No. S_____



**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

CHRISTOPHER WILLIAMS,
on behalf of himself and all others similarly situated,

Petitioners and Plaintiffs,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA,

Respondent,

ALLSTATE INSURANCE COMPANY,

Real Party in Interest.

After The Denial Of A Petition For Writ Of Mandate by the Court of Appeal, Second District, Division 8, Court of Appeal No. B244043
Los Angeles County Superior Court Case No. BC382577

# PETITION FOR REVIEW

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| LAW OFFICES OF KEVIN T. BARNES<br>Kevin T. Barnes, Esq. (SBN 138477)<br>Gregg Lander, Esq. (SBN 194018)<br>5670 Wilshire Boulevard, Suite 1460<br>Los Angeles, CA 90036-5664<br>Telephone: (323) 549-9100<br>Facsimile: (323) 549-0101 | TRUSH LAW OFFICE<br>James M. Trush, Esq. (SBN 140088)<br>695 Town Center Drive, Suite 700<br>Costa Mesa, CA 92626-7187<br>Telephone: (714) 384-6390<br>Facsimile: (714) 384-6391 |

Attorneys for Petitioner CHRISTOPHER WILLIAMS

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## ISSUES PRESENTED

This petition raises two issues of widespread importance to millions of California employers and their employees as well as to all Californians who utilize class action litigation to remedy wrongs on a collective basis:

**ISSUE 1**: Whether, after *Wal-Mart Stores, Inc. v. Dukes* ("*Dukes*"), —— U.S. ——, 131 S.Ct. 2541 (2011), all class action defendants have a universal right to prove an affirmative defense on an individualized basis.

**ISSUE 2**: Whether, after *Dukes*, class action plaintiffs may no longer use statistical sampling evidence to establish commonality.

## INTRODUCTION

Below, the trial court certified three wage and hour classes. Then, based solely on the United States recent pronouncement in *Dukes* (and not based on any new facts or evidence), the trial court reversed course and *decertified* two of the classes, concluding: "Under the changed law, ***the class action procedure is no longer appropriate*** . . . ." (11 PE 3149) (emphasis added). In doing so, the trial court made two incredibly sweeping holdings.

**First**, the court has taken a fairly narrow ruling by the Supreme Court (applicable solely to class certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure and Title VII's unique, detailed remedial statutory scheme prohibiting employment discrimination) and broadly concluded that, after *Dukes*, all class action defendants are entitled to litigate any affirmative defenses with respect to the claims of each and every individual class member. The practical effect of that ruling is that going forward class action defendants will easily and routinely defeat virtually all class certification efforts merely by asserting that the right to litigate any affirmative defense with respect to each class member renders class litigation unmanageable. In other words, the court below essentially concluded that class action litigation in California has largely been

eliminated. That ruling, if left unchallenged, will have long-lasting and far reaching implications – not only to millions of California employees who rely on wage and hour class action to protect their rights under California law – but to all Californians who seek to participate in class action litigation to remedy wrongs on a collective basis. In sum, the lower court's ruling has imposed a virtually insurmountable hurdle to class certification in any class action litigation.

**Second**, the court also broadly concluded that, after *Dukes*, class action plaintiffs may no longer use statistical sampling evidence to establish commonality. As an initial matter, *Dukes* made no such sweeping assertion and simply does not hold that statistical sampling cannot be used to establish commonality. Moreover, the lower court's rejection of statistical sampling evidence runs directly counter to this Court's long-stated opinion that trial courts are vested with broad discretion to consider statistical sampling in assessing commonality. Finally, even if *Dukes* did somehow preclude the use of statistical sampling as method of calculating individual damages, that would not preclude Court's from certifying classes with respect to liability issues. The lower court's conclusion to the contrary rests on an unsupported interpretation of *Dukes* and runs directly contrary to other California authorities addressing this issue.

## WHY REVIEW SHOULD BE GRANTED

This Court should grant the Petition for Review for several reasons, including: (1) the issue is already pending before this Court; (2) to settle important questions of law broadly applicable to all class action litigants; and (3) to secure uniformity of decision.

**First**, the issues presented by this Petition for Review are ***presently pending before this Court***. *See* Jon B. Eisenberg, *et al.*, *California Practice Guide: Civil Appeals and Writs* ("Eisenberg"), ¶ 13:73.1 (2012) ("A petition for review is especially likely to be granted if it raises an issue

already pending in the supreme court or so closely related to an already-pending issue as to indicate that both issues should be decided in order to clarify the law in a particular area."). In *Duran v. U.S. Bank Nat. Assn.* (2012) 137 Cal.Rptr.3d 391, review granted May 16, 2012 (S200923), the California Court of Appeal held, *inter alia*, that class action defendants: (1) have a due process right to assert an affirmative defense as to each potential class member (*id.* at 426, 434); and (2) after *Dukes* "representative sampling may not be used to prevent employers from asserting individualized affirmative defenses." *Id.* at 429 n.65. On May 16, 2012, this Court granted a Petition for Review in *Duran* so that it could consider, *inter alia*, whether: (1) a class action defendant has "a due process right to assert its affirmative defense against every class member"; and (2) statistical sampling and/or representative evidence can be used to prove classwide liability. (*Duran* Petition for Review at 1).

The instant Petition for Review raises two issues – whether, after *Dukes* (1) all class action defendants have a universal right to prove an affirmative defense on an individualized basis; and (2) class action plaintiffs may no longer use statistical sampling evidence to establish commonality. These two issues are identical to issues presently pending before this Court as a result of the *Duran* Petition for Review. Accordingly, this Court should grant and hold this petition pending resolution of the issues raised in the *Duran* Petition for Review. *See* Cal. Rules of Court, Rule 8.512(d)(2) ("On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court."); Eisenberg, ¶ 13:125 ("[The] 'grant and hold' procedure commonly occurs when several appeals present the same issue and in fact accounts for a significant number of cases granted review.").

**Second**, Supreme Court review is also appropriate "to settle an important question of law." Cal. Rules of Court, Rule 8.500(b)(1). Below, the Court held that *Dukes* has granted every class action defendant the right litigate any affirmative defense on an individual, member-by-member basis. The lower court's ruling is, in a word, shocking. The conclusion that every class action defendant has a due process right to litigate its affirmative defenses on an individualized basis essentially guts class action litigation *which is essential to ensure effective enforcement of California wage and hour laws*.

Importantly, this Court has a long-standing policy in favor of class action litigation. "[T]his state has a public policy which encourages the use of the class action device . . . ." *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 473, 174 Cal.Rptr. 515. "[C]lass actions have been statutorily embraced by the Legislature whenever 'the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .'" *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021, 139 Cal.Rptr.3d 315 (*quoting Cal. Civ. Proc. Code* § 382). "Courts long have acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial system." *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434, 23 Cal.4th 429; *see also Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578, 105 Cal.Rptr.2d 896 ("As a general proposition, class actions are favored in California."). "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Richmond*, 29 Cal.3d at 469 (quotation

omitted). "Generally, a class suit is appropriate 'when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.'" *Linder*, 23 Cal.4th at 435 (quotation omitted); *see also Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 935, 179 Cal.Rptr. 287 ("[T]he very purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights.").

California's long-standing policy in favor of class action litigation is particularly strong in the area of wage and hour litigation. California "Labor Code section 1194 confirms 'a clear public policy . . . that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers.'" *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340, 17 Cal.Rptr.3d 906 (quotation omitted); *see also Gentry v. Superior Court* (2007) 42 Cal.4th 443, 64 Cal.Rptr.3d 773 (class actions are "needed to assure the effective enforcement of statutory policies") (quotation omitted); *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 741, 9 Cal.Rptr.3d 544 ("[T]he class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights and statutory sanctions."); *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1538, 87 Cal.Rptr.3d 518 ("[W]age and hour disputes . . . routinely proceed as class actions.") (quotation omitted).

The trial court's conclusion has far-reaching implications to all California employees (and other California citizens) who seek to participate in class action litigation to remedy wrongs on a collective basis because litigating on an individual claims is simply too cost prohibitive, thereby permitting wrongful conduct to remain undeterred. If allowed to stand, the lower court's ruling will upend this Court's long-standing policy in favor of

class action litigation and will have the practical effect of virtually ending class action litigation in California. Obviously, such a result would serve as a nearly insurmountable detriment to class action litigation initiated on behalf of potentially millions of California employees who (until now) were able to use class action litigation to vindicate their rights to proper compensation. The lower court's holding would also extend far beyond the wage and hour area and severely limit class action litigation in other contexts, including consumer protection, product liability and construction defect cases. In short, the ruling below concerning granting class action defendant's the unfettered right to individually litigate affirmative defenses against each class member raises a fundamental issue relating to the health and welfare of California employees.[1]

Tellingly, even the trial court expressed the opinion that *Dukes* was a "game changer" and that the question as to "how do we handle [post-*Dukes* class actions] is something that is important." (2 PE 587). The trial court also readily acknowledged that numerous additional cases are "going to start coming in." *Id.* Not surprisingly, the trial court stated that: "***We badly need clarification in this field of law***." (11 PE 3142) (emphasis added). In short, given the widespread importance of the issues raised by this Petition for Review, review by this Court is especially important.

**Finally**, Supreme Court review is "necessary to secure uniformity of decision . . . ." Cal. Rules of Court, Rule 8.500(b)(1). The *Dukes* decision, as evidenced by the decision below, has caused widespread confusion among courts and litigants concerning the application of *Dukes* to class action litigation. Since *Dukes*, California state and federal courts have

[1] In addition, the court below also held that class action plaintiffs may no longer use statistical sampling evidence to establish commonality. This ruling also raises a critical question applicable to virtually all class action litigation.

reached inconsistent results with respect to both of the inter-related issues raised by this Petition for Review: (1) defendant's purported right to individualized determination of any affirmative defense; and (2) the purported inability of class action plaintiffs to utilize statistical sampling to establish commonality.

For example, some courts (including the Court below) have concluded that, after *Dukes*, individualized determination preclude certification and/or that plaintiffs cannot utilize statistical sampling to establish commonality:

- *Vandervort v. Balboa Capital Corp.*, --- F.R.D. ----, 2012 WL 5248420, *3 (C.D. Cal. Oct. 23, 2012) (declining to certify class because *Dukes* required an individualized inquiry regarding each class member);
- *Graham v. Overland Solutions, Inc.*, 2012 WL 4009547, *5 (S.D. Cal. Sep. 12, 2012) (noting that *Dukes* "disapproved of the use of sampling and surveys to determine class-wide practices"); and
- *Stone v. Advance America*, 278 F.R.D. 562, 566 n.1 (S.D. Cal. 2011) (*Dukes* "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 *Wackenhut Wage and Hour Cases*, Los Angeles Superior Court, Judicial council Coordination Proceeding No. 4545 ("*Wackenhut*"), another court recently decertified a wage and hour class action based upon a sweeping interpretation of *Dukes*. The *Wackenhut* Court first certified three wage and hour classes relating to meal breaks, rest breaks and paystub violations. *Wackenhut Wage and Hour Cases*, Aug. 1, 2012 Decertification Order at 1. The *Wackenhut* Court concluded that *Dukes* constituted

"changed circumstances" warranting Decertification. *Id.* at 4. The Court generally noted: "[T]he amount of effort to adjudicate [defendant's] defenses and determine liability on a plaintiff-by-plaintiff basis . . . would render trial unmanageable." *Id.* at 8. Regarding the issue of whether the employer provided on-duty meal breaks, the Court held: "[P]ursuant to *Wal-Mart*, [defendant] has a right to defend itself by proving that, in practice, . . . some class members were actually authorized to take off-duty meal periods", requiring an unmanageable evaluation of "hundreds of worksites and . . . millions of shifts." *Id.* at 11.

The *Wackenhut* Court also rejected the use of statistical sampling to establish liability, stating:

> As explained in *Wal-Mart*, Plaintiffs' approach will deprive [defendant] of its defenses to individual claims. Wackenhut will have no opportunity to present the affirmative defense . . . that specific class members signed valid on-duty meal period agreements. Instead, [defendant] would be limited to challenging Plaintiffs' statistical methods. This would violate Wackenhut's due process right to 'present every available defense' . . . .

*Id.* at 13. The *Wackenhut* Court concluded, stating: "Plaintiffs' use of statistical sampling to establish liability . . . is not an appropriate procedural tool to achieve manageability and protect [defendant's] due process rights." *Id.*

Despite these authorities, other post-*Dukes* decisions have concluded that certification may still be appropriate notwithstanding individualized determination of affirmative defenses:

- *Ellis v. Costco Wholesale Corp.*, --- F.Supp.2d ----, 2012 WL 4371817, *46 n.38 (N.D. Cal. Sep. 25, 2012) ("Although *Dukes* disapproved of a so-called 'Trial by Formula' without any individualized proceedings, there may be common issues to be resolved before embarking on such individual hearings.") (citation omitted).
- *Jimenez v. Allstate Ins. Co.*, 2012 WL 1366052, *15 (C.D. Cal. Apr. 18, 2012) ("[I]n light of *Dukes,* Plaintiff has not met his burden of affirmatively demonstrating that statistical sampling is a proper method of calculating individual damages. Nonetheless, this shortcoming is not sufficient to preclude class certification with respect to liability.")
- *Schulz v. QualxServ, LLC*, 2012 WL 1439066, *7 (S.D.Cal. Apr. 26, 2012) (certifying off the clock class despite employer's objection that individual inquiries were required to examine each employee's work day and the off the clock time was *de minimis*).

Moreover, this Court and other California courts have long-acknowledged that trial courts are vested with broad discretion to consider statistical sampling in assessing whether common issues exist. "California courts and others have in a wide variety of contexts considered pattern and practice evidence, ***statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices*** in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Sav-on*, 34 Cal.4th at 333 (emphasis added); *see also Capitol People First v. Department of Developmental Svcs.* (2007) 155 Cal.App.4th 676, 695, 66 Cal.Rptr.3d 300 ("Over the years, numerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition

testimony and the like to prove classwide behavior on the part of defendants."); *Bell*, 115 Cal.App.4th at 749-755 (upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability under the IWC's wage orders); *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279, 242 Cal.Rptr. 339 (class certification erroneously denied where illegal procedure could be proven by, *inter alia*, "sampling of representative cases"); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010) ("[I]t is quite plain to the Court that statistical sampling is appropriate in cases like this one.").

This Court has "encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." *Brinker*, 53 Cal.4th at 1053 (Werdegar, J., Concurring). "Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Id.* "[S]tatistical inference offers a means of vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost of litigation." *Id.* (quotation omitted).

Based on the foregoing, it is evident that the issues presented by this Petition for Review are vitally important, involve an unsettled area of law and require direction from this Court to promote uniformity of decision.

## STATEMENT OF FACTS

Allstate is an insurance company that employs Auto Field Adjusters at five California offices. (5 PE 1349). Auto Field Adjusters handle field inspections, drive-in inspections, or work out of the office. (5 PE 1377).

On December 18, 2007, Williams filed a putative class action Complaint in Los Angeles Superior Court against Allstate, his former employer. (1 PE 1). The Complaint seeks to recover unpaid wages on

behalf of Auto Field Adjusters employed by Allstate in California. (1 PE 2).

On February 22, 2010, Williams filed a Motion For Class Certification. On December 2, 2010, the trial court certified three of the five proposed classes, including the: (1) Off the Clock Class; (2) Wage Statement Class; and (3) Business and Professions Code 17200 Class. (1 PE 131-32). With respect to each of these three classes, the trial court found that: (1) the classes are ascertainable and identifiable from Allstate's corporate records; (2) common issues of law and fact predominate over individual issues; (3) the classes are so numerous that joinder would be impracticable; (4) the claims of the class representative are typical of the claims of the putative class members; (5) the interests of the classes will be adequately addressed by the class representative and counsel; and (6) a class action is a superior procedural device for resolution of these claims. (1 PE 132).

On June 20, 2011, the United States Supreme Court issued its Opinion in *Dukes*. Thereafter, the trial court unilaterally declared *Dukes* a "game changer" and stated that the question as to "how do we handle [post-*Dukes* class actions] is something that is important." (2 PE 587). The trial court also stated that numerous additional cases applying *Dukes* are "going to start coming in." (2 PE 587).

Based on the theory that *Dukes* represented a fundamental change in California class action law, Allstate filed a Motion to Decertify the Off the Clock and 17200 Classes. Allstate specifically argued that: (1) *Dukes* precludes this case from proceeding as a class action; (2) whether employees performed pre-shift tasks is an individualized inquiry; and (3) Williams' trial plan based on statistical sampling was improper. (1 PE 150-59).

At the hearing, on Allstate's Decertification Motion the trial court stated:

> [*Dukes*] is quite a new development that lawyers all over the country are trying to digest and courts are trying to understand and apply correctly. I think this means . . . that the ***defendant has a right in any class action now to individualize determination*** of each employee's eligibility for back pay.

(11 PE 3130) (emphasis added).

The trial court also unequivocally stated: "The proposal of trial by formula is a novel project that is disapproved. ***That's over in contrast to much California jurisprudence.***" (11 PE 3130) (emphasis added). The trial court also characterized *Dukes* as some "***extremely adverse*** Supreme Court law" with respect to class action litigation. (11 PE 3141) (emphasis added).

In decertifying the Off The Clock and 17200 Classes (11 PE 3147), the trial court's Order stated: "The motion is granted because **[*Dukes*] *has changed the law***." (11 PE 3149) (emphasis added). The trial court further stated: "Under the changed law, the class action procedure is no longer appropriate for this case." (11 PE 3149). The court continued: "After *Dukes, **Allstate is entitled to litigate its defenses to the claims of each individual class member***. For example, the court must permit Allstate to attempt to prove a particular class member did not work off the clock. . . . *Dukes* gives Allstate the right to demonstrate certain class members did not work off the clock on certain dates." (11 PE 3150) (emphasis added).

The trial court also stated: "Allstate is also entitled to advance evidence that off-the-clock work by particular employees was trivial. . . . If , for example, a particular employee spent a few seconds or minutes

checking voicemail on a handful of occasions, this time would be negligible and the employee would not be entitled to compensation. ***Williams cannot use the class action procedure to prevent Allstate from litigating this affirmative defense.***" (11 PE 3150) (emphasis added). Finally, the trial court's order concluded, stating: "A trial in which Allstate presents evidence of affirmative defenses to more than 200 individuals would be unmanageable." (11 PE 3150-51).

After receiving the trial court's ruling, Williams filed a Petition for Writ Of Mandate with the Second District Court of Appeal. On October 25, 2012, the appellate court issued an order summarily denying Williams' Petition.

## LEGAL DISCUSSION

### 1. Review Is Necessary To Resolve An Important Question Concerning The Right Of Class Action Defendants To Prove Affirmative Defenses On An Individualized Basis.

#### A. The *Dukes* Decision

In *Dukes*, the Court confronted "one of the most expansive class actions ever." *Dukes*, 131 S.Ct. at 2546. There, a nationwide class of 1.5 ***million*** current and former female employees sued Wal-Mart, alleging that the company engaged in a pattern or practice of gender discrimination in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 2547. The Court noted that the employees "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly." *Id.* at 2557 (quotation omitted). Moreover, the Court noted that Wal-Mart's pay and promotion decisions

were largely committed to the broad discretion of local managers. *Id.* at 2547.[2]

In reversing the class certification order, the *Dukes* Court divided its opinion into two distinct sections. ***Section II*** – which the Supreme Court unambiguously characterized as the "***crux of this case***" – dealt exclusively with "commonality–the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" *Id.* at 2550-51 (emphasis added). ***Section III***, in turn, dealt with Plaintiffs' claims for backpay pursuant to Federal Rule of Civil Procedure 23(b)(2). *Id.* at 2557. An analysis of each of these independent sections demonstrates that *neither* support the lower court's conclusion that all class action defendants have a universal right to prove an affirmative defense on an individualized basis.

**1. *Dukes* Section II – Commonality.**

In Section II, the *Dukes* Court discussed commonality, noting that it "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* at 2551. The Court noted that the "claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The Court also noted that "in resolving an individual's ***Title VII*** claim, the crux of the inquiry is the ***reason for a particular employment***

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[2] Plaintiffs alleged that the local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. *Dukes*, 131 S.Ct. at 2548. The district court certified a class of all women subjected to the pay and promotion policy and the appellate court affirmed. *Id.* at 2549. The Supreme Court reversed. *Id.* at 2561.

***decision***." *Id.* at 2552 (emphases added). The Court found that there was no unifying motive theory holding together "literally millions of employment decisions at once." *Id.* The *Dukes* Court further noted: "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.*

In discussing how to apply commonality ***in a discrimination case***, the *Dukes* Court noted that there was a wide gap between an individual discrimination claim (and an unsupported allegation of an employer's policy of discrimination) and the existence of a class of persons who have suffered the same injury, such that the claims will share common questions of law and fact. *Id.* at 2553. Thus, the court held that to bridge this gap, Plaintiff needed to present "significant proof" that the employer "operated under a general policy of discrimination." *Id.* Under the facts presented in *Dukes*, however, the Court concluded that Plaintiffs failed to offer any such proof. *Id.* Finally, the *Dukes* Court noted that the sole corporate policy established – allowing discretion by local supervisors over employment matters – is the "opposite of a uniform employment practice that would provide the commonality needed for a class action." *Id.* at 2554.[3] In sum, the *Dukes* Court ultimately held that Plaintiffs failed to demonstrate commonality, noting that the putative class members "have little in common but their sex and this lawsuit." *Id.* at 2557.

**2. *Dukes*' Section II Commonality Analysis Does Not Support The Sweeping Rule That Class Action**

[3] The Court also rejected an expert regression analysis showing statistically significant disparities between men and women and Plaintiffs' anecdotal evidence were simply "too weak to raise any inference that all the

**Defendants Have A *Universal* Right To Prove Affirmative Defenses On An Individualized Basis.**

**First**, the facts in *Dukes* are singularly unique as it involved 1.5 million putative class members working "a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states. *Id.* at 2547, 2557. The facts, alone, preclude a broad application of *Dukes'* commonality analysis to ***all*** class action litigation. As one Court aptly explained: "Time after time the [*Dukes*] Court circled back to the issue of scale." *Chen-Oster v. Goldman, Sachs & Co.*, --- F.Supp.2d ----, 2012 WL 2912741, *3 (S.D.N.Y. July 17, 2012). For example, *Dukes* noted that it was "presented with ***one of the most expansive class actions ever***." *Id.* at *3 (emphasis added) (*quoting Dukes*, 131 S.Ct. at 2547). In addition, the *Dukes* Court "suggested (when not explicitly stating) that the sheer size of the class and the vast number and diffusion of challenged employment decisions was key to the commonality decision." *Id.* Moreover, the Plaintiffs in *Dukes* brought suit about "literally ***millions of employment decisions***." *Id.* (emphasis added) (*quoting Dukes*, 131 S.Ct. at 2552). In addition, the *Dukes* Court noted that the putative class members "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Id.* (*quoting Dukes*, 131 S.Ct. at 2557).[4]

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individual, discretionary personnel decisions are discriminatory." *Dukes*, 131 S.Ct. at 2555-56.

[4] Similarly, in *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), the Seventh Circuit affirmed a certification order, concluding that the overtime class satisfied the commonality despite *Dukes*. The *Ross* Court concluded that *Dukes* was not controlling on the commonality issue in that case, stating: "Perhaps the most important distinction is the size of the class and

In *Dukes*, Plaintiffs sought to certify a class of 1.5 million. Here, in sharp contrast, Williams seeks to certify a class of only about 300-400 employees. (1 PE 121; 2 PE 581). Moreover, unlike in *Dukes*, the putative class members here fell within a single job category (Auto Field Adjusters), all performed the same tasks, all worked in a single state, and all worked out of only one of 5 offices. Finally, unlike in *Dukes*, this action does not involve "literally millions of employment decisions." *Dukes*, 131 S.Ct. at 2552. Rather, this action – like numerous other off the clock class actions – involves a single employer overtime policy. It also involves a single common issue – whether Allstate failed to pay Auto Field Adjusters for all overtime hours worked due to Allstate's policy of requiring pre-shift, off the clock work.[5]

In short, *Dukes* commonality analysis should be limited only to class actions where the putative class members have "little in common but . . . this lawsuit." *Dukes*, 131 S.Ct. at 2557 (quotation omitted).

**Second**, *Dukes* has no application outside of the ***employment discrimination*** context. In *Driver v. AppleIllinois, LLC*, 2012 WL 689169 (N.D. Ill. Mar. 2, 2012), for example, the district court denied a decertification motion based on *Dukes*, stating: The court identified a common question: "whether AppleIllinois required its tipped employees to engage in duties unrelated to their tipped occupation without paying them at the minimum wage rate." *Id.* at *2. The Court noted: "***Unlike a Title VII claim***, the answer to that question does not involve probing into the

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the type of proof the *Dukes* plaintiffs were required to offer." *Id.* at 909. The *Ross* Court noted that the class size was just over 1,000 (compared to 1.5 million in *Dukes*) and involved employees in a single state (as opposed to a nationwide class).

[5] *See Dukes*, 131 S.Ct. at 2556 (noting that even a single common question will suffice to certify a class); *Ross*, 667 F.3d at 908 ("To satisfy the

***motive or intent*** on the part of any defendant." *Id.* (emphases added). The Court specifically noted: "The answer to 'why,' which is critical to a Title VII case, ***is irrelevant here***. The analysis is strictly objective." *Id.* (emphasis added). Indeed, numerous courts have declined to follow *Dukes* where the commonality determination did not involve subjective inquiry into the reasons for allegedly discriminatory action:

- *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 (7th Cir. 2012) (declining to follow *Dukes* because an overtime claim "requires no proof of individual discriminatory intent");
- *Youngblood v. Family Dollar Stores, Inc.*, 2011 WL 4597555, *4 (S.D.N.Y. Oct. 4, 2011) (distinguishing *Dukes* because the claim at issue did not require "an examination of the subjective intent behind millions of individual employment decisions; rather, the crux of this case is whether the company-wide policies, as implemented, violated Plaintiffs' statutory rights") (quotation omitted);
- *Espinoza v. 953 Assocs. LLC,* 280 F.R.D. 113, 130 (S.D.N.Y. 2011) (distinguishing *Dukes* as plaintiffs' claims that Defendants failed to pay overtime compensation as a result of certain policies and practices "alleged a common injury that is capable of class-wide resolution");
- *Ramos v. SimplexGrinnell LP*, 796 F.Supp.2d 346, 356 (E.D.N.Y. Jun.21, 2011) (noting that Dukes had "little

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commonality element, it is enough for plaintiffs to present just one common claim.").

bearing" where plaintiffs had adduced significant proof that defendant routinely failed to pay proper wages).

- *Bouaphakeo v. Tyson Foods, Inc.*, 2011 WL 3793962, *2 (N.D.Iowa Aug. 25, 2011) (reasoning that because "*Dukes* was a Title VII case, the focus of the inquiry in resolving each individual's claim was 'the reason for [the] particular employment decision'").

These cases further demonstrate that *Dukes'* commonality analysis must be limited to class action litigation involving *employment discrimination.*

**Third**, as discussed above, the sweeping ruling below (that all class action defendants have a universal right to prove an affirmative defense on an individualized basis) should be limited to class actions: (1) involving only the most expansive classes; (2) requiring an analysis of millions of employment decisions; and (3) involving employment discrimination. In addition, review from this Court is required to clarify that lower courts may still routinely certify wage and hour class actions where common issues exist.

In *Jimenez v. Allstate Ins. Co.*, 2012 WL 1366052 (C.D. Cal. Apr. 18, 2012), for example, Plaintiff filed a putative class action asserting wage and hour claims on behalf of Allstate's California-based claims adjusters. *Id.* at *1. The district court certified a class with respect to unpaid overtime compensation and a derivative 17200 class. *Id.* Regarding commonality, the court concluded that Plaintiff presented sufficient evidence of common questions, including: (i) "whether Defendant had a common and widespread practice of not following its policies regarding overtime"; and (ii) "whether Defendant knew or should have known that claims adjusters were working off-the-clock without compensation." *Id.* at *11.

Similarly, in *Ross v. RBS Citizens*, the Court specifically noted that "[a]lthough there might be slight variations in how [defendant] enforced its overtime policy, both classes maintain a common claim that [defendant] broadly enforced an unlawful policy denying employees earned-overtime compensation. This unofficial policy is the common answer that potentially drives the resolution of this litigation." *Ross*, 667 F.3d at 909 (*citing Dukes*, 131 S.Ct. at 2551). "Ultimately, the glue holding together the . . . classes is based on the common question of whether an unlawful overtime policy prevented employees from collecting lawfully earned overtime compensation." *Id.* at 910.

Indeed, post-*Dukes* courts continue to find commonality in off-the-clock wage and hour class action cases. *See Ugas v. H & R Block Enters., LLC*, 2011 WL 3439219, at *9-10 (C.D.Cal. Aug. 4, 2011); *see also Schulz*, 2012 WL 1439066 at *7 (certifying off the clock class despite employer's objection that individual inquiries were required to examine each employee's work day and the off the clock time was *de minimis*); *Whitlock v. FSL Management, LLC*, 2012 WL 3274973, *5 (W.D.Ky. Aug. 10, 2012) (certifying off the clock class and rejecting argument that "conflicting employee declarations submitted by Defendants preclude a finding of any common policy or practice of requiring off-the-clock work"); *Jacks v. DirectSat USA, LLC*, 2012 WL 2374444, *6 (N.D. Ill. June 19, 2012) (certifying off the clock class although "[i]ndividual questions certainly exist as to how each technician responded to DirectSat's policies and the extent to which he or she actually performed off-the-clock work" because "class treatment does not require that all class members have been equally affected by the challenged practices—it suffices that the issue of whether the practice itself was unlawful is common to all").

In short, "the weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases." *Morris v. Affinity Health Plan,*

*Inc.*, 859 F.Supp.2d 611, 616 (S.D.N.Y. 2012); *see also Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 482 (D.Kan. 2012) (rejecting assertion that *Dukes* "worked some sea change in class action jurisprudence" as the "decision simply reflects the application of the long-standing rule that class members suffer a common injury").

Below, Williams identified numerous common facts, including whether:

- Allstate failed to track actual hours worked by Auto Field Adjusters and merely assumed that they worked 8 hours a day, 40 hours per week. (1 PE 42; 4 PE 971; 5 PE 1385-86, 1398)
- Allstate's WFMS did not allow Auto Field Adjusters to enter the time when they actually began working. (1 PE 43; 4 PE 971; 5 PE 1365).
- Allstate's Claims Handling Guidelines Manual, policy manuals, guidelines, job aids and checklists required Auto Field Adjusters to perform off the clock, overtime work prior to their first inspection of the day. (1 PE 44; 4 PE 973; 5 PE 1353, 1366, 1414; PSX S68, S151).[6]
- Allstate policy precludes the work day does from including pre-shift work performed by the Auto Field Adjusters. (1 PE 46; 4 PE 974; 5 PE 1405-06).
- Allstate discouraged Auto Field Adjusters from requesting overtime compensation for the regular pre-

[6] Petitioner initially attempted to file one volume of "Sealed Exhibits" in support of the Petition for Writ of Mandate filed with the Court of Appeal (pages S1 – S172). The appellate court ultimately accepted those exhibits for filing as a regular, ordinary Exhibits and as a separately-bound volume in addition to the 12 volumes of Exhibits. Those Exhibits are designated with the pre-fix "PSX".

inspection work they performed. (1 PE 46; 4 PE 974-75, 1143; 5 PE 1349, 1360; 9 PE 2527-2599).

- Allstate's own records demonstrate that the Auto Field Adjusters regularly work substantial overtime. (1 PE 47-48; 4 PE 976; 5 PE 1399, 1402, 1425-28).

Consistent with *Dukes*, the answer to these questions (which are central to the off the clock claim) can be determined "in one stroke." *Dukes*, 131 S.Ct. at 2551. For this additional reason, clarification is required to inform lower courts that class action litigation is still appropriate for wage and hour claims and courts can readily certify classes where common questions exist.

### 3. *Dukes* Section III – Backpay/FRCP 23(B)(2).

In Section III, of *Dukes*, the Supreme Court held that Plaintiffs' "claims for monetary relief may be certified under [Rule 23(b)(2)] . . . at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." *Dukes*, 131 S.Ct. at 2557. "Rule 23(b)(2) allows class treatment when 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.'" *Id.* "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* The *Dukes* Court noted that civil rights cases were "prime examples" of when Rule 23(b)(2) was appropriate as it could remedy segregation, for example, "by a single classwide order." *Id.* at 2558. Accordingly, the Court held that "individualized monetary claims belong in

Rule 23(b)(3)" and are subject to "procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out . . . ." *Id.*

Finally, in discussing Plaintiffs' claims for backpay (as opposed to compensatory damages), the *Dukes* Court noted that "Title VII includes a detailed remedial scheme." *Id.* at 2560. As such, "if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the 'hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.'" *Id.* at 2560-61 (quotation omitted). The *Dukes* Court specifically noted that when an employee seeks individual relief pursuant to Title VII's remedial scheme, the employer "will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" *Id.* at 2561 (quotation omitted). The *Dukes* rejected the notion that the statutory entitlement to backpay pursuant to Title VII could be resolved by "Trial by Formula" which would consist of a sample set of class members would be selected, as to whom liability and backpay owing would be determined in depositions supervised by a master and then the percentage of valid claims would then be applied to the entire remaining class without further individualized proceedings. *Id.* Finally, the *Dukes* Court noted that litigation concerning Wal-Mart's individual defenses necessarily prevented backpay from being "incidental" to a classwide injunction, precluding certification pursuant to Rule 23(b)(2). *Id.*

Duke's holding in Section III regarding backpay and Rule 23(b)(2) simply do not support the conclusion reached by the court below, that all class action defendants have a universal right to prove an affirmative defense on an individualized basis

**First**, in sharp contrast to Rule 23(b)(2), California law has "no specific statutory provision detailing procedures for class plaintiffs pursuing only injunctive and declaratory relief." *Capitol People First*, 155 Cal.App.4th at 692 n.12.[7] Indeed, Rule 23(b)(2) class "actions have no predominance or superiority requirements." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). Moreover, putative class members may not opt out of a class certified pursuant to Rule 23(b)(2) (as some putative class members have done in this case). *See Dukes*, 131 S.Ct. at 2558; *see also Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1610-11, 277 Cal.Rptr. 583; *see also Johnson v. American Airlines, Inc.* (1984) 157 Cal.App.3d 427, 433, 203 Cal.Rptr. 638 ("The courts have held that due process does not require that notice or an opportunity to opt out be provided class members in rule 23(b)(2) class actions."). In addition: "Commentators have noted that certification requirements under Rule 23(b)(2) are more stringent than under (b)(3)." *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 264 n.12 (3d Cir. 2011). For these reasons, it is not surprising that courts have distinguished *Dukes* on the grounds that it involved certification pursuant to Rule 23(b)(2), rather than Rule 23(b)(3). *See, e.g.*, *Ross*, 667 F.3d at 909 n.7; *Wallace B. Roderick Revocable Living Trust*, 281 F.R.D. at 487. Finally, *Dukes* did not consider or address the strong public policy in favor of class action litigation under California law. *See supra*, at pages 4-5.

For all these reasons, the analysis of Rule 23(b)(2) in *Dukes* provides no support for the lower court's sweeping conclusion that all class action defendants have a universal right to prove an affirmative defense on an individualized basis.

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[7] Below, Williams did not seek class certification pursuant to Rule 23(b)(2).

**Second**, *Dukes* is specifically applicable to Title VII discrimination claims because they are subject to a detailed remedial scheme. *Dukes*, however, has no general application to other class action claims. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Lit.*, 2012 WL 253298, *5 (N.D. Cal. Jan. 26, 2012) (declining to extend *Dukes*' Trial by Formula concept to antitrust because "damages in the antitrust context [are not] subject to a 'detailed remedial scheme' equivalent to that in Title VII."). *Dukes* expressly acknowledged that pursuant to Title VII's remedial scheme, an employer was entitled to individualized defenses to demonstrate the lawfulness of its allegedly discriminatory conduct.

Thus, this Court should grant the Petition for Review to clarify that *Dukes'* holding that class action defendants may litigate affirmative defenses on an individualized basis has no application unless discriminatory conduct is alleged or a detailed remedial scheme at issue (which is not the case in wage and hour litigation).

**2. Review Is Necessary To Resolve An Important Question Concerning The Right Of Class Action Plaintiffs To Use Statistical Sampling To Establish Commonality.**

Finally, the lower court concluded that, post-*Dukes*, class action plaintiffs may no longer use statistical sampling evidence to establish commonality. As an initial matter, *Dukes* simply does not hold that statistical sampling cannot establish commonality. In addition, this Court and other California courts have long-acknowledged that trial courts are vested with broad discretion to consider statistical sampling in assessing whether common issues exist. *See supra*, at pages 9-10.

Of course, even if even if statistical sampling were not a proper method of calculating individual damages, "this shortcoming is not sufficient to preclude class certification with respect to ***liability***." *Jimenez*, 2012 WL 1366052 at *15. In *Espinoza v. 953 Assocs. LLC,* for example,

the court certified a class based on evidence that defendants, *inter alia*, had a routine policy of requiring employees to work off the clock. *See Espinoza,* 280 F.R.D. at 121, 129. The court distinguished *Dukes*, explaining:

> Although plaintiffs' claims may raise individualized questions regarding the number of hours worked and how much each employee was entitled to be paid, those differences go to the damages that each employee is owed, not to the common question of Defendants' liability. Plaintiffs have alleged a common injury that is capable of class-wide resolution without inquiry into multiple employment decisions applicable to individual class members. Accordingly, *Wal–Mart* is distinguishable and does not preclude class certification

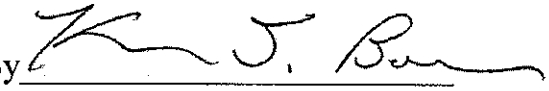
*Id.* at 130; *see also Wallace B. Roderick Revocable Living Trust*, 281 F.R.D. at 487 (certifying class and noting that the "remaining individualized issues [as to damages] may be tried on an individual basis after resolution of the common claims"). Thus, review is warranted to clarify that *Dukes* does not preclude plaintiffs from utilizing statistical sampling evidence to establish commonality.

**3. Conclusion**

For all these reasons, Petitioner respectfully requests that this Court grant review of the Court of Appeal's decision and hold pending disposition of *Duran*.

November 5, 2012

LAW OFFICES OF KEVIN T. BARNES
TRUSH LAW OFFICE

By 

Kevin T. Barnes
Attorneys for Petitioner and Plaintiff
CHRISTOPHER WILLIAMS

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, Counsel of Record hereby certifies that, the attached Petition for Review is proportionately spaced, has a typeface of 13 points or more and contains 7,470 words, including footnotes as counted by the Microsoft Word word processing program used to generate the Petition.

November 5, 2012

LAW OFFICES OF KEVIN T. BARNES
TRUSH LAW OFFICE

By 

Kevin T. Barnes
Attorneys for Petitioner and Plaintiff
CHRISTOPHER WILLIAMS

EXHIBIT 1

OCT 29 2012

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT



| | |
|---|---|
| CHRISTOPHER WILLIAMS et al., | B244043 |
| Petitioners, | (Super. Ct. No. BC382577) |
| v. | (John Shepard Wiley, Jr., Judge) |
| SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, | **ORDER** |
| Respondent; ALLSTATE INSURANCE COMPANY, | |
| Real Party in Interest. | |

We have read and considered the petition for writ of mandate filed on September 21, 2012.

The petition is denied.

RUBIN, Acting P. J. FLIER, J. SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Kevin Todd Barnes
Attorney at Law
5670 Wilshire Blvd., Suite 1460
Los Angeles, CA 90036

CHRISTOPHER WILLIAMS,
Petitioner,
v.
S.C.L.A.
Respondent
ALLSTATE INSURANCE COMPANY,
Real Party in Interest.
B244043

EXHIBIT 2

JUL 27 2012

SEYFARTH SHAW LLP
Andrew M. Paley (SBN 149699)
apaley@seyfarth.com
Sheryl L. Skibbe (SBN 199441)
sskibbe@seyfarth.com
Reiko Furuta (State Bar No. 169206)
rfuruta@seyfarth.com
Rishi Puri (State Bar No. 252718)
rpuri@seyfarth.com
2029 Century Park East, Suite 3500
Los Angeles, California 90067-3021
Telephone: (310) 277-7200
Facsimile: (310) 201-5219

Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - CENTRAL CIVIL WEST

| | |
|---|---|
| CHRISTOPHER WILLIAMS, on behalf of himself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ALLSTATE INSURANCE COMPANY, an Illinois corporation; and DOES 1 to 100, Inclusive,<br><br>Defendants. | Case No. BC 382577<br><br>[Assigned to Judge John S. Wiley Dept. 311]<br><br>**NOTICE OF RULING ON DEFENDANT'S MOTION TO DECERTIFY THE CLASS**<br><br>Date: July 24, 2012<br>Time: 8:30 a.m.<br>Dept.: 311<br><br>Complaint Filed: December 19, 2007 |

**TO PLAINTIFF AND TO HIS ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Defendant Allstate Insurance Company's Motion to Decertify came on regularly for hearing on July 24, 2012, on the 8:30 a.m. calendar of Department 311, of the

above-entitled Court, Judge John Shepard Wiley, presiding. Kevin Barnes of Law Offices of Kevin T. Barnes and James Trush of Trush Law Office appeared on behalf of the Plaintiffs and Andrew Paley and Sheryl Skibbe of Seyfarth Shaw, LLP appeared on behalf of the Defendant.

After considering the papers filed in support of and in opposition to the petition, the Court prepared a Tentative Ruling, a copy of which is attached as Exhibit A. After oral argument, the Court adopted its Tentative Ruling and ordered Class 1 and Class 5 decertified.

The Court set a status conference on September 5, 2012 at 10:30 a.m.: The parties are to submit a joint report on August 29, 2012. The Court also ordered the parties to meet and confer regarding the use of an on-line case management and electronic service provider to communicate with the Court. The parties are to agree upon a provider and provide access to the Court.

Counsel for Defendant was ordered to give notice.

DATED: July 25, 2012

SEYFARTH SHAW LLP

By _____
Sheryl Skibbe
Attorneys for Defendant
ALLSTATE INSURANCE COMPANY

# EXHIBIT A

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
**FOR THE COUNTY OF LOS ANGELES**
**DEPARTMENT 311**
***Williams v. Allstate Insurance Company***
**BC382577**
**Motion for Decertification**

The motion is granted because *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541 has changed the law.

Plaintiff Christopher Williams sued Defendant Allstate Insurance Company. Williams alleges Allstate requires its field adjusters to work off the clock. On December 2, 2010, the court granted Williams's motion for class certification in part. The court certified two classes at issue in this motion: Class 1 and Class 5. Class 1 and Class 5 consist of, "Defendant's California-based hourly-paid Auto Field Adjusters from January 1, 2005 to the present, to the extent that Defendant failed to pay for off-the-clock work for the following specific tasks performed prior to the first inspection of the day; logging on and off computer systems, preparing and checking voicemail messages; checking for schedule and travel changes, obtaining directions to the first inspection if there is a travel change, and making courtesy calls." (See Order Regarding Plaintiff's Motion for Class Certification, p. 2.) The court granted certification of these classes "because Plaintiff alleges that all California Auto Field Adjusters worked off the clock by performing the aforementioned tasks prior to the first inspection of the day." (*Ibid.*)

Allstate moves for decertification of Class 1 and Class 5. Williams contends Allstate has not moved for decertification of Class 5, but Allstate states in its notice of motion that it moves to decertify the class action as to Williams's claims for "violation of Business & Professions Code section 17200," which are the claims of Class 5. In a motion for decertification, a defendant must demonstrate new evidence or changed circumstances warrant reconsideration of the class certification order. (*Weinstat v. Dentsply Intern., Inc.* (2010) 180 Cal.App.4th 1213, 1226.)

Allstate has demonstrated the governing law has changed since the court's certification order. Under the changed law, the class action procedure is no longer appropriate for this case.

After the certification hearing, *Wal-Mart Stores, Inc. v. Dukes* (2011) 131

S.Ct. 2541 changed the law. In *Dukes*, the Court considered "the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women." (*Id.* 2547.) The Court stated, "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court 'may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate [ . . . ]. But, if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the 'hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.'" (*Id.* at 2560-2561.) The Court concluded, "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (*Id.* at 2561.)

After *Dukes*, Allstate is entitled to litigate its defenses to the claims of each individual class member. For example, the court must permit Allstate to attempt to prove a particular class member did not work off the clock. Williams's own characterization of the evidence demonstrates not every class member worked off the clock before every shift. For example, Williams states his evidence "shows overtime worked more than 50% of the time." (Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Decertify 22:5-6.) By offering the statistic of 58.1%, Williams implies the balance of the class did not work off the clock every shift. *Dukes* gives Allstate the right to demonstrate certain class members did not work off the clock on certain dates.

Allstate also is entitled to advance evidence that off-the-clock work by particular employees was trivial. "As a general rule, employees cannot recover for otherwise compensable time if it is *de minimis*." (*Lindow v. U.S.* (9th Cir. 1984) 738 F.2d 1057, 1062.) If, for example, a particular employee spent a few seconds or minutes checking voicemail on a handful of occasions, this time would be negligible and the employee would not be entitled to compensation. Williams cannot use the class action procedure to prevent Allstate from litigating this affirmative defense. According to Allstate, there are between 216 and 234 field adjusters at any given time. (Declaration of Gary Ray, ¶ 3.) A trial in which Allstate presents evidence

of affirmative defenses to more than 200 individuals would be unmanageable.

## PROOF OF SERVICE

STATE OF CALIFORNIA )
) ss
COUNTY OF LOS ANGELES )

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Seyfarth Shaw LLP, 2029 Century Park East, Suite 3500, Los Angeles, California 90067-3021. On July 25, 2012, I served the within documents:

**NOTICE OF RULING ON DEFENDANT'S MOTION TO DECERTIFY THE CLASS**

☐ I sent such document from facsimile machine (310) 201-5219. I certify that said transmission was completed and that all pages were received and that a report was generated by facsimile machine (310) 201-5219 which confirms said transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed below.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by transmitting the document(s) listed above, electronically, via e-mail at jtrush@earthlink.net and barnes@kbarnes.com

☒ by placing the document(s) listed above in a sealed Federal Express envelope with postage paid on account and deposited with Federal Express at Los Angeles, California, addressed as set forth below.

James M. Trush, Esq.
TRUSH LAW OFFICE
695 Town Center Drive, Suite 700
Costa Mesa, CA 92626
Tele: 714-384-6390
Fax: 714-384-6391
Email: jtrush@earthlink.net

Kevin T. Barnes, Esq.
Gregg Lander, Esq.
Law Offices of Kevin T. Barnes
5670 Wilshire Boulevard, Suite 1460
Los Angeles, CA 90036-5627
Tele: 323-549-9100
Fax: 323-549-0101
Email: barnes@kbarnes.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than on day after the date of deposit for mailing in affidavit.

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

Executed on July 25, 2012 at Los Angeles, California.

Kelley Lehr

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am over the age of 18 years and not a party to this action. My business address is 5670 Wilshire Boulevard, Suite 1460, Los Angeles, California 90036-5627, which is located in Los Angeles County, where the service herein occurred.

On the date of execution hereof, I served the attached document(s) described as:

- **PETITION FOR REVIEW**

on the interested parties in this action, addressed as follows:

Andrew M. Paley, Esq. / *
Sheryl L. Skibbe, Esq.
SEYFARTH SHAW LLP
2029 Century Park East, Suite 3500
Los Angeles, CA 90067-3063
Tel.: (310) 277-7200 / Fax: (310) 201-5219
Email: APaley@seyfarth.com

James M. Trush, Esq. / **
TRUSH LAW OFFICE
695 Town Center Drive, Suite 700
Costa Mesa, CA 92626-7187
Tel.: (714) 384-6390 / Fax: (714) 384-6391
Email: JTrush@earthlink.net

Honorable John Shepard Wiley, Jr. / *
Central Civil West Courthouse
600 S. Commonwealth Avenue, Dept. 311
Los Angeles, CA 90005

2nd District Court of Appeal / *
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, Ca 90013

using the following service method(s):

___* **VIA PERSONAL DELIVERY:** I personally arranged for the delivery of such sealed envelope(s) by hand to the offices of the addressee(s) pursuant to California Code of Civil Procedure §1011.

___** **VIA MAIL:** I deposited the document(s) to be served at: **5670 Wilshire Boulevard, Los Angeles, CA**, which is a mailbox or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person(s) on whom the document(s) is/are to be served, at the office address as last given by that/those person(s), otherwise at that/those person(s)' place(s) of residence. I am aware that on motion of any party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing stated herein.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 2012, at Los Angeles, California.

**Cindy Rivas**

KEVIN T. BARNES
5670 WILSHIRE
BLVD. SUITE 1460
LOS ANGELES, CA
90036-5614
TEL.: (323) 549-9100
FAX: (323) 549-0101