No. 1031608

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IN THE SUPREME COURT OF ALABAMA

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HARSCO CORPORATION d/b/a TAYLOR-WHARTON,

Defendant-Appellant,

vs.

EDWARD J. MALLON, JR., et al.,

Plaintiffs-Appellees.

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On Appeal from the Circuit Court of Mobile County

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BRIEF OF APPELLEES

_____

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Statement Regarding Oral Argument

Oral argument is not requested.

Table of Contents

Table of Authorities

Statement of the Case

This is an appeal from a class certification order. The case involves an employer that implemented a change in its vacation policy in such a way as to take away vacation days that the employees had already earned. The plaintiff class's claim is that the employer's actions violated the principles set forth in such cases as *Amoco Fabrics and Fibers Co. v. Hilson*, 669 So.2d 832 (Ala. 1995), a case that was itself a class action.

This case is unlike most appeals from class certification orders. In most successful class certification appeals, defendants argue that some element of the claim, such as reliance or the content of a contract, is a matter of proof that is unique to each class member, thus rendering class certification inappropriate. Here, by contrast, the defendant employer's arguments all come down in the end to one contention: that the plaintiffs are not entitled to recover because (in the employer's view of the case) the employer did not take anything from its employees to which they had an entitlement.

Thus, the employer's argument against class certification is entirely dependent on its view of the

substantive merits of the case. This Court could therefore affirm the class certification quite simply, based on the familiar rule that the issue of class certification is distinct from the issue of whether the case has substantive merit. Alternatively, this Court could reach the merits and conclude – as the trial court did, in rulings separate from the class certification order – that the plaintiffs and the class they represent are entitled to prevail.

Relevant proceedings below were as follows.

The three named plaintiffs, Mallon, Dixon and Busby, filed suit on behalf of themselves and others similarly situated. The defendant is their employer, which is referred to herein as Taylor-Wharton. (Amended Complaint, C-12 *et seq.*).

Plaintiffs moved for class certification. (Plaintiffs' Motion for Class Certification, C-48 *et seq.*). Taylor-Wharton opposed the motion (C-421 *et seq.*) and Plaintiffs replied in support of the motion (C-706 *et seq.*).

Plaintiffs moved for summary judgment. (Motion, C-51 *et seq.*; Brief, C-54 *et seq.*; Narrative Summary, C-65 *et seq.*). The Motion was supported by affidavits of plaintiffs Busby (C-72 to –171, with attachments), Dixon

(C-172 to -270, with attachments), and Mallon (C-271 to -370, with attachments), as well as other materials including responses to requests for admission (C-384-400). Plaintiffs further filed a second affidavit of plaintiff Mallon. (C-889 to –890). Taylor-Wharton filed a cross-motion for summary judgment (C-402 *et seq.*). Plaintiffs opposed that motion. (C-709 *et seq.*).

The trial court (Hon. Joseph S. Johnston) granted Plaintiffs' motion for summary judgment as to the substantive issues in the case. (C-891 to –897). This was not a final order, as the issues of class certification and remedy remained.

Several months later, Taylor-Wharton filed a "renewed" motion for summary judgment that was in substance merely a reiteration of its previous arguments. (C-898 to –905). Plaintiffs opposed the motion. (C-926 to –929). The trial court denied the motion. (C-936).

When the motion for class certification was still pending after some time, Plaintiffs filed a brief in support of the motion, in order to bring the matter to a ruling. (C-1046 *et seq.*; *see also* Reply Brief, C-1231 *et seq.*).

The trial court held an evidentiary hearing on the issue of class certification. (R-1 *et seq.*). After that hearing, the trial court granted the motion for class certification, with an opinion explaining the reasons for that ruling. (C-1242 to –1249). This appeal followed.

Statement of the Issues

The issue is whether the trial court abused its discretion in certifying the class. This is a question separate from the merits of the case.

If the Court reaches the merits of the case, the issue is whether an employer can unilaterally decide to take from employees the vacation days that they earned through work that they already performed, through a sleight-of-hand that accompanies implementation of a change in the way vacation pay will be earned in the future.

Statement of the Facts

Plaintiffs are employees of Taylor-Wharton at its Mobile County facility. See Amended Complaint, ¶ 3 (C-12), Answer to Amended Complaint, ¶ 3 (C-19).

This suit is brought as a class action on behalf of

similarly-situated employees who are likewise subject to the vacation policy at issue here. See Amended Complaint, p. 4 et seq. (C-15 to -16). There are approximately 175 such employees, who were in the same position in that they were subject to the "old" vacation policy and were then subject to the change that gave rise to this suit. See Affidavits of Edward J. Mallon, Jr. (C-275), Gary W. Dixon (C-176) and James R. Busby (C-76).

The facility at issue was formerly owned by Union-Carbide. The Union-Carbide vacation policy, practice, and understanding was that vacation taken in a given year was earned by virtue of work performed during the prior year. That is why the Union-Carbide vacation policy explicitly called the vacation entitlement a "vested" benefit. The Union-Carbide policy explained to every employee that if he or she worked for the year and was on the payroll as of December 31, "you will have a vested right on that day to such vacation for the following year." See Affidavits of Edward J. Mallon, Jr. (C-271), Gary W. Dixon (C-172) and James R. Busby (C-72) and Exhibit 1 thereto (e.g., C-301).

When Taylor-Wharton took over the facility in 1985, it did not alter the vacation policy in any way, and continued

to honor the vacation policy as it had existed under Union Carbide. Insofar as vacation policy was concerned, the transition from Union-Carbide to Taylor-Wharton was a seamless one; Defendant recognized the vacation days that employees had earned in the prior year through service under Union-Carbide, and Taylor-Wharton counted employees' years of service under Union-Carbide in determining the number of vacation days each employee was entitled to. See Affidavits of Edward J. Mallon, Jr. (C-272), Gary W. Dixon (C-173) and James R. Busby (C-73).

Taylor-Wharton made a brief effort in early 1988 to change the vacation policy, to do away with the "vested" nature of the vacation entitlement as a part of an employee's compensation for the prior year's work. Taylor-Wharton attempted instead to grant vacation on a monthly 1/12 allotment basis to be taken during the same year it was being earned. This attempted change was announced by memo of January 6, 1988. See Affidavits of Edward J. Mallon, Jr. (C-272), Gary W. Dixon (C-173) and James R. Busby (C-73) and Exhibit 2 thereto (e.g., C-308 *et seq.*).

There was such an outcry from employees about this change in policy, that a few days thereafter Taylor-Wharton

returned things to the way they had been under Union-Carbide. This return to the old policy was announced by memo of January 21, 1988. No longer was there any talk of earning vacation on a month-by-month basis during the same year the vacation was taken. Instead, Taylor-Wharton returned to the understanding and the policy that vacation was earned on a yearly basis, in a lump sum at the outset of the year, by virtue of work performed during the prior year. See Affidavits of Edward J. Mallon, Jr. (C-272 to -273), Gary W. Dixon (C-173 to -174) and James R. Busby (C-73 to -74) and Exhibit 3 thereto (e.g., C-312).

Further confirming that vacation was earned by virtue of the prior year's work, is the fact that Taylor-Wharton's policy (as communicated in Exhibit 3 to the affidavits, C-312 *et seq.*) provided full vacation benefits to an employee who voluntarily resigned with appropriate notice. Thus, for instance, an employee who informed Taylor-Wharton on December 15 that his last day of employment with the company would be on January 1, would thereafter be entitled to receive his full vacation due him as of January 1. (See paragraph V.A. of Exhibit 3, C-314). Again, this confirms that, under Taylor-Wharton's written policy, vacation to be

taken in a given year was earned by virtue of work performed in the prior year.

In 1989, Taylor-Wharton again confirmed to affected employees, in writing, that the vacation policy continued unchanged in this regard. Taylor-Wharton made this communication in connection with its dissemination of an employee handbook; Taylor-Wharton noted in writing, to employees, that there was only one major change to any policy, and that was an improvement in the vacation policy in the sense that an additional week of vacation was granted to the most senior employees. Thus, by representing that there was no major change other than this, Taylor-Wharton confirmed the long-standing understanding and agreement that vacation for a given year was earned by virtue of service in the prior year. See Affidavits of Edward J. Mallon, Jr. (C-273), Gary W. Dixon (C-174) and James R. Busby (C-74) and Ex.4 thereto (e.g., C-315).

Taylor-Wharton again confirmed this long-standing understanding in 1999, when it issued a new employee handbook. The 1999 handbook did not indicate that there was any change in this understanding. And indeed it

expressly confirmed the understanding that vacation was earned through the prior year's work, in the handbook's discussion of the vacation entitlement of new employees: "The first year vacation will not be earned (cannot be taken) prior to your first anniversary date unless approved for use during the shutdown by a Superintended or Department Manager." See Affidavits of Edward J. Mallon, Jr. (C-273 to -274), Gary W. Dixon (C-174 to -175) and James R. Busby (C-74 to -75) and Ex. 5 thereto (e.g., C-353). This confirmed that (absent some special individual one-time dispensation from management) an employee earned his or her first vacation allotment only by working a full year. This necessarily means, as matter of logic, that the employee would then earn his or her second vacation allotment only by working a second year; and so on. In short, vacation was given as a vested benefit upon the year's completion, as part of the compensation package for the prior year's work.

As explained in the preceding paragraphs, and as supported by the evidentiary materials cited therein, this was the well-understood nature of vacation at Taylor-Wharton's facility. Taylor-Wharton acknowledged in certain

responses to Plaintiffs' Requests for Admission that this was how the vacation plan operated. Plaintiffs' Request Number 8 stated as follows: "Admit that a regular full-time hourly employee who was on the payroll of December 31, 1999, and who had 10 years of company service on December 31, 1999, was entitled to three weeks of paid vacation as of January 1, 2000." Taylor-Wharton admitted this Request. (C-397 to -398). Likewise, Taylor-Wharton admitted Request for Admission number 9, which stated as follows: "Admit that a regular full-time hourly employee who was on the payroll on December 31, 1999, and who had 23 years of company service on December 31, 1999, was entitled to four weeks of paid vacation as of January 1, 2000." (C-398).

There was no change in this policy, until the year 2000 drew to a close. On or about December 14, 2000 – after employees had worked practically the entire year in the knowledge that such work would gain them a vacation allotment for 2001 – Taylor-Wharton issued a memo that purported to change the policy. See Affidavits of Edward J. Mallon, Jr. (C-274), Gary W. Dixon (C-175) and James R. Busby (C-75). Under this change, vacation was taken during the year it was earned, and was earned on a month-by-month

1/12-per-month basis. See Ex. 6 to affidavits, section III (e.g., C-370).

Under the way that Taylor-Wharton has implemented this change, employees will never receive the vacation benefit that was a part of their compensation package for the work they performed in 2000. As shown in the prior paragraphs, the vacation that employees took in 2000 was earned by their work in 1999. And under the change announced by Taylor-Wharton, the vacation taken in 2001 will have been earned by work in 2001. The vacation entitlement that employees worked diligently for in 2000 – as a part of their total compensation package for that year's work – was sneakily gobbled up by Taylor-Wharton. This is true as to each employee who was on the payroll during 2000 and was still on the payroll in 2001. (E.g., C-274).

Under the plan as it existed prior to this change, an employee with 1 year of service received 1 week of vacation; an employee with 2 years but less than 10 years received 2 weeks; an employee with 10 years but less than 20 years received 3 weeks; and an employee with 20 years or more received 4 weeks. See Affidavits of Edward J. Mallon, Jr., Gary W. Dixon and James R. Busby and Exs. 4 and 5

thereto. Thus, calculation of the value of the vacation benefit unlawfully taken from employees would be a simple matter of determining each affected employee's entitlement based on years of service, determining each affected employee's hourly wage rate, and performing a simple mathematical calculation. There would be no divergence in the relief available to affected employees; each one's relief would be calculated in this same way. See Affidavits of Edward J. Mallon, Jr., Gary W. Dixon and James R. Busby.

This, then, is the crux of the case. Employees worked the year 2000 under terms of employment that included the vesting of a vacation benefit that accrued by virtue of work already performed. Then, in 2001, the employer instituted a rule that, from that year and into the future, vacations would be earned on a month-by-month basis and would be taken in the year it was earned. The sleight of hand is that the employer implemented this change in a manner that resulted in employees receiving no vacation on account of the work that they performed in 2000.

If the point is still not clear, here is a chart that shows how employees have been harmed by this change in

policy. It shows the reasonable thoughts that a long-term employee would have had in various years, starting (simply for explanatory effect) in 1998.

1998	1999	2000	2001	2002
"The work that I do in this year will entitle me to a vacation next year (1999)."	"I am taking vacation this year by virtue of the work I did in 1998, just as I anticipated. The work that I do in this year will entitle me to a vacation next year (2000)."	"I am taking vacation this year by virtue of the work I did in 1999, just as I anticipated. The work that I do in this year will entitle me to a vacation next year (2001)."	"I am taking vacation this year by virtue of the work I am doing this year (2001) – that's the new policy. **But what happened to the vacation that I worked so hard for, last year? When do I get that???**"	"I am taking vacation this year by virtue of the work I am doing this year (2002)."

Though Taylor-Wharton now argues in this Court for a different understanding of the facts, it admitted the true nature of the change in the trial court. Taylor-Wharton expressly told the trial court as follows. "[U]nder the prior vacation policy, an employee earned vacation for the following year based on the preceding year's work. . . . Under the new policy announced prior to January 1, 2001,

however, an employee earned his allotted vacation, based on his total number years of continuous service, in the year that the vacation is taken, so that an employee has no earned vacation time at the beginning of the year." (C-407 to -408). That admission, which is quite correct, will dispose of much of Taylor-Wharton's argument to this Court. So, it is worth emphasizing: under the policy that was in existence until the last days of 2000, "an employee earned vacation for the following year based on the preceding year's work." But then, Taylor-Wharton changed things, such that for 2001 and later years, "an employee has no earned vacation time at the beginning of the year." What happened to the vacation time that had been earned in 2000? It is gone, having been swept away in Taylor-Wharton's sleight-of-hand for each member of the plaintiff class in precisely the same way, unless this litigation yields a remedy. What that remedy is for each member of the class is a simple matter of arithmetic, using each person's number of years of service and hourly rate of pay.

Statement of the Standard of Review

"This Court has consistently held that a trial court's class-certification order is to be reviewed by an abuse-of-discretion standard." *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1176 (Ala. 2000).

Summary of the Argument

The argument, in summary, is this:

1. Taylor-Wharton's arguments against class certification are almost entirely arguments about the merits of the class's claims. Therefore, the arguments are misguided, because it is settled that the question of class certification is separate from the merits. The plaintiffs' legal theory is perfectly suited for class treatment. Whether that legal theory will ultimately prevail is a separate question.

2. If the Court does see fit to reach the question of the merits, in considering the question of class certification, then the Court should agree with the trial court's summary judgment ruling in favor of the plaintiffs. To put it most simply, an employer cannot retroactively reduce employees' compensation for work that the employees

have already performed.

3. Taylor-Wharton makes one or two minor arguments about class certification that are not dependent on its view of the merits of the case. But those arguments, too, are without merit. In particular, Taylor-Wharton claims that each class member's claim would depend on proof as to whether that class member either resigned without adequate notice or was terminated for cause. But the record demonstrates that, when asked what employees it contended were in that category, Taylor-Wharton identified no employees about whom it made that contention. So, for this most simple reason (and for others explained in the argument) Taylor-Wharton's attempt to complicate the case is unavailing.

Argument

The trial court correctly certified the class. This is, in fact, the perfect case for class treatment. The plaintiffs' legal theory is straightforward, and the merits of the class claims will undisputedly not depend on any individualized inquiry into reliance, or individual communications with the defendant, or individuals' unique

understandings of those communications; there is no such contention by Taylor-Wharton. The class will succeed or fail together on the merits. And if the class succeeds, then the remedy will be simple: a declaratory judgment, along with monetary remedies that are a simple matter of arithmetical calculation on a formula that is identical to all class members. If this case cannot be treated as a class action, it is impossible to imagine a case that is suitable for class treatment.

Taylor-Wharton's arguments to the contrary are almost solely based on the contention that the plaintiffs are not entitled to recover on the merits. This argument is not based on something unique about the named plaintiffs that makes them different from all other class members; it is instead an attack on the merits of the plaintiffs' legal theory. As such, it is no reason to deny class certification, because it is well-settled that the issue of class certification is separate from the merits.

But if this Court does find it appropriate to reach the merits, the Court should conclude that the trial court was correct in granting summary judgment to the plaintiffs on the merits. At least it must be recognized that this Court

is in no position to issue a ruling that would, in effect, amount to a summary judgment for Taylor-Wharton. A ruling in favor of Taylor-Wharton on the merits, under the guise of a ruling on the question of class certification, would violate one of the most basic rules of employment law: an employer cannot retroactively reduce employees' compensation package for work that the employees have already performed. *See, e.g., Amoco Fabrics and Fibers Co. v. Hilson*, 669 So.2d 832 (Ala. 1995).

1. The nature of Plaintiffs' legal theory, which is the same for all class members.

Plaintiffs' theory, both factually and legally, is a straightforward one. And it is a theory that is the same as to every class member, that would yield a remedy in favor of every class member according to the same principles, a remedy that would be a simple matter of arithmetical calculation for each class member.

The case is based on a simple proposition: after one party has provided its services to another, under terms of compensation that were understood (indeed, written) in advance, the benefited party cannot unilaterally decide to lessen the compensation for the services already performed.

Whether a matter of contract or quantum meruit, this is just basic law: once the work has already been done, the party for whom it was done cannot unilaterally decide to pay less for the work than had been stated in advance. It hardly seems that citation of legal authority would be necessary for this simple proposition, but there is clear legal authority in such cases as *Amoco Fabrics and Fibers Co. v. Hilson*, 669 So.2d 832 (Ala. 1995).

The fact that this case concerns vacation policy, rather than an hourly wage, does not change the fact that this amounts to a change in compensation. *Amoco Fabrics* itself involved vacation benefits, and the Court applied the obvious principle that such benefits could not be taken away once they had already been earned. As this Court held, the employer "could not, as a matter of law, revoke the vacation pay policy once the employees had performed ..." *Id.*, 669 So.2d at 835. This Court so held as a matter of contract law, and indicated that the same result would likely prevail under *quantum meruit* law even if there were no actual contract. *Id.* The same is true here. Once the employee has performed, the employer cannot reduce the compensation on a retroactive basis.

The analysis in *Amoco Fabrics*, which is applicable here, is furthermore consistent with the law's usual treatment of vacation pay and the like; these are treated as items of compensation that are earned as a contractual matter when the employee performs and cannot thereafter be taken away. As the old Fifth Circuit recognized in *U.S. v. Munro-Van Helms Co.*, 243 F.2d 10, 13 (5th Cir. 1957), "Vacation pay is, by all of the decisions, regarded as wages," and "'Wages' are compensation for personal services rendered by employees, and are 'earned' when the service is rendered, even though not then payable." Alabama cases are to the same effect, as in (for instance) *W.B. Davis Hosiery Mill v. Wilson*, 74 So.2d 532, 534, 37 Ala. App. 675, 678 (1954): "The amount here sued for was not a mere gift or bonus, but an offer of additional wages to those whose length of service, with increased efficiency resulting from experience, came within the offer. When an employee entered upon service with the incentive pay inducement, a supplemental contract resulted. The additional incentive wages were as much a part of the employee's compensation as were the original and base wages."

The Plaintiffs' theory is, furthermore, based in part

on the understanding and assertion that under the policy as it existed in the year 2000 and before, the vacation benefit enjoyed in one year had been earned by work that the employee performed had already performed before that year. Though Taylor-Wharton attempts to deny or obscure that fact in this Court, it expressly admitted it in the trial court. Taylor-Wharton told the trial court the following:

> [U]nder the prior vacation policy, an employee earned vacation for the following year based on the preceding year's work. . . . Under the new policy announced prior to January 1, 2001, however, an employee earned his allotted vacation, based on his total number years of continuous service, in the year that the vacation is taken, so that an employee has no earned vacation time at the beginning of the year.

(C-407 to -408).

Taylor-Wharton's admission, that this was the nature of the pre-2001 program, was correct. Quite obviously, vacation days with pay were not a *gift* from the employer to the employees. Those days' pay was, instead, compensation that the employees earned as part of their income. And this pay was, under the pre-2001 program, earned by work performed *before* the January 1 date on which the vacation pay was recognized; it was,

the undisputed evidence shows, *not* advanced pay for services that had yet to be performed.[1]

This, then, was what gave rise to the problem. When changing the way that vacation was earned and enjoyed for year 2001 and subsequently, Taylor-Wharton could have implemented the policy in a way that honored the fact that the employees had already earned a vacation benefit by their work in 2000. Taylor-Wharton could have allowed employees to take the vacation they had earned by the prior year's work (in addition to the vacation they were earning under the new policy in 2001), or it could have paid them in lieu of actual days off. But Taylor-Wharton did neither. Instead, it tried to implement the change in such a way that employees would never enjoy the vacation benefit that they had earned in 2000. Vacation taken in 2001 was the vacation that was earned a month at a time in that same year, under the new policy. Gone forever – but for this suit – was the vacation for which employees had worked in

[1] It is true that if an employee left without notice or was fired for case, then that accrued vacation would be forfeited. But the existence of that forfeiture provision does not detract from the fact that, under the pre-2001 program, vacation pay was earned by work that had already been performed before the year in which the vacation would be taken.

2000.

That was the retroactive reduction in compensation that violated the principle of *Amoco Fabrics*. That, at least, is the Plaintiffs' theory. It is a theory that will yield a remedy for each class member by a simple arithmetical calculation. And it is, to the extent this is relevant upon review of class certification, a theory with which the trial court *agreed* as a matter of law in summary judgment rulings that were separate from the class certification order that is under review.

2. Taylor-Wharton's arguments about Rule 23(a) are all dependent on its assertion that Plaintiffs' legal theory is without merit; but the propriety of class certification does not depend on whether Plaintiffs' legal theory will ultimately be accepted as correct.

The first part of a class certification decision is to determine whether the Rule 23(a) prerequisites are met. The trial court expressly concluded that they were met, discussing each one in turn and giving reasons for its conclusion. (C-1243 to -1245).

In contesting some of the Rule 23(a) factors, however, Taylor-Wharton's contentions are based purely and squarely on its contention that there is no valid claim on the merits, at least for those employees (including the named

Plaintiffs and the large majority of the class) who remained employed by Taylor-Wharton in 2001. Thus, Taylor-Wharton's various arguments at pp. 26-50 of its brief, all designed to show that Taylor-Wharton had no contractual liability regarding vacation benefits, are all arguments that go towards the validity of *each class member's claim* on the merits; these are arguments that there was no contract, no vesting, and so forth. And the remainder of Taylor-Wharton's Rule 23(a) argument, at pp. 50-52 of Taylor-Wharton's brief, offers a fall-back argument that again is directed squarely at the merits of whether Plaintiffs are entitled to prevail on their legal theory; this argument is that only those employees who left Taylor-Wharton would be entitled to any recovery, or in other words that Plaintiffs' theory (that all employees are entitled to a recovery) is without merit as a matter of law.

Taylor-Wharton itself tells the Court that there were only 19 class members who left its employ during 2001, out of a total class membership of 187. (Taylor-Wharton brief, pp. 50-51). Thus, when Taylor-Wharton argues that employees who worked the year 2001 (such as the named

Plaintiffs) received all that they were owed (Brief, pp. 24-25, 50-52), this is an argument that would go to the merits of 90 percent of class members' claims. When Taylor-Wharton tells the Court that there was no breach of contract, or the like (Brief, pp. 24-50), these are arguments that would go the merits of 100 percent of class members' claims. These are not, in any sense, arguments about the standing of the named plaintiffs in particular. They are merits arguments on the core issues in the case.

By premising its contentions as to the Rule 23(a) prerequisites on its view that the Plaintiffs' legal theory lacks merit as a matter of substantive law, Taylor-Wharton has missed the point of class certification and has given this Court no reason to reverse the trial court's decision. The principle is clear that the question whether to certify a class is separate from the question whether the class claims have substantive merit. See, *e.g.*, *Mitchell v. H&R Block*, 783 So.2d 812, 816 (Ala. 2000); *Ex parte GEICO*, 729 So.2d 299, 303 (Ala. 1999) ("This Court is not in the position of deciding the merits of this action today. 'The question of class certification is a procedural one distinct from the merits of the action.'"). The

legislature has agreed with and adopted this principle, by noting the distinction between discovery directed solely to the merits and discovery that is appropriate to the class-certification question. *See Ex parte CIT Communication Finance Corp.*, ___ So.2d ___, 2004 Ala. LEXIS 225 (Ala. 2004) (discussing Ala. Code § 6-5-641(c)).

Taylor-Wharton tries a back-door approach to bring the question of the merits into the class-certification question, by contending that one cannot represent a class unless he himself has a claim. Taylor-Wharton attempts to tie this to the Rule 23(a) prerequisites of typicality and adequacy; this is the supposed justification for Taylor-Wharton's focus on the merits, in this appeal from a class-certification order. (Taylor-Wharton brief, pp. 24-25).

But Taylor-Wharton has dramatically overstated the extent to which this Court should delve into the merits of a named plaintiff's claim, in assessing the propriety of class certification. True, it can be appropriate to ask whether a would-be class representative is trying to represent a class of which he is not even a member, or is trying to represent a class when he has not even suffered the injury that the class has suffered. But the reason for

those inquiries is not because class certification is the right time to decide the merits of a claim. The reason is to make sure that the named plaintiff, and would-be class representative, has interests that are squarely aligned with the interests of the class that he seeks to represent. In this case, there is no question about that: the named Plaintiffs stand in the same position as the class they seek to represent. The legal theory of the named Plaintiffs is a legal theory that would lead to recovery by every member of the class. What was done to the named Plaintiffs, was done to everyone. If a legally-redressable wrong was done to the class as a whole, it was done to the Plaintiffs. The named Plaintiffs are therefore, under any reasonable construction of Rule 23(a), adequate class representatives and their claims are typical of the class's claims.

Where a putative inquiry into the standing of a named plaintiff is based on arguments that would actually dispose of the claims of all (or nearly all) class members, as in this case, then the defendant is inappropriately linking the class certification question to the issue of the merits. If this Court allows such arguments to carry the

day in this case, then the procedural separation between class certification and the merits will disappear – and, along with it, the legislature's distinction between class certification discovery and pure "merits" discovery. *See* Ala. Code § 6-5-641(c).

None of the cases cited by Taylor-Wharton (Brief, pp. 24-25) allows a defendant to obtain review of the merits of the class's legal theory under the guise of reviewing a class certification order. *Kid's Care, Inc. v. Ala. Dep't of Human Resources*, 843 So.2d 164 (Ala. 2002) was not an appeal regarding class certification, and contains no holding or even dictum that a class certification appeal can be premised on the defendant's arguments about the merits of the legal theory that is common to all class members. Similarly, *Williamson v. Indianapolis Life*, 741 So.2d 1057 (Ala. 1999) has nothing to do with appeals from class certification decisions; the case was a certified question from federal courts, and the case did not involve a question of class certification.

Mason v. Prudential Ins. Co., 783 So.2d 821 (Ala. 2000) did not allow review of a class certification decision to be premised on arguments about the merits of the class's

legal theory. Instead, the court merely held that one of the named plaintiffs had not suffered injury, on the basis of facts specific to her – not on the basis of legal arguments attacking the merits of the class's legal theory; indeed, the Court was careful to note that it was not ruling on the merits of the class's claim. *Id.* at 822. Similarly, *Ex parte Prudential Ins. Co.*, 721 So.2d 1135 (Ala. 1998) did not allow a class-certification appeal to become an inquiry into the merits of the class's legal theory; instead, the relevant holding was merely that the named plaintiffs could not be class representatives because (as a matter of fact specific to them as individuals) they did not have the type of Medicare supplement policy with the defendant that the suit concerned. They were, therefore, not even members of the class they sought to represent. *Id.* at 1137. *Ex parte Blue Cross and Blue Shield*, 582 So.2d 469 (Ala. 1991) is of the same sort; the discussion of class certification was not in any way premised on the assertion that the class's legal theory lacked merit, but rather on the assertion that the named plaintiffs were, for reasons specific to each of them, not actually members of the class that they sought to

represent.

Finally, *Warehouse Home Furnishing Distributors v. Whitson*, 709 So.2d 1144 (Ala. 1997), a case affirming class certification, does not hold that a court can reach the merits of the class's legal theory under the guise of assessing whether the named plaintiffs are adequate or typical; instead, the Court reached the merits of one of the claims only because a partial summary judgment ruling had been made final under Rule 54(b).

In short, Taylor-Wharton has cited no case allowing a class action defendant to do what Taylor-Wharton is trying to do here: to premise its attack on the Rule 23(a) prerequisites on legal arguments that go to the merits of the claims of the class as a whole (or, at the very least, the claims of roughly 90 percent of the class). Such an effort runs afoul of the often-stated rule that the question of class certification is separate from the question of the merits of the case. See, *e.g.*, *Mitchell v. H&R Block*, 783 So.2d 812, 816 (Ala. 2000); *Ex parte GEICO*, 729 So.2d 299, 303 (Ala. 1999)

So, this Court should summarily reject Taylor-Wharton's arguments about Rule 23(a). If the Court looks at what the

issues and claims are in this case – not at whether those claims will ultimately prevail or whether the Plaintiffs are right on the merits of the issues – then the Rule 23(a) prerequisites are plainly met, as the trial court concluded. Indeed, Taylor-Wharton has effectively stipulated to this, by failing to make any argument about the Rule 23(a) factors that is not premised on Taylor-Wharton's own view of the merits. There are more than 175 members of the class whose claims are the same, premised on the same legal contentions. The named plaintiffs are among them, and are entitled to prevail if the class is entitled to prevail, and will recover in precisely the same way as other class members if the class prevails. So, when one focuses on what the class's claims are rather than on whether they will ultimately prevail, numerosity and typicality and adequacy are all met; and Taylor-Wharton does not even contest the "commonality" part of Rule 23(a), nor the "adequacy" part insofar as it focuses on class counsel. The trial court was plainly correct in finding the Rule 23(a) prerequisites to be met.

3. The trial court correctly agreed with Plaintiffs' legal theory. Therefore, if the Court reaches the merits in considering the Rule 23(a) factors, this reinforces the correctness of the class certification decision.

As we have discussed above, the great bulk of Taylor-Wharton's argument in opposition to class certification consists of arguing, in various ways, that this suit has no merit. While we believe that this issue is not properly before the Court for reasons that have been discussed above, the Court may deem it appropriate to reach the merits. This would, in effect, be a review of the trial court's entry of summary judgment in favor of the plaintiffs. (The denial of Taylor-Wharton's motion, by contrast, is certainly not a reviewable order. So, Taylor-Wharton could not possibly win a reversal of that denial. *See Thompson Properties v. Birmingham Hide & Tallow*, 839 So.2d 629 (Ala. 1992) (while reversing summary judgment that had been granted in favor of one party, this Court held that the denial of the other party's cross-motion for summary judgment was not reviewable)).

Taylor-Wharton's "merits" arguments are wrong for the following reasons. In responding as follows, we have made our best attempt to understand, and to explain, the various different sorts of arguments that Taylor-Wharton is making,

and to respond separately to each separable thread of the argument.

a. The "no loss" argument.

Taylor Wharton argues that the named plaintiffs have no claim – and by the same token that very few class members have any claim, so few that the case cannot meet the "numerosity" requirement – because they received the same number of vacation days in 2001 that they had always expected. (Taylor-Wharton Brief, pp. 24-25, 50-52). This is the sleight-of-hand that is at the core of the case, and it is no basis for a ruling in Taylor-Wharton's favor.

When employees took vacation days in 2001, they were – as the new policy stated – days that had been earned by work in 2001. The days that had been earned by virtue of previous work were never taken, and never will be taken or paid for unless this suit succeeds. That is the loss, and it is a loss felt by each class member. This has been explained at more length in the Statement of Facts, and does not need to be repeated here. However, an analogy might help.

Imagine two corporations, one a supplier to the other. General Widgets, the purchaser, tells Acme, the supplier,

at the beginning of 2000, "I will pay you $100 a week for cleaning supplies. And here is a further incentive: if our relationship is still in existence at the end of the year, I will pay an extra $520 on January 1." Acme performs, through the year. Just as the year 2000 draws to a close, General Widgets says, "For next year I am offering different terms. I will simply pay you $110 per week." And again, Acme performs. But General Widgets never gets around to paying that promised $520, even when Acme demands it.

General Widgets might say – just as Taylor-Wharton says here – "but there was no loss! We paid Acme just as much in 2001 as we would have, if we had not changed the terms of the deal at all." That would be a sleight-of-hand in that hypothetical, just as it is here. General Widgets would have pocketed the $520 bonus that Acme earned by delivering throughout 2000. This Court would not hold, in that business-to-business case, that there was no loss. This Court would see through the sleight-of-hand. The Court should do the same in this case.

b. The "no contract" argument.

Taylor-Wharton's next "merits" argument is that there

was no contract for vacation benefits, in that its employee handbook (which memorialized the longstanding terms of the vacation benefit) contained a disclaimer of contractual status. (Taylor-Wharton Brief, pp. 26-30). This argument misses the mark for at least two reasons.

First, a "disclaimer" of the sort that Taylor-Wharton is relying upon cannot provide the basis for an employer to withhold part of employees' compensation after work has already been performed. Whether the employer likes it or not – and whether the duty arises, in a legal sense, from the pages of the handbook or not – the law is simply and obviously that an employer cannot refuse to pay what it had said that it would pay, once the employees have already done the work. That is why this Court, in *Amoco Fabrics and Fibers*, rejected the very same argument. *See id.*, 669 So.2d at 834 (noting that "Amoco claims the Handbook contained an express disclaimer of contractual liability"); *id.* at 835 (upholding the finding of liability on the breach-of-contract claim). Would this Court hold that an employer was free to reduce employees' hourly wage rates for work that the employees had already performed, on the grounds that the previously-promised rates had been set out

in a contract that included a boilerplate disclaimer of contract status? Of course not; once the work was performed, it would not be up to the employer to unilaterally decide to pay a lower rate for that work. And, as has been discussed above, vacation benefits are a component of compensation just as hourly wages are, so the same principle applies.

Second, Taylor-Wharton's "no contract" argument would not shield Taylor-Wharton from liability even if the argument were accepted. The reason is that – as this Court intimated in *Amoco Fabrics*, 669 So.2d at 835-36 – the employees would be entitled to prevail in quantum meruit if they were not entitled to recover in contract. Again, the principle is simple: once an employee has already done the work, the employer cannot unilaterally take away part of the compensation. Taylor-Wharton's argument against quantum meruit recovery is a procedural one, that this theory was not expressly pleaded. (Taylor-Wharton Brief, p.2 n.1, p. 5). But the alternative legal theory of quantum meruit has expressly been part of this case for *nearly three years now*, at least since Plaintiffs discussed it expressly as an alternative basis for summary judgment

in their favor. (C-61 to -62). The trial court might conceivably have had discretion to refuse to entertain this argument unless the pleadings were amended to reference it directly – but instead the trial court considered the theory on its merits and agreed with it, *two and a half years ago*. (C-894, summary judgment order). If Taylor-Wharton had, for some indiscernible reason, wanted to ask for an order that Plaintiffs be required to set out this theory in amended pleading, they could have asked for such an order. It did not. So, since quantum meruit has been litigated as an issue in the trial court for years now, it is much too late in the day for Taylor-Wharton to pretend that the issue is not in the case.[2]

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[2] Taylor-Wharton also argues (p.2 n.1) that Plaintiffs are not entitled to recover in quantum meruit because Plaintiffs are claiming the benefit of a written contract. We do not understand this argument. The theory of quantum meruit is in this case as an alternative, in case it is held that there was no contract. If there is no contract, then the premise for Taylor-Wharton's argument disappears. Taylor-Wharton cites no case for the absurd proposition that a plaintiff cannot recover under quantum meruit if it has pursued that theory as an alternative to a claim for breach of contract. To the contrary, *Amoco Fabrics* recognizes that quantum meruit is a proper alternative argument in a case like this. *Amoco Fabrics*, 669 So.2d at 835-36.

c. The "not yet accrued" argument.

Taylor-Wharton's next "merits" argument is that there is no liability because it announced the new vacation policy in mid-December 2000 rather than at the beginning of January 2001. For this reason, says Taylor-Wharton, no benefit had yet "accrued" (or "vested"), and so Taylor-Wharton was privileged to refuse to snatch away the benefit that employees had been working towards for eleven and a half months of the year 2000. (Taylor-Wharton Brief, pp. 30-40).

The first problem with this argument is the one that will be explored in the next section to come. It is that Taylor-Wharton is working from a flawed premise. The premise is that, by putting out the new policy, Taylor-Wharton gave notice that no vacation benefit would be paid on account of work that had been performed in the year 2000. That premise is flawed, as will be discussed below. It was not inherent, in the announcement of how vacation would be earned in the future, that Taylor-Wharton would be taking away part of the earned compensation for work done in 2000. Taylor-Wharton could have, and should have, given employees the compensation that they worked for in 2000,

even if it wanted to change the manner of vacation-earning for later years. Taylor-Wharton decided not to do so. But it did not candidly announce that decision to employees; it took this suit to bring the issue to the fore.

But even leaving that aside for now, Taylor-Wharton's "no accrued benefit" argument is erroneous as a matter of law for other reasons, as the trial court correctly held on summary judgment. (C-895 to -897). To put Taylor-Wharton's argument into plain language, it is this: that Taylor-Wharton had the absolute and unilateral entitlement to decide, even as late as December 31, 2000, that it would not pay its employees the vacation pay for which they had worked the entire year.

In fact, Alabama law is diametrically opposed to Taylor-Wharton's argument in this regard. Alabama law is clear, in fact, that each employee was entitled to the vacation he or she earned by virtue of the work performed in 2000, even if such employee had not remained on the payroll and performed services through the end of the year. Even if there is some room for dispute about this hypothetical point, the dispositive point for this suit is clear: Taylor-Wharton has cited absolutely no authority for

the proposition that it could take away the earned vacation benefit of those employees (i.e., the named plaintiffs and members of the plaintiff class) who did perform work for the entire year 2000.

Taylor-Wharton's obligation to pay the vacation benefit earned even by those employees who might not have worked through the end of year 2000 is imposed by such Alabama cases as *American Security Life Ins. Co. v. Moore*, 72 So.2d 132, 37 Ala. App. 552 (1954). In that case, employees were promised (in writing, as here) a bonus payment on December 15 if they were "then employed by the company." *Id.*, 37 Ala. App. at 554. The plaintiff was not, ultimately, employed on December 15 because the company shut down its operations. *Id.* at 553-54. Plaintiff sought the bonus, but the company asserted that he was not entitled to it because he was not employed on December 15. The Court noted that the rule in such cases was that

> "in the absence of special provisions in the contract, 'assuming there is a valid and enforceable promise through the offer of a bonus and an acceptance by the employee's continuing in the service, if the employment is terminated by mutual consent of the parties or by the act of the employer through no fault of the employee, the latter should be entitled to a proportionate share of the bonus, according to the time served, even though there was no time fixed for the duration of

> the employment, and it could, therefore, be terminated at will.'"

Id. at 555. The Court adopted and applied that rule as the law of Alabama, and (distinguishing the cases in which the language of the promise included a clearly-stated forfeiture provision, *id.*), held that the plaintiff was entitled to the bonus sought.

Taylor-Wharton tries to analogize this case to *Group W. Cable v. Gargis*, 545 So.2d 819 (Ala. Civ. App. 1989), in which it was held that an employee who had retired mid-year was not entitled to vacation pay that she claimed she had earned during the months of that year in which she worked. The employee lost in *Group W* because the employment handbook specifically provided, "If you are separated for any reason as of the last working day in the calendar year, you will not be considered on the active roll as of the close of business on December 31, and therefore not eligible for vacation for the following year." *Id.* at 820. This was precisely the sort of special and explicit "forfeiture" provision that the Court in *American Security* had distinguished.

In the present case, the handbook simply does not include any such explicit "forfeiture" provision as was

included in *Group W*. The language at issue in this case is much more like that in *American Security*. Thus, it is clear, Taylor-Wharton would have to pay the vacation benefit even to employees who did not stay on the payroll through the entirety of the year 2000. This case comes within the rule of *American Security* rather than the exception of *Group W*.

But again, all of this is hypothetical (because all Plaintiffs worked through the end of year 2000) and is offered merely to illustrate that Alabama law is diametrically opposed to Taylor-Wharton's self-serving arguments. Even if there is any doubt about what we have said above – even if, that is, there is some room for argument that Taylor-Wharton could lawfully deny vacation pay to an employee who did not perform services through the end of year 2000 – there is absolutely no support in Alabama law for the much more extreme stance that Taylor-Wharton is taking here, that it was entitled to retroactively deny benefits even to those who stayed on the payroll through the year 2000, performing the services that were asked of them, and fulfilling every condition within their power to earn the vacation benefit. No case cited by

Taylor-Wharton holds that an employer can, in such a way, retroactively reduce the compensation package of an employee who has performed the work required of him or her.

In order to see just how absurd Taylor-Wharton's contention is, it may be useful to return to the analogy that we discussed earlier in this brief. Again, the hypothetical was that General Widgets told Acme that it would pay $100 a week and an extra $520 on January 1. If Acme fully performed throughout 2000, surely no court in the land would allow General Widgets to unilaterally announce on December 15 that it had changed its mind and had decided after all that it was not going to make that $520 payment. Even if for some reason there was held to be no legally enforceable contract, then Acme would succeed under the most basic principles of equity and quantum meruit. To hold otherwise would make every business relationship a perilous undertaking, as no party could ever be sure that promises were enforceable and that it would be paid for its performance. The same is true in this case: if this Court were to hold that an employer can unilaterally and retroactively change employees' compensation after the work has already been performed,

then the law of employment relationships will be illusory.

d. The "they agreed to it" argument.

Taylor-Wharton's last "merits" argument is based on two contentions: (a) that employees could not, as a matter of law, accept vacation in 2001 under the "new" policy while still claiming an entitlement to vacation earned under the "old" policy; and (b) the employees all accepted the new policy and therefore abandoned any claim under the old one, by continuing to work in 2001. (Taylor-Wharton brief, pp. 40-50). This argument, too, is misguided.

Taylor-Wharton's argument in this regard is based on the premise that Taylor-Wharton's December 2000 announcement of its new policy was the equivalent of saying the following: "For 2001 and beyond, vacation will be earned on a month-to-month basis and will be taken in the year that it is earned. Furthermore, Taylor-Wharton will be taking away, and will never give to you, the vacation that you earned during the year 2000 under the old policy. If you do not agree to our taking away the vacation benefit for which you worked during 2000, then you must quit; if you do not quit, then you have agreed to this." If that is not a reasonable paraphrase of what Taylor-Wharton said to

employees, then its argument cannot possibly prevail; if that is not a reasonable paraphrase of what Taylor-Wharton said to its employees, then its employees were never put to the test of choosing to give up their earned vacation or to quit.

There is, we submit, a serious question as to whether an employer would be allowed to put its employees to such a choice, even if it did so expressly or by clear implication. It would be legally, economically, morally, and practically tantamount to saying, "You will all be terminated unless you immediately pay the company an amount equivalent to several weeks' of your earnings." In an employment-at-will state like Alabama, "you will be terminated unless you agree to x" and "if you do not quit, you will be taken to have agreed to x" are precisely equivalent. And, from an economic as well as a legal perspective, there is no material difference between "agreeing that the employer can get away with not paying a previously-promised $x" and "agreeing to pay the employer a previously-promised $x." So, Taylor-Wharton's argument really is tantamount to saying that an employer can tell its employees, "You will be fired unless you pay the

company an amount equivalent to four weeks' wages." Whether such a modification of the contractual employment relationship is permissible, as a matter of public policy and common law, is perhaps an interesting question. But it is a question that ultimately will not have to be reached here.

That question does not need to be reached in this case, because as a matter of fact Taylor-Wharton did *not* tell its employees that it was reclaiming the vacation benefit that they earned during 2000 and that they would be taken to have agreed to this if they did not resign in protest. Taylor-Wharton was obviously careful not to say that, because any such message would have been devastating to workplace harmony, morale, and productivity. Instead, Taylor-Wharton tried to do this as a sleight-of-hand. Taylor-Wharton did not say forthrightly that this is what it was doing, but did it anyway under the semi-cover of the change in how vacation would be earned in future years.

Even now, Taylor-Wharton tries to pretend that it did not in fact put employees to this horrible choice; that is the whole point of Taylor-Wharton's "no loss" argument that has been the cornerstone of its defense in this case.

Having argued for years now that it did not take anything away from employees, Taylor-Wharton cannot plausibly claim that it told employees that it was taking something away from them and that the employees agreed to this.

As has been explained above, the change for 2001 and following years as to how vacation would be earned in the future did not inherently mean that previously-earned vacation would be reclaimed by Taylor-Wharton. Taylor-Wharton could have implemented its announced change, and also honored its obligation to pay employees the benefit that they had earned by prior work. If Taylor-Wharton wanted to demand that employees give up that previously-earned benefit as a condition of future employment, it should at least have said so unambiguously. It did not do so. At most, it could be said that this was *one possible* interpretation of the December 2000 announcement. But the better interpretation is that the December 2000 announcement did *not* tell employees that the benefit they earned in 2000 would be taken away from them. Taylor-Wharton, after all, was the drafter of its own policy and announcement. As the drafter, as the party with superior economic and legal resources, and as the party that could

have written unambiguous language if it had so chosen, Taylor-Wharton should have any ambiguity resolved against it. *SouthTrust Bank v. Copeland One, LLC*, ___ So.2d ___, 2003 Ala. LEXIS 255, *13 (Ala. 2003) ("It is a well-established rule of contract construction that any ambiguity in a contract must be construed against the drafter of the contract.").

To put it bluntly, an employer that wants to force its employees to agree to give up money that they have already earned, should at least be honest enough and forthright enough to tell its employees unambiguously that that is what it is doing to them. Taylor-Wharton, instead, has tried and is still trying to this day to pretend that it has done nothing of the sort.

4. Taylor-Wharton's arguments about Rule 23(b) are without merit. The trial court correctly certified the case under Rule 23(b)(2), and certification under Rule 23(b)(3) would plainly be appropriate in the alternative.

Because we have shown above that the trial court correctly found the prerequisites of Rule 23(a) to be met, the remaining point is that the trial court was also correct in finding certification to be appropriate under Rule 23(b). This conclusion, again, is reviewed under an

abuse of discretion standard. And the trial court's lengthy discussion of the point (C-1245 to -1247) shows that the trial court soundly exercised its discretion consistent with this Court's precedents. Taylor-Wharton's arguments about Rule 23(b) are a mere afterthought, occupying much less of the brief than its earlier attempts to argue the merits of the claims. (Taylor-Wharton Brief, pp. 52-58).

The trial court certified the class under Rule 23(b)(2), after careful analysis of the circumstances of this case in light of precedent from this Court. (C-1245 to -1247). Rule 23(b)(2) allows class certification when the Rule 23(a) requirements are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." That language is directly applicable to this case. The trial court was correct – and, in particular, did not abuse its discretion – in concluding that certification was appropriate under this Rule.

Taylor-Wharton has, the evidence shows, "acted ... on

grounds generally applicable to the class," by changing and implementing its policy in a manner that applies to all class members alike. And, whether or not injunctive relief becomes appropriate in the end, declaratory relief will be an appropriate part of a final judgment in this case: an order declaring the parties' rights, declaring that Taylor-Wharton was not entitled to take away the vacation pay that had already been earned. By its plain language, Rule 23(b)(2) allows for certification of a class under these circumstances.

Nor is the applicability of Rule 23(b)(2) destroyed by the fact that a proper remedy would also include a monetary component. This Court has recognized that Rule 23(b)(2) can be applicable to a case that involves monetary relief as well as declaratory/injunctive relief, so long as the monetary relief is "incidental" and does not "predominate" over the equitable relief *See, e.g., Funliner of Alabama v. Pickard*, 873 So.2d 198, 208 (Ala. 2003).

The monetary relief in this case would be "incidental" to the equitable relief, and would not "predominate" over it, under the definitions of those words that were applied in *Funliner*. As explained in *Funliner*, monetary relief is

incidental – and therefore consistent with Rule 23(b)(2) certification – if the liability is established on a group basis, flowing directly from liability to the class as a whole on the claims forming the basis for declaratory relief. As *Funliner* also mentions, in order to be incidental, monetary relief should also be capable of calculation based on objective standards without the need for individualized hearings. *Funliner*, 873 So.2d at 208 (citing and quoting above principles from *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998)).

In this case, liability for monetary relief as well as declaratory relief would flow on a group basis. (This case is very different in that regard from *Funliner* itself, in which each putative class member's amount of damages would have been unique and would have required different individualized proof). The individual monetary recovery would depend solely on easily-calculated objective factors: how many years service the employee had, and her salary rate. There would be no need for individualized damage hearings. And the entitlement would flow directly from the findings that gave rise to the declaratory relief, on a group basis; there would be no need for individualized

inquiries into liability. The group-wide liability will be determined based on facts that are common to all members of the class: the history of the vacation policy, and its change.

In arguing against Rule 23(b)(2) certification, Taylor-Wharton argues first that monetary compensation is the "only" remedy available – apparently meaning that, in Taylor-Wharton's view, declaratory relief is unavailable as a matter of law. (Taylor-Wharton Brief, pp. 52-53). However, Taylor-Wharton cites absolutely no authority for such a proposition, and there is no authority for it. This case is perfectly suited to declaratory relief, to declare the rights of the parties. *See* Ala. Code § 6-6-222 (providing that courts can grant declaratory relief, "whether or not further relief is or could be claimed"); § 6-6-223 (providing that party to a written contract can seek a declaration of rights thereunder); § 6-6-221 (providing that the Declaratory Judgment Act is to be liberally construed); § 6-6-230 (providing that further relief can follow, along with a declaratory judgment). The claim for declaratory relief brings this case within the plain language of Rule 23(b)(2).

Taylor-Wharton's other argument against Rule 23(b)(2) certification is that individualized proof would be necessary in regard to damages. (Taylor-Wharton Brief, pp. 54-55). But Taylor-Wharton is incorrect. None of the things that Taylor-Wharton claims will require individualized proof are truly matters for any significant proof. For instance, whether each class member worked the entirety of 2001, or was laid off during some of that year, is irrelevant to the case; this case concerns the vacation benefit that was earned during 2000, and was taken away from each employee alike. And "how many years of continuous company service [each class] member has" is a simple matter that will almost certainly not yield any disputed proof on an individualized basis.

This leaves, as Taylor-Wharton's sole remaining objection to Rule 23(b)(2) certification, its suggestion that individualized proof will be necessary as to whether each class member resigned without notice or was terminated for cause, in such a way as to forfeit the vacation pay that had been earned in 2000. This contention fails for two reasons. *First*, even if it were true, it would be no real objection to certification; this factual inquiry would

be an extremely minor detail of proof that would not entail any significant proceedings and would not alter the fact that damage calculations in this case would be a simple matter of mathematics. And *second*, Taylor-Wharton's premise is not true because this will not even be an issue in the case. The reason is that Taylor-Wharton was asked, during discovery, to identify which employees if any it contended had resigned without notice or had been terminated for cause. Had Taylor-Wharton identified any employees as to whom that was its contention, then the facts as to those employees could have been discovered and litigated. But Taylor-Wharton, in answer to that discovery request, *did not identify a single employee as to whom it made this contention*.[3] So, pretrial discovery has admirably performed its function, in this case, of narrowing the issues and clarifying the matters that are in dispute.

[3] Plaintiffs' Interrogatory #1 asked Taylor-Wharton to identify any employees who had been on the payroll for at least a year as of the end of 2000 and who had since separated from employment for any reason, "noting those (if any) who [Taylor-Wharton] contend[s] were terminated for cause, and those (if any) who [Taylor-Wharton] contend[s] resigned without 2 weeks' notice." C-1005. Taylor-Wharton responded, and did not make that contention with regard to *any* employee. *See* C-1005, referencing a spreadsheet at C-1010 to –1013, which contains no such contention as to any employee.

There is no need for *any* proof as to whether any employee forfeited vacation pay by resigning without notice or being terminated for cause – because *no party contends* that any employee is in that category. So, Taylor-Wharton's main contention about supposedly individualized proof is merely something that it has invented for rhetorical purposes, and is not a real issue in the case.

For all these reasons, the trial court was correct in certifying the class under Rule 23(b)(2). This case is the perfect example of a Rule 23(b)(2) claim in which there is also monetary relief, because liability is established on a group-wide basis and damage calculations are a mere matter of simple arithmetic. This Court's precedents, such as *Funliner*, show that class certification is appropriate under these circumstances.

The trial court also noted that certification would have been possible under Rule 23(b)(3) even if it had not certified the class under Rule 23(b)(2). (C-1245-46). A Rule 23(b)(3) certification would have been a correct ruling as well, and the Court should so conclude if the Court finds an abuse of discretion on the Rule 23(b)(2) point.

Certification under Rule 23(b)(3) is appropriate if "the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Taylor-Wharton makes one and only one narrow argument in opposition to Rule 23(b)(3) certification. It does not dispute that the "superiority" test of the Rule is met, nor could it; a class action is obviously preferable to roughly 175 individual lawsuits, where there is so much commonality and the stakes in each individual suit would be relatively small. Not contesting "superiority," Taylor-Wharton attacks only the "predominance" prong of Rule 23(b)(3), but here again the argument is quite narrow. The argument is that common issues do not "predominate" within the meaning of Rule 23(b)(3) because (Taylor-Wharton says) individualized proof will be necessary as to whether each class member "who is no longer employed by [Taylor-Wharton) . . . was terminated for other than cause or resigned with two weeks' prior notice." (Taylor-Wharton Brief, p. 58). This was the same narrow argument that it made in the trial

court, effectively admitting that this was the only objection to a Rule 23(b)(3) certification. (C-1076 to -1077). Therefore, it is recognized (explicitly or implicitly) by all parties that if this narrow objection fails, then Rule 23(b)(3) certification is plainly appropriate.

Taylor-Wharton's narrow objection fails for the reasons that have already been explained above. When asked which employees it contends were ineligible for vacation pay on the grounds that they were terminated for cause or resigned without notice, Taylor-Wharton did not contend that any employees fell into that category. Thus no individualized proof at all will be necessary; Taylor-Wharton has already been asked, in the legally-appropriate way, to identify any cases in which it thinks such individualized proof will be necessary, and it has identified none. Even if Taylor-Wharton did now belatedly come up with a few names, and even if it could somehow explain why it should be allowed to do so after having failed to offer them in discovery, that would hardly mean that the individualized proof would "predominate." The entirety of the rest of the case – legally and factually – is undisputedly common to all class

members, and "predominance" within the meaning of Rule 23(b)(3) does not mean, and never has meant, that *all* matters of proof no matter how minor must be common to the class. *See, e.g., Avis Rent a Car Systems v. Heilman*, 876 So.2d 1111, 1120 (Ala. 2003) (discussing predominance test, and reflecting that it does not mean that all issues must be common to the class).

For these reasons, the trial court correctly concluded that class certification was appropriate under Rule 23(b).

Conclusion

The trial court's decision should be affirmed.

Respectfully submitted,

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