hand-scanners and Etime) to establish liability. However, Plaintiffs and the trial court failed to address the plethora of evidence in the record that no employee is paid without their time being reviewed by a Wellman lead. Thus, Wellman's system establishes an employer's compliance with the law. Wellman's leads conduct an individualized review of all time records to ensure that each employee is properly paid for the time authorized to be worked. To prove liability, Plaintiffs would have to prove not the common system, but a deviation thereto requiring specific individualized evidence regarding whether someone was working, whether that work was authorized, and if so whether it was paid.

Based upon the public policy expressed in the Protection of Labor Act and the *Reynolds* decision, class treatment is inappropriate because common issues do not predominate over individual issues.

B. The record fails to establish that Plaintiffs' breach of express and/or implied contract claims are appropriate for class treatment.

While the reviewing courts are cautioned not to determine who should ultimately prevail on the merits, the courts must "analyze the elements of the claims and defenses of the

parties" when considering whether to certify a class action. *Commander Properties Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 534 (D. Kan. 1996). To prove a breach of contract claim, Plaintiffs must prove the existence of a contract and a breach of that contract (not to mention actual damages).

Plaintiffs present no evidence in the record of a common contract – be it express or implied, upon which liability could be established. Plaintiffs rely solely upon the employee handbook. Wellman, like most employers, has a statement in its handbook disclaiming the creation of any contractual rights or obligations. In fact, the receipt signed by each named Plaintiff contains the following language: "This handbook is not to be construed as any type of contract . . . ." R. 1338 (Def. Exs. 9, 24, 31, 38). Such practices of employers were born out of judicial decisions holding an employer may disclaim the creation of contractual rights when the disclaimer is clear. *Johnson v. Nasca*, 1990 OK CIV APP 87, ¶ 11, 802 P.2d 1294.

Even if the employee handbook or policies could be considered a common contract, there is no evidence of a common breach. The promise, if any, was to pay employees for their scheduled shift and approved overtime. Wellman's handbook states:

> No employee is permitted to authorize himself or herself to work overtime. All overtime must be approved by the employee's supervisor and accurately recorded on the time-card to be paid.

R. 1343 (Pl. Ex. 21 (Handbook, p. 23)). Such statements are found in most employers' handbooks and certainly cannot be construed as a promise or contractual obligation to pay for all time an employee spends on the employer's premises or for unauthorized work. Assuming *arguendo* this handbook could be viewed as a contract, the handbook is equally clear that employees or workers cannot work outside their shift and be paid unless authorized to do so. Plaintiffs have presented no evidence of a breach of this promise.

Public policy implications must be considered when determining whether certification is appropriate. Public policy encourages employers to communicate with their employees without fear of retribution. Thus, employers have developed handbooks as a means of communicating with its employees in a fair and evenhanded manner. Courts have protected employers from claims that these handbooks are contracts when the handbooks clearly state they are not contracts. *Miner v. Mid-America Door Co.*, 2003 OK CIV APP 32, ¶ 33, 68 P.3d 212 (". . . the Court has recognized that an employer may disclaim or deny any intent to make the provisions of a personnel manual a binding part of the employment relationship, as long as the disclaimer is clear and the company has not engaged in conduct negating the disclaimer's effect."); George L. Blum, Annot., *Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship*, 17 A.L.R.5th 1 (1994). To now allow employers to be sued not in an individual lawsuit, but in a *class action* for the very same handbook for which it has historically been provided protection turns that protection on its head.

C. The record fails to establish that Plaintiffs' claims of tortious breach of contract are appropriate for class treatment.

Since *Eisen*, cases have debated the length to which a court may go to determine class certification. As a matter of public policy and judicial prudence, a court must make an inquiry to determine if the legal claim is even cognizable. Not every wrong provides legal redress. *See, e.g., City of Tahlequah v. Lake Region Elec. Coop., Inc.*, 2002 OK 2, 47 P.3d 467. Despite the number of persons who may believe something is wrong, unless there is a recognized legal theory for recovery, those persons have no right to recovery.

Plaintiffs assert a claim for tortious interference with contractual relations against Wellman. Oklahoma law, however, does not recognize a claim for intentional interference

with contractual relations between an employer and employee unless the employee shows that a third party, such as a supervisor, intentionally interfered with that employment contract. It is not unlawful to interfere with the contractual relations of another if it is accomplished by honest intent and done to better one's own business and not to harm another's business. *Mason v. Okla. Turnpike Auth.*, 115 F.3d 1442, 1453 (10th Cir. 1997); *Martin v. Johnson*, 1998 OK 127 ¶ 31, 975 P.2d 889, 896. The *Martin* court found that a claim of tortious interference with contract does not exist "merely because an employee or agent of a party to the contract was involved in the" alleged contract interference. *Id.* at 897.

It is inconceivable that a court could certify a class to proceed on a claim that is not recognized in the state's jurisprudence.

D. The record fails to demonstrate that Plaintiffs' fraud claims are appropriate for class treatment.

While possible, fraud claims are not intuitively appropriate for class treatment because there would have to be common misrepresentations, proof of intent that these common misrepresentations were to be relied upon, and common proof of that reliance to the class members' detriment. *See Bunch v. K-Mart Corp.*, 1995 OK CIV APP 41, 898 P.2d 170. While the Chamber is mindful that there have been cases in which fraud cases have been certified for class treatment, no evidence in the record supports Plaintiffs' belief that they can prove fraud on a class-wide basis.

Additionally, the trial court completely ignored this claim in the trial court's certification order. In fact, upon the Chamber's review of the trial court's order, the word "fraud" was not used even once. R. 1296. The absence of such a discussion supports the conclusion that there is no evidence of a common pattern of fraud.

E. The record does not support the inclusion of temporary workers.

The trial court included temporary workers – persons employed by a different employer but performing work at Wellman – in its class certification order. Between January 1990 and 2006, the use of temporary workers in the U.S. more than doubled from 1.2 million to 2.6 million. Yukako Ono, *Why Do Firms Use Temporary Workers?*, Chicago Fed Letter (Mar. 1, 2009). Without any legal analysis as to the propriety of such a decision, the trial court ignored the many differences between temporary workers and employees. For example, Plaintiffs claim Wellman breached its alleged contracts with the proposed class. Yet, no evidence shows any contractual relationship, either express or implied, between Wellman and its temporary workers. Plaintiffs' claim fraud based on the payroll stubs issued by Wellman, but Wellman never distributed payroll stubs to temporary workers.

The record does not support inclusion of temporary workers in the class, and the trial court's order is wholly lacking in any support for its decision to do so.

F. The trial court's order is deficient.

Given the policy as derived from the Oklahoma Legislature's 2009 amendments, the trial court's order fails to adhere to § 2023's requirements.

First, the trial court's order wholly failed to define the class claims, issues, or defenses. § 2023(C)(1). One might argue that this requirement serves to ensure that the court considers the claims, issues, and defenses in arriving at its decisions. Without any discussion of these elements in the trial court's order, the trial court failed to properly consider these factors in its decision.

Second, the trial court's order failed to properly consider its appointment of class counsel, including the factors enumerated in § 2023(F). There is scant evidence in the record

on any issue in subsection (F). The Chamber is mindful of a stipulation among the parties that "class would be represented by adequate counsel." Tr. 335. However, a stipulation of fact does not relieve the court of its statutory obligations. *See, e.g., Keota Mills & Elevator v. Gamble*, 2010 OK 12, ¶ 19 n. 31; *Longhorn Partners Pipeline L.P. v. KM Liquids Terminals, LLC*, 408 B. R. 90, 95-6 (Bankr. S.D. Tex. 2009)("Parties cannot circumvent statutory requirements . . . through stipulations."); *Caban v. Installation & Serv. Techs., Inc.*, No. 08-CV-1689, 2009 WL 4730537 *2 (M.D. Fla. Dec. 4, 2009)("The plain language of the statute requires a district court to allow a reasonable fee; it does not permit a court to allow unreasonable attorneys' fees merely because plaintiff's counsel negotiated those fees with the defendant as part of a settlement or stipulation."). As a matter of public policy, the Chamber is concerned that the trial court did not properly consider the factors enumerated in § 2023(F).

The law is clear that the court "shall consider" such things as "the work counsel has done in identifying or investigating potential claims in this action". § 2023(F)(1)(a)(1). In addition to the mandatory subjects, the trial court is advised it "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." § 2023(F)(1)(b). Sufficient facts and arguments appear in the record to require the trial court, and now this Court, to consider, whether counsel is fairly and adequately representing the interests of the class.

With regard to whether the named Plaintiffs were adequate representatives, Wellman argued that disclaiming remedies under the Fair Labor Standards Act (FLSA) to avoid federal court jurisdiction was counter to the interests of the class. R. 806 (Wellman's Brief in Opposition to Plaintiffs' Motion for Class Certification at 28-30). The same argument can be

made to question the adequacy of class counsel. The FLSA, originally enacted in 1938, provides litigants with a fully-developed body of statutory, regulatory, and case-law. The Act provides for the payment of minimum wages, 29 U.S.C. § 206, and provides for the payment of overtime compensation at the rate of 1.5 times the regular rate for any time worked in excess of 40 hours per work week. 29 U.S.C. § 207. The Act has a mechanism for representative actions (*i.e.*, opt-in collective actions), 29 U.S.C. § 216, and provides for attorneys fees to ensure that even small claims can be prosecuted. 29 U.S.C. § 216(B).

Despite these laws and remedies available to potential class members, counsel's investigation of claims led them to the conclusion that foregoing federal remedies was a better strategy than proceeding in federal court. In their zeal to remain in state court, they failed to appreciate the lack of guidance in Oklahoma on their key issues. Indeed, just weeks after the certification order, the Oklahoma Supreme Court issued the *Reynolds* decision which is contrary to virtually everything counsel argued below. *See, e.g.*, Plaintiffs' Reply re Class Certification Motion, R. 1132 at p. 7 ("Both Oklahoma and federal law require employers to fully compensate employees for all time worked.") Counsel's mistaken belief that Oklahoma would follow the FLSA undermined the rights of each and every class member they purport to represent. On a de novo review, this Court should consider whether Plaintiffs' counsel was adequately representing the potential class members when they abandoned the known FLSA for the unknown Oklahoma law.

The trial court did not fulfill its gate-keeping function when it certified this class. It is important to the Chamber's members that the policy of § 2023 be upheld and that the courts do not shirk these new responsibilities.

IV. THE TRIAL COURT'S ORDER GRANTING CERTIFICATION REPRESENTS A DEPARTURE FROM ESTABLISHED LAW IN "GAP PERIOD" LITIGATION.

The trial court's December 9, 2009 certification order represents a significant departure from state and federal rulings on motions for class certification arising out of similar state-law claims for breach of contract and violation of state wage and hour laws. *See e.g., Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009); *Cornn v. United Parcel Service, Inc.*, No. C03-2001, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592 (E.D. La. 2002); *Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1 (Ct. App. Md. 2007). The certification order in this case creates an anomaly among those cases involving claims for compensation for time allegedly worked after an employee "clocks in," but before the start of an employee's shift. *Babineau*, 576 F.3d 1183; *Cornn*, 2005 WL 2072091.

In *Cornn*, plaintiffs alleged they were not compensated for "early morning work," *i.e.*, work activities performed after the employee punched in for "check-in" purposes, but before the start of the employee's shift. 2005 WL 2072091 at * 1. Like Wellman, the employer (UPS) had instructed its employees, via written, distributed memorandum, not to undertake certain activities prior to the start of their work shifts and had previously, on numerous occasions, altered time records to ensure employees were paid for time actually spent working outside their scheduled shifts. *Id.* at * 3-4. The court ultimately denied class certification:

> The only class-wide evidence provided by Plaintiffs demonstrates only that package-car drivers enter start times...that sometimes differ from the drivers' scheduled start times, and that UPS only begins to count hours worked from drivers' scheduled start times, or from the punched-in time if the punched-in time is later than the scheduled start times. *This practice would only be unlawful if drivers were actually working during the time between when they punched in and when they were scheduled to start work.* However, there is no common practice among package-car drivers as to when they punch in to

> work. Some drivers may punch in immediately after arriving at the building, while others may punch in just before their scheduled start times. In addition, drivers perform a variety of non-work-related tasks, such as socializing, reading the newspaper, and drinking coffee or tea, after punching in but before their scheduled start times. If a driver punched in thirty minutes prior to his or her scheduled start time but actually did not work during that time, then UPS's practice of calculating hours worked based on the scheduled start time would not be unlawful. *Because the Court cannot determine whether a driver performed work during the interval in question without undertaking individualized inquiries that predominate over any common questions, class certification would be inappropriate.*

Id. at * 5 (evidentiary citations omitted) (emphasis added).

Similarly, in *Babineau*, the court rejected class certification. There, employees filed suit alleging breach of contract and unjust enrichment based upon the employer's "pervasive and long-standing policy" of not paying its employees for time worked after punch-in but before shift start, and after shift end but before punch-out. 576 F.3d at 1185-86. Like Wellman, Fed-Ex had a written employee manual that expressly disclaimed the creation of any contract and prohibited off-the-clock work. *Id.* at 1186. Like Wellman, Fed-Ex presented evidence that employees punched-in early or punched-out late for a variety of personal reasons, including enjoying a beverage, engaging in in-person or telephone conversations or simply relaxing. *Id.* at 1188. Like Wellman, Fed-Ex provided evidence that its employees understood the policy against off-the-clock work and that at least one employee did not "expect to be paid for this time because [he was] not working." *Id.* Finally, like Wellman, Fed-Ex provided evidence showing that if its employees were actually *required* to work outside their shifts, they were compensated in full. *Id.* The Eleventh Circuit ultimately denied class certification, finding "that punch clock records do not provide common proof of any uncompensated work during gap periods – particularly in light of the employee testimony regarding the various non-work-related activities that took place during

the gap periods and the various personal reasons that employees listed for coming in early and staying late." *Id.* at 1192.

Similar analyses exist in cases involving claims for compensation allegedly due and owing as a result of hours worked "off-the-clock" generally, including hours worked in lieu of rest or meal periods. *Basco*, 216 F. Supp. 2d 592; *Cutler*, 927 A.2d 1. For example, in *Basco*, current and former employees filed suit in state court alleging violations of state wage and hour laws as well as breach of contract. Specifically, the employees alleged that they were not provided with mandatory rest and meal breaks, were required to work "off-the-clock," and were therefore not compensated for all hours worked. 216 F. Supp. at 595. With respect to their claims for breach of contract, the *Basco* plaintiffs alleged Wal-Mart entered into oral contracts with its employees at the time of hire and that the terms of those agreements were evidenced in employee handbooks and orientation materials. *Id.* at 596-97. Like Wellman, Wal-Mart's handbook (1) contained an express disclaimer that it did not constitute a contract, and (2) expressly prohibited working off-the-clock. *Id.* at 596.

The *Basco* Court separately analyzed each cause of action alleged by the plaintiffs. *Id.* at 602-03. With respect to the claim for breach of contract, the court ultimately held that common questions did not predominate as required by applicable law:

> Plaintiffs' allegations that defendants entered into and breached individual, oral contracts for rest and meal breaks with each of the approximately 100,000 class members during their orientation sessions will depend on the resolution of highly specific issues including: (1) whether defendant's employees made offers to plaintiffs, (2) if so, whether those offerors had apparent or actual authority to make the offer, (3) what were the conditions of the offer and terms agreed on by the parties, and (4) whether, and to what extent, was each contract breached. While plaintiffs reason that Wal-Mart had a system-wide policy to enter into these contracts with its employees, every "contract" at issue in this case was created at a different time, by different employees, and under different circumstances. At trial, each plaintiff will be required to establish the existence of a contract with defendant through offer and

> acceptance and prove the terms of the contract and it is possible that no two plaintiffs' allegations concerning the formation or terms of their contract will be the same.

Id. at 602.

Similar facts precluded certification of the *Basco* plaintiffs' wage and hour claims:

> Individual issues also predominate plaintiffs' claims that they were required to work off-the-clock. In this instance, however, the individualized issues will arise from the myriad of possibilities that could be offered to explain why any one of the plaintiffs worked off-the-clock. As defendant noted, as to any of the class members it may argue that: (1) the particular class member did not in fact work off-the-clock, (2) any instructions received to work off-the-clock without compensation were outside the scope of authority and directly contrary to well established policy and practice, (3) even if a particular class member did work off-the-clock, that employee unreasonably failed to avail themselves of curative steps provided by defendant to be compensated for that work, (4) if a class member received instructions from a fellow class member such as a personnel manager or hourly supervisor to work off-the-clock and/or not to request a time adjustment, then the class member unreasonably relied on instructions directly contrary to Wal-Mart's express policy, (5) a class member had an actual and/or constructive knowledge of Wal-Mart's policies banning off the clock work and voluntarily chose to engage in such work in deviance of that policy for any one of a number of reasons, and (6) that a particular class member has a unique animus toward Wal-Mart or its employees that would cause that class member to fabricate or inflate his or her claims.

Id. at 603. To establish liability in the instant case, Plaintiffs must present identical proof as the *Basco* plaintiffs – proof the *Basco* court found to preclude class certification.

Employees in *Cutler* alleged that Wal-Mart employed a "systematic and clandestine scheme" to deprive its employees of rest and meal breaks and thus not compensate them for hours worked. 927 A.2d at 4. The employees alleged causes of action for, *inter alia*, breach of contract and violation of Maryland wage and hour laws. *Id.* Like Plaintiffs, the employees relied upon handbook provisions and a written corporate policy addressing rest and meal breaks. *Id.* at 4-5. The handbook contained express disclaimers regarding contract formation; the policy expressly provided that managerial employees "may not require nor

request Associates to perform work during their break and meal periods." *Id.* at 5. The policy further provided that employees who were instructed to work through such periods "will receive compensation for the entire period at their regular rate of pay." *Id.*

Similar to the time clock system employed by Wellman, employees were required to swipe electronic cards at the beginning and end of work shifts or breaks. *Id.* Like Wellman, the timekeeping system was merely the starting point for payroll – it was subject to manual review and adjustment. *Id.*

Analyzing each cause of action according to its elements, the trial court denied class certification with respect to the claim for breach of contract:

> Because appellants presented no evidence that tended to show that there was an implied contract common to all, or even most, members of the class, the circuit court properly concluded that the possible existence of thousands of implied contracts, one for each member of the proposed class, warranted a finding that individual issues predominated on appellants' contract claims. The circuit court correctly concluded that, absent a contract applicable to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees.

Id. at 10. Notably, the court rejected the argument that such a finding constituted an improper consideration of the merits. *Id.*

The appellate court also affirmed the trial court's denial of certification with respect to statutory wage and hour claims, finding that "[e]vidence of each class member's time records, as well as individual explanations for breaks missed and individual testimony regarding work performed off the clock, would be required in order for the employees to prove their claims of...violation of Maryland labor laws." *Id.* at 12.

The cases discussed above are representative of a large body of law acknowledging that individualized issues predominate in wage cases involving state law statutory violations and common law claims of breach of contract. While the Chamber recognizes these cases

are not binding upon this Court, it believes these cases are factually indistinguishable and legally sound. There is guidance for the proposition that Oklahoma's appellate courts, when faced with a question of first impression such as is presented here, may be persuaded by the class action determinations of other jurisdictions. *Martin v. Hanover Direct, Inc.*, 2006 OK CIV APP 33, ¶ 29, 135 P.3d 251 ("This Court recognizes that the opinion by the New Jersey Superior Court in *Morris* is not precedential authority for this Court. However, keeping in mind the similarity in facts between the two cases and the causes of action alleged in each litigation, this Court finds the *Morris* court's analytical, well-reasoned, and well-written opinion persuasive.")

The certification order in the instant case is a significant departure from the developed body of law in other jurisdictions described herein. Permitting such a class action order to stand will once again distinguish Oklahoma from its fellow state and federal tribunals - in a way the Oklahoma Legislature was trying to rectify when it amended § 2023.

This Court should reverse the trial court's order in order to preserve continuity in the context of class certification.

CONCLUSION

Erroneous class certification decisions impose unique and unwarranted burdens on the litigants, other employers, the courts, and society. Plaintiffs' request for class certification, reviewed under the applicable standards, does not meet the rigorous standards of Section 2023 and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2010, 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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