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**Seyfarth Shaw Files Two Amicus Briefs before the Supreme Court in
Wal-Mart v. Dukes Case**

Briefs filed on behalf of leading retailer Costco, the Society for Human Resource Management, and HR Policy Association, challenge largest employment discrimination class action ever certified

WASHINGTON, D.C. (February 2, 2011) – Leading employment and labor law firm Seyfarth Shaw has filed two friend-of-the-court briefs in the United States Supreme Court in the closely-watched workplace discrimination case *Wal-Mart v. Dukes*. Seyfarth submitted amicus briefs on behalf of leading national retailer Costco Corp. and the professional associations the Society for Human Resource Management and HR Policy Association. Copies of the briefs can be viewed on Seyfarth Shaw’s *Workplace Class Action Blog*, <http://www.workplaceclassaction.com/class-action/defense-groups-file-their-amicus-submissions-in-dukes/>

The *Dukes* case, which challenges the Bentonville, Ark.-based retailer’s pay and promotion practices, is an appeal by Wal-Mart of the Ninth Circuit Court of Appeals decision affirming an earlier class certification order in the largest employment discrimination class action ever certified – which could include over 500,000 female employees who were employed at any of the company’s 3,400 stores across the United States.

On Jan. 27, 2011, 10 amicus briefs were filed with the Supreme Court in support of Wal-Mart. While amicus briefs are not unusual in Supreme Court appeals, the number of amicus briefs filed in the *Dukes* case is unusual, and manifests the high-stakes, which employers and the plaintiffs’ class action bar confront in this litigation. Seyfarth is the only law firm to have submitted multiple briefs on behalf of multiple amici.

“The issues before the Court in *Dukes* are extremely critical for employers, and we are gratified to be working alongside one of the nation’s major retailers as well as two of the most respected human resource organizations in support of Wal-Mart’s position,” said Lisa J. Damon, National Chair of Seyfarth’s Labor & Employment Department.

SHRM is the world’s largest association devoted to human resource management representing over 250,000 human resource professionals. HR Policy Association represents the chief human resources officers of over 300 of the largest employers doing business in the United States. Their brief provides the Supreme Court with unique expertise and a widespread knowledge of human resources practices in the United States and in particular a unique perspective on the human resources practices that underlie the Ninth Circuit decision under review by the Supreme Court.

SHRM and HR Policy Association’s brief demonstrated that the Ninth Circuit’s endorsement of the theory that the combination of a centralized company-wide culture and decentralized, individualized, non-formulaic personnel decision-making can be inherently discriminatory was flawed. The amicus brief explains that the Ninth Circuit: “misunderstood, misjudged, and ignored” the topics of individualized performance reviews

and the impact of organization-wide diversity programs on a company's internal culture. Specifically, their brief highlights how the decision of the Ninth Circuit: (1) inappropriately criticized the system of individualized performance reviews by an employee's direct manager as a factor contributing to a finding of gender bias, and (2) inappropriately ignored the key role a company's strong corporate diversity policy and program play in creating and reinforcing a culture of inclusion.

The brief presented the Court with specific data, including: "SHRM's survey evidence, which reports that '[a]cross all job levels, the direct supervisor had the most input into [individual employee] performance evaluation[s],' and that 96% of corporations rely heavily on input from direct supervisors in conducting employee job performance appraisals." The brief points out that the Ninth Circuit's conclusions ignored the widespread and frequently essential role individual judgments by supervisors play in employment decisions as well as the Supreme Court's own decisions, the EEOC's best practices, and human resource literature.

Seyfarth Partners Camille A. Olson and Richard B. Lapp of the firm's Chicago office are counsel for the Society of Human Resource Management and HR Policy Association. Seyfarth's Los Angeles-based attorney James M. Harris also contributed to the brief.

From a class action litigation perspective, *Dukes* also presents the Supreme Court with the opportunity to explain how much class members must have in common for a class action to be certified under federal law, and the extent to which individual claims for money damages impact Plaintiffs' request for certification.

The Costco amicus brief explains that the Ninth Circuit erred in its class certification analysis when it permitted plaintiffs to:

- rely upon statistics aggregated above the decision-making level to demonstrate a disparate impact in decision-making;

- rely upon external labor market data to judge a company using a promote-from-within practice for employment decisions;

- rely upon an abstract sociological theory of stereotyping without first showing how that theory applies to actual workplaces, and;

- seek monetary damages under Rule 23(b)(2), which is primarily designed for injunctive relief.

The brief on behalf of Costco states that the retailer is made into an "attractive target of class actions that would seek to exploit the permissive approach that the Ninth Circuit has endorsed."

David B. Ross of the firm's New York office is Counsel of Record for Costco. Also contributing to the Costco brief were Seyfarth partners Kenwood C. Youmans and David D. Kadue, Of Counsel Thomas J. Wybenga and Senior Counsel Holger G. Besch, all of the Los Angeles office; as well as Seyfarth partner Gerald L. Maatman, Jr. and associate Jennifer A. Riley of the firm's Chicago office.

Seyfarth Shaw has over 750 attorneys located in 10 offices throughout the United States, including: Atlanta, Boston, Chicago, Houston, Los Angeles, New York, Sacramento, San Francisco, and Washington D.C., as well as internationally in Brussels, Belgium. Seyfarth Shaw provides a broad range of legal services in the areas of labor and employment, employee benefits, litigation, corporate, and real estate. The firm's practice

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