S200923

IN THE SUPREME COURT OF CALIFORNIA

SAM DURAN, MATT FITZSIMMONS, individually and on behalf of other members of the general public similarly situated,
Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT
DIVISION ONE, CASE NOS. A125557 AND A126827

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT AND APPELLANT U.S. BANK NATIONAL ASSOCIATION

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Defendant and Appellant.

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC.

Pursuant to California Rules of Court, rule 8.520(f), amici curiae, Chamber of Commerce of the United States of America (the Chamber) and Retail Litigation Center, Inc. (RLC), respectfully request permission to file the accompanying amici curiae brief in support of defendant and appellant U.S. Bank National Association (U.S. Bank).[1]

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, their members, or their counsel made a monetary contribution intended
(continued...)

The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size. The Chamber has many members located in California and others who conduct substantial business in the state. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

Few issues are of more concern to American business than those pertaining to class actions, and the issues in this case are unusually problematic. During the trial in this action, the trial court dramatically restricted the fundamental right of defendant U.S. Bank to defend itself. Although U.S. Bank presented over 70 sworn statements showing its defenses to the claims of individual class members, the trial court refused to consider any of that evidence and instead allowed plaintiffs to establish class liability solely by the use of statistical sampling. If allowed to stand, such use of statistical sampling will violate the fundamental due process rights of the Chamber's members and all companies doing business in California by denying them the right to present their defenses to liability.

The RLC is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The

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(...continued)
to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(A).)

RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The issues here are of crucial importance to the retail industry, which often stands on the front line of class-action litigation. If retailers are deprived of their fundamental right to present evidence showing their defenses to the claims of individual class members, retailers will inevitably be found liable to individuals who lack valid claims. Such phantom liability will lead to inflated damage awards and settlements. The use of statistical sampling to preclude individual defenses to liability will undermine the due process right of retailers and other defendants and will impose a crippling and unwarranted burden that retailers in this economy can scarcely afford.

Counsel for amici have reviewed the briefs on the merits filed in this case and believe this court will benefit from additional briefing regarding the dangers of permitting statistical sampling to preclude individual defenses to liability.

Accordingly, amici respectfully request the court accept and file the attached amici curiae brief.

April 2, 2013

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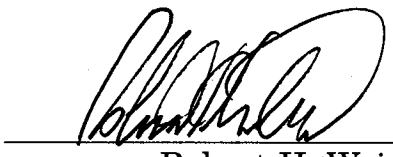
By: 
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AMICI CURIAE BRIEF

INTRODUCTION

In this case, the trial court refused to permit defendant to present evidence that at least 78 of 260 total class members lacked valid claims and instead allowed plaintiff to show liability against all class members through statistical sampling. This decision is wrong because statistical sampling must not be permitted to establish class liability when, as here, the defendant has presented evidence showing defenses to the claims of individual class members. Such misuse of statistical sampling violates the defendant's due process right to defend the claims against it. When misused in this manner, statistical sampling also contravenes the fundamental rule that class action procedure not alter the parties' substantive rights.

Both the United States and California Constitutions guarantee a litigant the due process right to a full opportunity to present every available defense to the claims against it. That right applies fully in a class action. When the defendant has presented evidence showing a defense to the claims of at least some members of the class, statistical sampling that allows liability to be extrapolated from a mere sampling of the class—without considering the evidence of individual defenses—abrogates the defendant's right to prove it is not liable. Such preclusive use of statistical sampling violates due process.

This court has held that class actions in California, as under federal law, are procedural devices that should not be altered by courts to modify substantive law. On this basis, the United States Supreme Court has rejected the type of "Trial by Formula" that occurred here. (*Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __ [131 S.Ct. 2541, 2561, 180 L.Ed.2d 374] (*Wal-Mart*); see also *Comcast Corp. v. Behrend* (Mar. 27, 2013, No. 11-864) __ U.S. __ [2013 WL 1222646, at p. *5] (*Comcast*) ["a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory"].) The *Wal-Mart* court held that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Ibid.*) Such an approach would modify substantive law and, indeed, would jeopardize the defendant's due process rights. Likewise, the misuse of statistical sampling here to prevent the defendant from proving individual defenses to liability must be rejected as an impermissible modification of the substantive law and an infringement of the defendant's constitutional rights.

LEGAL ARGUMENT

I. DEFENDANTS HAVE A DUE PROCESS RIGHT TO BE HEARD AND TO PRESENT EVERY AVAILABLE DEFENSE TO CLASS ACTIONS.

The United States and California Constitutions guarantee the right to due process. (U.S. Const., 14th Amend., § 1 [no state shall

"deprive any person of life, liberty, or property, without due process of law"]; Cal. Const., art I, §§ 7, 15 [no person shall be "deprived of life, liberty, or property without due process of law"].)

Fundamental to the due process right " 'is the opportunity to be heard.' " (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267 [90 S.Ct. 1011, 25 L.Ed.2d 287], quoting *Grannis v. Ordean* (1914) 234 U.S. 385, 394 [34 S.Ct. 779, 58 L.Ed. 1363].) Due process requires a "meaningful opportunity to be heard and to explain one's actions." (*People v. Coleman* (1975) 13 Cal.3d 867, 873.)

Before a defendant can be deprived of property, due process thus requires the defendant be afforded " 'an opportunity to present *every available defense.*' " (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 [127 S.Ct. 1057, 166 L.Ed.2d 940], emphasis added, quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66 [92 S.Ct. 862, 31 L.Ed.2d 36] (*Lindsey*).) This principle has long been recognized. (See, e.g., *United States v. Armour & Co.* (1971) 402 U.S. 673, 682 [91 S.Ct. 1752, 29 L.Ed.2d 256] [the "right to litigate the issues raised [is] . . . guaranteed . . . by the Due Process Clause"]; *Nickey v. State of Mississippi* (1934) 292 U.S. 393, 396 [54 S.Ct. 743, 78 L.Ed. 1323] [due process satisfied when "all available defenses may be presented to a competent tribunal"].)

This court had described class actions under California law as procedural devices. "Class actions are provided only as a means to enforce substantive law." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462 (*City of San Jose*); accord, *Deposit Guaranty Nat. Bank, Etc. v. Roper* (1980) 445 U.S. 326, 332 [100 S.Ct. 1166,

63 L.Ed.2d 427] [the right to proceed as a class is "a procedural right only, ancillary to the litigation of substantive claims"].)

Because a California class action is a purely procedural device, courts must not use class treatment to alter the substance of a party's rights or liabilities. As this court held in *City of San Jose*, "Altering the substantive law to accommodate [class] procedure would be to confuse the means with the ends—to sacrifice the goal for the going." (*City of San Jose, supra,* 12 Cal.3d at p. 462; accord, *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749 ["it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen"]; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1014 ["Class certification does not serve to enlarge substantive rights or remedies"].)

Federal law is no different. The federal class-action device "leaves the parties' legal rights and duties intact and the rules of decision unchanged." (*Shady Grove Orthopedic Associates v. Allstate Ins.* (2010) 559 U.S. 393, ___ [130 S.Ct. 1431, 1443, 176 L.Ed.2d 311] (plur. opn. of Scalia, J.) (*Shady Grove*); *Sikes v. Teleline, Inc.* (11th Cir. 2002) 281 F.3d 1350, 1365, abrogated on another ground in *Bridge v. Phoenix Bond & Indem. Co.* (2008) 553 U.S. 639 [128 S.Ct. 2131, 170 L.Ed.2d 1012] ["class treatment may not serve to lessen the plaintiffs' burden of proof"].)

Even if the class action device in California could be used by courts to alter substantive law, however, it certainly could not be used to deprive a litigant of constitutional protections. The due

process right to present every available defense applies fully in a class-action lawsuit. Although "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," it is well settled "that extreme applications" of this principle "may be inconsistent with a federal right that is 'fundamental in character.' " (*Richards v. Jefferson County, Ala.* (1996) 517 U.S. 793, 797 [116 S.Ct. 1761, 135 L.Ed.2d 76], quoting *Postal Telegraph Cable Co. v. City of Newport, K.Y.* (1918) 247 U.S. 464, 475 [38 S.Ct. 566, 62 L.Ed. 1215]; e.g., *People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 16 [recognizing defendant's due process right in class action context].) Class actions may " 'achieve economies of time, effort, and expense,' " but only when those goals can be achieved " 'without sacrificing procedural fairness or bringing about other undesirable results.' " (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 615 [117 S.Ct. 2231, 138 L.Ed.2d 689], quoting Adv. Comm. Notes, 28 U.S.C.App., p. 697.)

When a state "abrogat[es] a well-established common-law protection," it creates "a presumption that its procedures violate the Due Process Clause." (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 430 [114 S.Ct. 2331, 129 L.Ed.2d 336].) Of course, the due process right does not prohibit all changes to established procedure. (*Ibid.*) But the trial court here did not just deviate from an established procedure. Instead, the court abrogated the defendant's right to be heard and to present its defenses to liability. The use of statistical sampling to deny the defendant its right to

present individual defenses to liability presumptively shows the violation of its due process rights.

II. THE TRIAL PLAN HERE VIOLATED DUE PROCESS AND THE FUNDAMENTAL REQUIREMENT THAT CLASS ACTION PROCEDURE NOT ALTER THE PARTIES' SUBSTANTIVE RIGHTS.

In *Wal-Mart*—cited with approval in other respects by this court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*)—the United States Supreme Court relied on the core principles of a right to a defense in rejecting the type of "Trial by Formula" that occurred here. (*Wal-Mart, supra,* 131 S.Ct. at p. 2561.) In that case, the Ninth Circuit affirmed the district court's class certification on the assumption that statistical sampling could be used to decide the defenses to individual claims. Thus, the claims of a sample set of class members were to be tried, and the results of those trials were to be applied to the remaining class without further individualized proceedings. (*Ibid.*) The Supreme Court "*disapprove[d] that novel project*" because "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." (*Ibid.*, emphasis added.)

The *Wal-Mart* court thus reversed on the ground that a federal class action cannot " 'abridge, enlarge or modify any substantive right.' " (*Wal-Mart, supra,* 131 S.Ct. at p. 2561, quoting 28 U.S.C. § 2072(b).) *Wal-Mart* applies with equal force here,

because under federal law, like under California law, class actions are procedural devices that do not modify substantive rights. (See, e.g., *City of San Jose, supra,* 12 Cal.3d at p. 462 & fn. 9; *Shady Grove, supra,* 130 S.Ct. at p. 1443.)

When California and federal class procedures are similar, as they are on this point, federal authorities such as *Wal-Mart* are highly persuasive. (See *Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839 [noting the court's reliance in the class action context on "federal case law, in the absence of controlling California authority"]; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 ["we have previously suggested that trial courts, in the absence of controlling California authority, utilize the class action procedures of the federal rules"]; *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1119, fn. 4, quoting *Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1264, fn. 4. [" 'California courts may look to federal authority for guidance on matters involving class action procedures' "]; *Danzig v. Superior Court* (1978) 87 Cal.App.3d 604, 610 ["Where, as here, there is no controlling California authority in a class action and the California procedural rule involved is identical to the corresponding federal rule, federal cases construing the rule are particularly persuasive authority"].)

The class action "procedural protections" at issue in *Wal-Mart* are "grounded in due process." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 901 [128 S.Ct. 2161, 171 L.Ed.2d 155].) Numerous courts have thus found due process violations on similar facts. The Fifth Circuit applied due process principles when rejecting a class-action trial

plan that, like the plan here, would have allowed the claims of all class members to be decided based on a trial of representative claims. (*In re Fibreboard Corp.* (5th Cir. 1990) 893 F.2d 706, 711 (*In re Fibreboard*).) Under the trial plan in that case, the defendants were "exposed to liability not only in 41 cases actually tried with success to the jury, but in 2,990 additional cases whose claims [were] indexed to those tried." (*Ibid.*) The Fifth Circuit held this plan eliminated "the requirement that a plaintiff prove both causation and damage" and, by doing so, "inevitably restate[d] the dimensions of tort liability." (*Ibid.*)

Other decisions are in accord in recognizing this fundamental due process right to present all defenses to liability. (See, e.g., *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 232, quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith* (3d Cir. 2001) 259 F.3d 154, 191-192 (*Newton*) [" 'defendants have the right to raise individual defenses against each class member' "]; *In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 853 ["The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation"]; *Western Elec. Co. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199 [trial court abused its discretion by denying defendants the right to obtain discovery on the claims of the individual class members; "to deny [defendants] the right to present a full defense on the issues would violate due process"]; *Southwestern Refining Co., Inc. v. Bernal* (Tex. 2000) 22 S.W.3d 425, 437 (*Southwest Refining Co.*) ["basic to the

right to a fair trial—indeed, basic to the very essence of the adversarial process—is that each party have the opportunity to adequately and vigorously present any material claims and defenses"].)[2]

The due process violation here was manifest. The trial court excluded sworn statements that 78 of 260 class members lacked valid claims. (Typed opn., 5, fn. 11; typed opn., 54 & fn. 66.) Those same class members "are now slated to recover at least $6 million from [defendant], including prejudgment interest." (Typed opn., 54, fn. 66.) Indeed, the judgment awarded about $160,000 to four former class representatives who were removed after they testified at deposition to facts rebutting their claims. (Typed opn., 54.)

As the Court of Appeal here properly recognized, whether " 'a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice.' " (Typed opn., 56, quoting *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1366.) Such fairness cannot be reconciled with the use of statistical sampling to preclude evidence

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[2] Justice Scalia has recognized similar due process concerns when deciding an application to stay enforcement of a judgment. (*Philip Morris USA Inc. v. Scott* (2010) 561 U.S. __ [131 S.Ct. 1, 3, 177 L.Ed.2d 1040] (Scalia, J., Circuit Justice) (*Scott*).) In that case, the Louisiana Court of Appeal affirmed a fraud judgment against the defendants despite a trial plan that "eliminated any need for [class-action] plaintiffs to prove, and denied any opportunity for [defendants] to contest," the reliance element of plaintiffs' fraud claim. (*Ibid.*) Justice Scalia concluded it was "significantly possible that the judgment below will be reversed" as defendants had a "due-process right to '. . . present every available defense.' " (*Id.* at pp. 3-4, quoting *Lindsey, supra*, 405 U.S. at p. 66.)

showing defenses to the claims of individual class members. The businesses and retailers whose interests amici represent are frequently targets of class action lawsuits. Both fairness and due process dictate that they be afforded the right to defend the claims against them.

Whether viewed under federal or California law, the type of trial plan used here and in *Wal-Mart* must fail. The court here applied a standard that was substantively different from the one required by law when it allowed the use of statistical sampling to establish class liability after the defendant presented evidence supporting individual defenses to liability. The effect of the trial plan below was "that individual plaintiffs who could not recover had they sued separately can recover only because their claims were aggregated with others' through the procedural device of the class action." (*Scott, supra,* 131 S.Ct. at p. 4; see also *Comcast, supra,* 2013 WL 1222646, at p. *6] [trial court erred by accepting damages model in class action that was not limited to the antitrust theory of anticompetitive impact at issue]; *Wang v. Chinese Daily News, Inc.* (9th Cir. Mar. 4, 2013, No. 08-56740) __ F.3d __ , __ [2013 WL 781715, at p. *6] [defendants are "entitled to litigate any individual affirmative defenses they may have to class members' claims"]; *Southwestern Refining Co., supra,* 22 S.W.3d at p. 437 ["With the help of models, formulas, extrapolation, and damage brochures, plaintiffs may indeed be able to present their case in an expeditious manner. . . . But, while [defendant] may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually"].)

Moreover, the class certification here does not excuse the Trial by Formula that was rejected in *Wal-Mart* for the additional reason that, even after class certification, any individual issues must "effectively be managed." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334-335 (*Sav-On*); see *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1105-1106 [there is "no per se or categorical bar . . . to a court's finding medical monitoring claims appropriate for class treatment, so long as any individual issues the claims present are *manageable*" (emphasis added)].)

Thus, even when the predominance of common issues supports class certification, " 'each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages.' " (*Sav-On, supra,* 34 Cal.4th at p. 333.) If individual claims remain after trial of the common issues, "each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity *to contest each individual claim* on any ground not resolved in the trial of common issues." (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1210, emphasis added.)

Assuming common issues predominate yet a defense to liability raises individual issues, the trial court must manage the individual issues and cannot abrogate the defendant's right to present its defenses to liability. Clearly, statistical sampling is not an appropriate means of managing these individual issues if the sampling allows liability to be extrapolated in a way that abrogates the defendant's right to prove it was not liable to at least some of

the class members. Such use of statistical sampling allows class action procedure to alter the defendant's substantive right—and represents the very Trial by Formula *Wal-Mart* rejected.

III. PLAINTIFFS' AUTHORITIES ARE UNPERSUASIVE AS THEY DO NOT ADDRESS THE RIGHT TO PRESENT DEFENSES TO LIABILITY.

Citing dicta both from this court's opinion in *Sav-On* and Justice Werdegar's concurring opinion in *Brinker*, plaintiffs argue this court has "made clear that statistical methods, including sampling, are appropriate in class action cases." (OBOM 34-35.) But in *Sav-On* and *Brinker* this court reviewed class certification orders, not liability determinations. (See *Sav-On*, *supra*, 34 Cal.4th at p. 324; *Brinker*, *supra*, 53 Cal.4th at p. 1017.)

Plaintiffs also reprise an argument that was rejected in *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341. Like the plaintiffs in that case, plaintiffs here rely on Justice Werdegar's comment that " ' "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." ' " (*Id.* at p. 1369, quoting *Brinker*, *supra*, 53 Cal.4th at p. 1054 (conc. opn. of Werdegar, J.); see OBOM 35.) But whether or not statistical tools can be helpful, they were abused here. Such tools are inappropriate in a case "not concerned with determinations regarding the 'extent of liability,' but more fundamentally with *the fact* of liability." (*Morgan*, at p. 1369.)

Moreover, plaintiffs misplace their reliance on *Sav-On* and *Brinker* because, as discussed above, those cases recognize that class certification is appropriate only when any individual issue "may effectively be managed." (*Sav-On, supra,* 34 Cal.4th at p. 334; accord, *Brinker, supra,* 53 Cal.4th at p. 1024 [in deciding certification, the court must determine "whether there are ways to manage effectively proof of any elements that may require individualized evidence"]; *id.* at p. 1054 (conc. opn. of Werdegar, J.) ["certification will hinge on the manageability of any individual issues"].) Individual issues are not managed by the trial court's refusal to accept any evidence showing individual defenses to liability. That is *mismanagement,* not management.

Plaintiffs cite *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715 (*Bell*) as the "leading California case on statistical sampling." (OBOM 35.) But *Bell* addressed the issue of damages. The defendant's "aggregate liability" in that case "was *not* affected by the method of determining individual entitlements to members of the plaintiff class." (*Bell,* at p. 752.) Here, by contrast, the trial court used statistical sampling to preclude specific evidence of defenses to liability. Thus, the trial court refused to consider sworn statements from over 70 class members even though the statements contained "specific evidence refuting their potential claims for recovery." (Typed opn., 54.) Plaintiff's "leading" case merely confirms the unprecedented nature of the trial plan below.

Plaintiffs argue that *Bell* "cited with approval many cases endorsing statistical methodology to determine *liability*."

(OBOM 35.) Although plaintiffs do not specify these cases, they apparently refer to *Hilao v. Estate of Marcos* (9th Cir.1996) 103 F.3d 767, 786, on which *Bell* relied for its conclusion that statistical sampling did not necessarily violate due process. (*Bell, supra,* 115 Cal.App.4th at pp. 751-752, 755.) Plaintiffs omit to mention that the United States Supreme Court has disapproved *Hilao*'s "Trial by Formula." (*Wal-Mart, supra,* 131 S.Ct. at p. 2561; see *id.* at p. 2550; see also *Stone v. Advance America* (S.D.Cal. 2011) 278 F.R.D. 562, 566, fn. 1 ["The Supreme Court's disapproval of the *Hilao* method largely eliminates a 'trial by formula' approach to use statistics to extrapolate average damages for an entire class, at least when the statute contains an individualized defense"].)

In short, none of the authorities cited by plaintiffs can or do hold that statistical sampling may be used to deprive a defendant of the right to present a defense to liability.

IV. IF ALLOWED, A TRIAL BY FORMULA WILL UNFAIRLY PRESSURE DEFENDANTS TO SETTLE CLASS ACTIONS AND BURDEN THE STATE'S ECONOMY.

Even without the use of a Trial by Formula, the certification of a large class may "so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." (*Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476 [98 S.Ct. 2454, 57 L.Ed.2d 351].) The very fact of certification gives a class-action

plaintiff enormous leverage in settlement negotiations; lower courts have variously described the pressure on defendants to settle in the wake of certification decisions as "inordinate," "hydraulic," and "intense." (See *Newton*, *supra*, 259 F.3d at p. 164; *Matter of Rhone-Poulenc Rorer Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298; see also Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA* (2006) 106 Colum. L.Rev. 1872, 1875 ["Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements"].) Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (*Rhone-Poulenc*, 51 F.3d at p. 1298, quoting Friendly, Federal Jurisdiction: A General View (1973) p. 120.)

This leverage will increase exponentially if statistical sampling is permitted to preclude the defendant from showing individual defenses to the claims of individual class members. Such a Trial by Formula would "inevitably restate[ ] the dimensions of tort liability." (*In re Fibreboard*, *supra*, 893 F.2d at p. 711.) By violating the defendant's fundamental right to present every defense (see *Lindsey*, *supra*, 405 U.S. at p. 66), the Trial by Formula would in most cases coerce the only rational alternative—settlement.

The costs of settling such actions would not simply fall on individual defendants; they would impose a drag on this state's economy. "No one sophisticated about markets believes that

multiplying liability is free of cost." (*S.E.C. v. Tambone* (1st Cir. 2010) 597 F.3d 436, 452 (conc. opn. of Boudin, J.). Here, the trial plan multiplied liability by preventing the defendant from proving its defenses to the claims of numerous class members. The inflated costs of settling such claims would "get passed along to the public." (*Id.* at p. 453 (conc. opn. of Boudin, J.).) When confronted with such inflated costs, a company might pass some of the costs on to consumers in the form of higher prices. Or it might be forced to take some other action to offset those costs, such as scaling back its operations. In either situation, the ultimate burden would be borne by the public.

These serious policy implications all flow from the use of statistical sampling to preclude individual defenses to liability and underscore the importance of ensuring that every defendant is afforded the due process right to present a defense.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court of Appeal's judgment be affirmed. The trial court abused its discretion by approving a Trial by Formula that modified California substantive law and denied defendant its due process right to present its defenses to liability.

April 2, 2013

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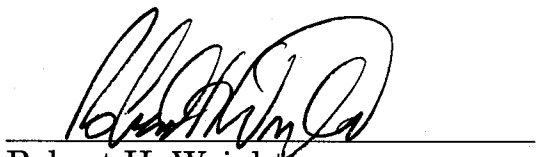
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 4,086 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: April 2, 2013



Robert H. Wright

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

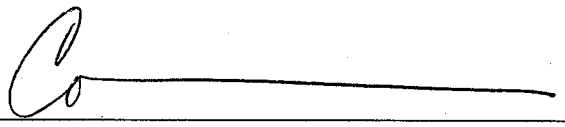
On April 2, 2013, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT AND APPELLANT U.S. BANK NATIONAL ASSOCIATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2013, at Encino, California.



Connie Christopher

SERVICE LIST
Duran v. U.S. Bank National Association
Case Number S200923

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