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No. 94592-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 33556-9-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JUDITH Q. CHAVEZ, KATHLEEN CHRISTIANSON, ORALIA GARCIA,
AND MARRIETTA JONES, individually, and on behalf of all similarly-
situated registered nurses employed by Our Lady of Lourdes Hospital at Pasco,
d/b/a Lourdes Medical Center,

Petitioners,

v.

OUR LADY OF LOURDES HOSPITAL AT PASCO,
d/b/a Lourdes Medical Center, AND JOHN SERLE, individually and in his
official capacity as an agent and office of Lourdes Medical Center

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association (“WELA”) is an organization of approximately 188 lawyers licensed to practice law in Washington. WELA is a chapter of the National Employment Lawyers Association. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA’s members frequently represent employees in cases brought under Washington wage statutes. WELA members have an interest in ensuring that employees can pursue wage-and-hour claims in class actions.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court erred in denying class certification in this case, and the Court of Appeals erred in affirming that denial. Both decisions raise important issues about the standards trial and appellate courts should apply under Civil Rule 23.

Because the parties disputed certain factual issues at the class certification stage, the trial court postponed ruling on certification until the parties filed motions for summary judgment. Appx. 27. The trial court then decided the summary judgment motions before ruling on class certification, making factual findings that extended to the claims of potential class members who were not parties to the case. Appx. 59-61. The trial court subsequently denied the Nurses’ renewed motion for class

certification, providing only cursory reasoning that did not address the court's apparent concerns with conflicting evidence. Appx. 28, 54-55.

Division III of the Court of Appeals affirmed, assuming the trial court resolved disputed factual issues in the Hospital's favor. The appellate court held that a class action was not the superior method for adjudicating the claims for two reasons: first, the Nurses "could litigate in the inexpensive small claims court"; and second, "each nurse's right to compensation hinged on his or her individual experience." Appx. 37-39.

There are four key issues for this Court to address. The first issue is the level of deference to be applied by appellate courts in reviewing denials of class certification. Class certification decisions are generally reviewed for abuse of discretion. Washington's courts recognize, however, that the class action procedure is an important tool for vindicating the common claims of a large group of people, particularly when those people have relatively small damages. This Court should announce that reviewing courts give less deference to denials of class certification as opposed to grants, particularly where the denial is insufficiently supported by findings and analysis.

Next, the Court should provide further guidance to trial courts on how best to handle factual disputes when deciding whether the requirements of Civil Rule 23 are met. It is common for the parties to

present conflicting evidence at the class certification stage, and pre-certification summary judgment motions are not an appropriate method for resolving those conflicts. Indeed, this Court has previously held that while a trial court may decide a purely legal issue before ruling on class certification, factual disputes that are interrelated with the requirements of Civil Rule 23 need not and should not be resolved at that time. The Court should instruct trial courts faced with conflicting facts at class certification to focus on the elements of the plaintiffs' claims and whether those elements will be proven with generalized, class-wide proof or with purely individualized proof.

The Court should also hold that an employer's liability for rest and meal break claims does not turn on the "individual experience" of employees, and thus a trial court can manageably resolve these claims through the class action procedure. As the Court recently made clear in *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017), Washington law "imposes a mandatory obligation on the employer to provide [rest and] meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092." Employees can meet their prima facie case by providing evidence that they did not receive the breaks to which they were entitled. *Id.* The employer may then rebut this by showing that in fact no violation occurred or, in the case of meal breaks,

that a valid waiver exists. *Id.* To the extent the courts below were concerned with the *reason* breaks were being missed, that is not part of the analysis. And to the extent the courts were concerned with employees missing rest and meal breaks at different frequencies, that is a question of damages and does not defeat certification. At a minimum, certification should not be denied on manageability grounds without a consideration of the procedural tools available to achieve a unified adjudication.

Finally, the Court has an opportunity to provide further guidance on the superiority requirement of Civil Rule 23. The Court has previously explained that the crux of this requirement is a comparison of the class action procedure with available alternatives. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 275, 259 P.3d 129 (2011). In focusing on the purported ability of some Nurses to pursue litigation in small claims court, the Court of Appeals fell short of making the required comparison. Small claims court is not a viable alternative to class litigation, particularly in employment cases. Given Washington's strong public policy of protecting employee rights, the Court should hold that class actions are a favored method for resolving wage and hour claims. These claims are usually too small to bring individually, and employees are often reluctant to take their employer to court.

III. AUTHORITY AND ARGUMENT

A. The Court should direct the Courts of Appeals to give less deference when reviewing a denial of class certification, especially when the decision has insufficient findings.

It is well settled that “[a] trial court’s decision to grant class certification is reviewed for abuse of discretion.” *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). A trial court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (citation omitted). Trial courts “should err in favor of certifying the class” because “[a] class is always subject to later modification or decertification by the trial court.” *Id.* Thus, “[a]n appellate court resolves close cases in favor of allowing or maintaining the class.” *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 188-89, 157 P.3d 847 (2007).

This appeal raises an important question about the level of deference a reviewing court gives a trial court when applying the abuse of discretion standard. In answering this question, federal appellate courts have concluded that a district court is entitled to “noticeably more deference” on a grant of class certification as opposed to a denial. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010) (citation omitted); *see also Levitt v. J.P. Morgan Secs., Inc.*, 710 F.3d 454,

464 (2d Cir. 2013).¹ Federal courts have also held that if the district court “fails to make sufficient findings to support its application of the Rule 23 criteria,” the court’s decision “is not entitled to the traditional deference given to such a determination.” *Narouz v. Charter Commc’n, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010) (citation omitted).

This Court should adopt these standards and hold that a denial of class certification will be more closely scrutinized than a grant of certification, particularly where the trial court’s decision is not supported by sufficient findings and analysis. Giving less deference to denials is consistent with this Court’s directive that courts should err in favor of class certification. *See Moeller*, 173 Wn.2d at 278; *Nelson*, 160 Wn.2d at 188-89. It is also consistent with the policy favoring the use of class actions to resolve the relatively small claims of a large group of people. *See Moore v. Health Care Auth.*, 181 Wn.2d 299, 309, 332 P.3d 461 (2014).

Lacking such guidance, Division III wrongly granted substantial deference to the trial court’s denial of class certification. Indeed, because the findings were sparse, the Court of Appeals went so far as to assume

¹ Because “CR 23 is identical to its federal counterpart, ... federal cases interpreting the analogous federal provision are highly persuasive.” *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001).

the trial court had resolved factual conflicts in the Hospital's favor. Appx. 32. The court then viewed the evidence in the light most favorable to the Hospital for purposes of its review, despite acknowledging there was no authority for doing so. Appx. 31.

As explained below, it was unnecessary for either court to resolve factual disputes at the class certification stage. The Court of Appeals should have recognized this and focused more on whether the Rule 23 requirements are satisfied. Instead, the Court of Appeals deferred to the trial court's manageability concerns despite recognizing that there are numerous common issues of fact and law. Appx. 38-39.

In reviewing a class certification decision with insufficient findings, federal courts either remand to the trial court for further analysis or, if the record is sufficiently developed, determine whether the class certification requirements are satisfied. *See Narouz*, 591 F.3d at 1266 (remanding "for a reasoned determination of class action status"); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001) ("the factual record is sufficiently well developed that we may evaluate for ourselves whether the provisions of Rule 23 have been satisfied"). The record here demonstrates that the Nurses meet the requirements for class adjudication of their rest

and meal break claims. Accordingly, the Court should reverse and instruct the trial court to grant certification.

B. When faced with conflicting evidence at class certification, courts should focus on the elements of the claims and whether the parties will use common or individualized proof at trial.

Division III said the trial court “astutely” decided to defer ruling on class certification until the Nurses filed summary judgment motions, adding that “[t]he law encourages the trial court, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions.” Appx. 27 (citing *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005)). In fact, pre-certification rulings on factual issues related to the class certification requirements are potentially prejudicial to all parties and do not focus on the relevant inquiry—whether the elements of the plaintiffs’ claims will be proven with predominantly common or individualized evidence.

This Court has twice addressed the propriety of deciding merits-based motions before class certification. In *Sheehan*, the plaintiff alleged that two motor vehicle excise taxes were unconstitutional and sought certification of a class of motor vehicle owners who paid one or both of the taxes. 155 Wn.2d at 793-95. The constitutionality of the taxes was a purely legal question which, if decided in the defendant’s favor, would resolve all potential class members’ claims at once. *Id.* at 797. The trial

court deferred ruling on the plaintiffs' class certification motion until it disposed of the parties' cross-motions for summary judgment on the constitutionality of the taxes. *Id.* at 807. It is not surprising this Court held that in those circumstances "a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions." *Id.*

In *Washington Education Association v. Shelton School District No. 309*, the trial court ruled on the defendants' challenges to venue, joinder and standing before class certification. 93 Wn.2d 783, 787-88, 613 P.2d 769 (1980). This Court reversed, holding the trial court abused its discretion. *Id.* at 788-90. The Court acknowledged that "class certification need not always be undertaken before other pretrial motions are considered" but concluded that such an approach is generally appropriate only where the pretrial motion will have "no impact on certification of the class except to the extent that it might preclude the action simply because there was no claim upon which relief could be granted to any conceivable class: i.e., there was no cause of action as a legal, rather than a factual, matter." *Id.* at 789. Because the venue and standing issues raised factual issues that were interrelated with class certification, it was improper for the trial court to decide them before class certification. *Id.*

The Court's recognition that early resolution of a purely legal issue can streamline the litigation is consistent with federal case law. In *Wright v. Schock*, cited in *Sheehan*, the defendants argued they could not be liable for the plaintiffs' securities claims as a matter of law, and the district court granted their summary judgment motion without ruling on class certification. 742 F.2d 541, 542-43 (9th Cir. 1984). The Ninth Circuit affirmed, holding that "[i]t is reasonable to consider a Rule 56 motion first when early resolution of a motion for summary judgment seems likely to protect both the parties and the court from needless and costly further litigation." *Id.* at 742. The Court cautioned that its conclusion might have been different if the parties or class members would have been prejudiced by ruling on the merits before certification. *Id.* at 543-45.

In this case, the trial court directed the Nurses to file a summary judgment motion *not* because it would allow the court to decide a purely legal issue that could protect the parties from needless litigation, but rather to flesh out the legal and factual issues that were implicated by class certification. RP122-129. Requiring plaintiffs to file pre-certification summary judgment motions is not an appropriate method for courts to address merits issue that may arise in connection with class certification. In fact, plaintiffs who file early summary judgment motions may be precluded from subsequently moving for class certification by due process

considerations. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057-58 (7th Cir. 2016) (“The rule against one-way intervention prevents plaintiffs from moving for class certification after acquiring a favorable ruling on the merits of a claim.”), *cert. denied*, 137 S. Ct. 2289 (2017).

Federal courts have noted that the predominance and superiority inquiries may sometimes overlap with the merits of the plaintiff’s claims. But to ensure that any consideration of the merits does not prejudice the parties by straying into an inappropriate resolution of disputed factual issues without a full and fair presentation of the evidence,² federal courts focus their analysis on the elements of the plaintiffs’ substantive claims and whether the parties will use common or individual evidence to prove those elements. *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011) (explaining that the predominance analysis “begins, of course, with the elements of the underlying action”); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (“[A] common question is

² The United States Supreme Court has cautioned that “Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits inquiries may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). In addition, a court does not make “binding findings on the merits” at class certification because “the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues.” *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 24 (1st Cir. 2008).

one where ‘the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.’” (second alteration in original) (citation omitted)).

The United States District Court for the Southern District of California followed this approach in determining whether predominance and superiority were satisfied in a case involving a potential class of employees who alleged they were deprived of meal and rest breaks. *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 630 (S.D. Cal. 2010). The court considered the types of evidence the parties intended to use to prove the elements of the plaintiffs’ claims, including company policies and practices, a payroll system that automatically deducted time for meal breaks, records and testimony showing a lack of evidence of employees taking second meal breaks during shifts over ten hours, and the testimony of plaintiffs and class members. *Id.* at 636-39. The court found that even though the employees’ “circumstances varied,” predominance was satisfied and a class action trial would be manageable because the claims turned on common evidence. *Id.* at 639, 641.

The trial court below does not appear to have focused on the elements of the Nurses’ claims and the types of evidence that would be used to prove them (although the findings are too brief to discern the court’s reasoning). Instead, the trial court recited several purported

differences among the Nurses, such as their shifts, job duties, managers, and departments, without explaining how those differences might impact the elements of the Nurses' claims and the proof the parties would present at trial. Appx. 55.

There are always differences among potential class members. The issue for courts to resolve in deciding whether to certify a class is whether the important common questions can be resolved with class-wide proof or will turn on individual evidence that is unique to each class member. *See King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994) (“Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate.”). When the Civil Rule 23 requirements are considered in the context of the proof the parties will use at trial, it becomes evident whether any differences among class members are relevant to predominance and manageability. Here they are not.

C. Rest and meal break claims turn on predominantly common evidence and can be manageably resolved as a class action.

Washington courts recognize that rest and meal break claims are proven with predominantly common evidence and routinely allow them to proceed as class actions. *See, e.g., Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 51, 308 P.3d 635 (2013); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 682-84, 267 P.3d 383 (2011); *McConnell v. Mothers Work, Inc.*, 131

Wn. App. 525, 529-30, 128 P.3d 128 (2006). This Court's recent ruling in *Brady* confirms these claims do not turn on issues of the types of "individual experience" that concerned the courts below. 188 Wn.2d at 584. The Court recognized that Washington law requires employers to provide meal and rest breaks. *Id.* As a result, an employee meets her prima facie case by showing that she did not receive such breaks (or did not receive them in a timely manner). *Id.* The employer may then rebut the employee's showing but demonstrating that no violation occurred or, in the case of meal breaks, that a valid waiver exists. *Id.*

Brady confirms that the concerns raised by the trial court and Court of Appeals about *why* the Nurses missed their breaks should not be part of the analysis. That the Nurses may not have missed the same number of breaks has no impact on class certification and is relevant only to damages. *See Pellino*, 164 Wn. App. at 698-99 (discussing expert testimony proving class members' damages for missed meal and rest breaks); *see also Smith v. Behr Process Corp.*, 113 Wn. App. 306, 323, 54 P.3d 665 (2002) ("That class members may eventually have to make an individual showing of damages does not preclude class certification.").

This Court should hold that rest and meal break claims do not turn on questions of "individual experience" and can be manageably resolved on a class-wide basis. Division III appears to have recognized that the

numerous common questions raised by the Nurses' claims predominate over individualized questions, but the Court said "we base our decision on the superiority prong not the predominance prong." Appx. 39. This was error. The issue of manageability cannot be addressed separately from the predominance analysis because if a court "determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than and superior to individual actions." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1358 (11th Cir. 2009) (remanding for consideration of the employees' argument that they would prove their claims with class-wide evidence despite the employer's decentralized decision-making).

Division III also erred in deferring to the trial court's concerns about manageability, stating that "the trial court best knows the ability of the Franklin County Superior Court's ability to manage a class action process and trial." Appx. 39. "[T]he question that courts consider when they analyze manageability is not whether a class action is manageable in the abstract but how the problems that might occur in managing a class suit compare to the problems that would occur in managing litigation without a class suit. In other words, the manageability inquiry is a comparative one." 2 Newberg § 4:72. Because Division III did not analyze alternatives other than some employees' ability to litigate in small claims

court, it did not address whether a class action was more or less manageable than available alternatives. Many federal courts hold that denial of certification on manageability grounds is disfavored because “the very concerns that might make a class suit difficult to manage also infect the procedural alternatives.” *Id.* (citing cases from seven circuits holding that there is a presumption against denial of certification on manageability grounds). This Court should do the same.

D. Small claims court cases are not superior to a class action, particularly in employment cases because public policy favors granting employees the protections of class-wide litigation.

This Court has rarely had occasion to address the superiority requirement. In *Schnall v. AT&T Wireless Services, Inc.*, the Court explained that “[t]he superiority requirement ‘focuses upon a comparison of available alternatives.’” 171 Wn.2d 260, 275, 259 P.3d 129 (2011) (citation omitted). The plaintiffs sought certification of a nationwide class that would have required the trial judge to manage a trial involving the laws of the fifty states. The Court identified statewide class actions as an alternative that would allow the individuals in each state to litigate collectively and cover the associated costs. *Id.* at 275-76. The Court remanded for consideration of whether a Washington state class should be

certified. *Id.* at 280-81.³

Division III noted that some potential class members could bring their claims in small claims court, but the court did not explain why that alternative would be superior to proceeding as a class action. *See Mendez v. C-Two Group, Inc.*, No. 13-cv-05914-HSG, 2015 WL 8477487, at *8 (N.D. Cal. Dec. 10, 2015) (finding the ability of class members to file in small claims court “has no bearing whatsoever on the propriety of class action treatment under Rule 23(b)(3) unless it is a superior method of adjudication”). Federal courts regularly dismiss a defendant’s suggestion that the possibility of small claims court cases is superior to a class action because the litigation may still be time-consuming and complex. *See, e.g., Sandusky Wellness Ctr., LLC v. MedTox Scientific, Inc.*, 250 F. Supp. 3d 354, 362 (D. Minn. 2017) (finding certification superior to forcing class members to figure out how to file a lawsuit in small claims court); *A&L Indus., Inc. v. P. Cipollini, Inc.*, No. 12-07598 (SRC), 2013 WL 5503303, at *4-5 (D.N.J. Oct. 2, 2013) (“plaintiffs can still face protracted litigation when they sue individually” in small claims court (citation omitted)).

³ The Court peripherally addressed superiority in the context of a settlement in *Pickett*, but the main focus of the Court’s analysis was the predominance requirement. 145 Wn.2d at 193-97 (noting that the trial court’s denial of class certification was based in part on its determination that individual issues of causation made class-wide litigation impractical).

Federal courts have declined to find individual litigation of small claims to be superior even when statutory damages and attorneys' fees are available. "[C]ourts are generally skeptical that claims with statutory floors and guaranteed attorney's fees render individual suits superior to class actions." William B. Rubenstein, 2 Newberg on Class Actions § 4:87 (5th ed. Oct. 2017) (discussing cases). And "most courts begin to see individual litigation as feasible, and perhaps superior to a class suit, when member claims reach, roughly speaking, a six-figure level." *Id.*

This skepticism is even more pronounced in employment cases because "class members may fear reprisal and may not be inclined to pursue individual claims." *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002); *see also Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 346 (S.D.N.Y. 2004) (employees' fear of reprisal and unfamiliarity with the legal system may discourage them from pursuing claims). Moreover, lawyers are typically reluctant to accept cases where damages are small even where statutory attorney fees are available. Individual small claims as an alternative to class certification would almost inevitably result in a substantial number of valid claims never being filed at all.

Washington has robust statutory protections for employees. *See Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 154, 159, 961 P.2d 371 (1998) (Washington's "comprehensive legislative system" reflects a

“strong legislative intent to assure payment to employees of wages they have earned”). This Court has lauded the State’s strong public policy favoring the payment of wages and safeguarding employees’ welfare. *See Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 656-69, 355 P.3d 258 (2015) (Washington law requiring rest breaks protects employees’ health and safety); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (citing “Washington’s long and proud history of being a pioneer in the protection of employee rights”).

These policy considerations are also implicated when employees seek to pursue their rights collectively. This Court has held that class actions are necessary for effective vindication of the public interests served by Washington’s Consumer Protection Act. *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007); *Schnall*, 171 Wn.2d at 291. The same reasoning applies with greater force in employment cases, as most wage claims are too small to bring individually and employees face the daunting prospect of confronting their employer in court.

This Court has an opportunity to expand on its instruction in *Schnall* that the superiority analysis requires a comparison of a class action with available alternatives. Merely noting the possibility of individual litigation and concerns about manageability of a class trial cannot support denial of certification when no consideration is given to

whether available alternatives will be any more manageable. The Court should hold that the filing of multiple cases in small claims court is not superior to a class action because the litigation may still be complicated, and employees in particular may be deterred from suing their employers individually.

IV. CONCLUSION

WELA respectfully requests that the Court direct that reviewing courts give less deference to denials of class certification as opposed to grants, particularly where the denial is insufficiently supported by findings and analysis. WELA also urges the Court to hold that disputed factual issues usually need not be resolved in the context of class certification because the proper focus is on the elements of the plaintiffs' claims and the type of evidence that will be used to prove them. The Court should also hold that rest and meal break claims do not turn on issues of "individual experience" and can be manageably resolved on a class-wide basis. Finally, the Court should provide additional guidance on the superiority analysis, recognizing that that small claims court cases are not preferable to class actions. This is particularly true in employment cases because Washington's strong public policy of protecting employees favors ensuring their access to class action litigation.

RESPECTFULLY SUBMITTED AND DATED this 30th day of
November, 2017.

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DATED this 30th day of November, 2017.

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