

No. 14-4764

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

WAL-MART STORES INC.,

Defendant-Appellant,

v.

TRINITY WALL STREET,

Plaintiff-Appellee.

Appeal from the United States District Court
for the District of Delaware
No: 1:14-CV-00405-LPS

**BRIEF FOR MARK AND JACQUELINE BARDEN,
IAN AND NICOLE HOCKLEY, BILL SHERLACH,
LEONARD AND VERONIQUE POZNER, GILLES ROUSSEAU,
AND LAW CENTER TO PREVENT GUN VIOLENCE
AS AMICI CURIAE IN SUPPORT OF
PLAINTIFF-APPELLEE**

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INTEREST OF AMICI CURIAE

Amici Mark and Jacqueline Barden, Ian and Nicole Hockley, Bill Sherlach, Leonard and Veronique Pozner and Gilles Rousseau

Amici Mark and Jacqueline Barden are the parents of Daniel Barden. Ian and Nicole Hockley are the parents of Dylan Hockley. Bill Sherlach is the husband of Mary Sherlach. Leonard and Veronique Pozner are the parents of Noah Pozner. Gilles Rousseau is the father of Lauren Rousseau. Daniel Barden, Dylan Hockley, Mary Sherlach, Noah Pozner and Lauren Rousseau were all killed in the shooting at Sandy Hook Elementary School in Newtown, Connecticut which took place on the morning of December 14, 2012.¹

In less than five minutes that morning, twenty children and six adults were killed. The weapon used in that shooting was an assault rifle commonly used in military and law enforcement operations, the “AR-15.” The shooter was armed with ten 30-round magazines; 154 spent bullet casings were found by investigators at the scene of the shooting. See *Report of the State’s Attorney for the Judicial District of Danbury on the Shooting at Sandy Hook Elementary School on December 14, 2012 (2013)*.

¹ Pursuant to Federal Rule of Appellate Procedure 29 (c)(5), no parties’ counsel authorized this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief and no person other than the amici curiae or their counsel contributed money that was intended to fund preparation or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29 (c), all parties have consented to the filing.

Wal-Mart, the nation's largest retailer, sells AR-15s and other similar assault rifles. Those rifles come equipped with high capacity magazines. The Trinity proposal at issue in this case would obligate the Wal-Mart Board to oversee the creation and implementation of standards for when to sell products raising public safety and other specified concerns. While this resolution would not ban the sale of any product, it would require Wal-Mart to consider the implications of selling assault rifles equipped with high-capacity magazines.

It is difficult to conceive of any greater interest than that of the instant Amici in encouraging Wal-Mart to give serious thought to the potentially catastrophic ramifications of selling guns that facilitate mass killings to ordinary citizens, and the impact of doing so on its reputation.

Amicus Law Center to Prevent Gun Violence

Amicus curiae Law Center to Prevent Gun Violence (“Law Center”) is a nonprofit, national law center dedicated to reducing gun violence. The Law Center provides comprehensive legal expertise to promote smart gun laws, including all Second Amendment litigation nationwide and provide support to jurisdictions facing legal challenges to their firearms regulations. As an amicus, the Law Center has provided informed analysis in a variety of firearm-related cases including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 501 U.S. 742 (2010).

The Law Center has an interest in this particular litigation because the Center was formed in the wake of an assault weapon massacre at a San Francisco law firm in 1993 that left nine people dead and six wounded. The shooter in that rampage was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition.

SUMMARY OF THE ARGUMENT

The District Court correctly found that Trinity's Proposal did not interfere with ordinary business operations and therefore should not have been excluded from proxy materials. Rather, the Proposal requires an existing Board Committee to perform a function it already performs in other contexts – overseeing the development and implementation of policies by management. It also concerns a significant social policy issue. The resolution thus was very appropriate for a shareholder vote. The Court's findings in this regard are well-grounded in the applicable law.

Moreover, rather than leading to the dire consequences suggested by Wal-Mart and its Amici, the policy would promote serious consideration by company management of the wisdom of selling products such as assault rifles with high-capacity magazines, without seeking to dictate by a particular result as to a particular product by shareholder resolution.

ARGUMENT

I. The District Court's opinion is consistent with SEC Rule 14(a)-8(i)(7) and SEC guidance on submission of shareholder proposals, and the District Court properly concluded that the Trinity proposal involves a significant policy issue appropriate for shareholder consideration

This case revolves around a simple request by Plaintiff-Appellee Trinity Wall Street, an owner of Wal-Mart stock, to submit a proposal at the company's annual shareholder meeting in 2014.² The proposal reads as follows:

27. Providing oversight concerning the formulation and implementation of, and the public reporting of the formulation and implementation of, policies and standards that determine whether or not the Company (i.e., Wal-Mart) should sell a product that:

- 1) especially endangers public safety and well-being;
- 2) has the substantial potential to impair the reputation of the Company; and/or
- 3) would reasonably be considered by many offensive to family and community values integral to the Company's promotion of its brand.

(A-268). The proposal was motivated in part by the tragic shooting at Newtown and Trinity's resultant desire to see Wal-Mart exercise more oversight of products

² There was no contention below that the instant case involved a genuine issue of material fact and therefore the Court resolved it on briefs as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

with special business risks, including assault rifles with high-capacity magazines.

(Affidavit of James H. Cooper in Support of Trinity's Motion for Summary

Judgment, June 13, 2014 p.2, paragraphs 4-5). Wal-Mart refused the request and excluded the proposal from its proxy materials. (A-19).

SEC Rule 14a-8 (i)(7) states that a company may exclude a shareholder proposal that deals with a company's "ordinary business operations" from its proxy materials. 17 C.F.R. Section § 240.14a-8(i)(7).³ The District Court found that Wal-Mart's exclusion of the proposal under this rule was erroneous, stating that "Trinity's 2014 Proposal is best viewed as dealing with matters that are not related to Wal-Mart's ordinary business operations." (A-21).

In so finding, the Court relied heavily on guidance provided by the SEC for determining whether a proposal involves ordinary business operations. *Id.* That agency has elaborated that "tasks fundamental to management's ability to run a company on a day-to-day basis, could not, as a practical matter, be subject to direct shareholder oversight" while proposals raising "sufficiently significant social policy issues" would be appropriately voted on by shareholders. *Amendments to Rules on Shareholder Proposals, Release No. 34-40018, 63 Fed. Reg. 29106,*

³ Section 14 (a) empowers the SEC to regulate the solicitation of proxies for purposes of public interest and to protect investors, not for the benefit of management. 15 U.S.C. § 78n. Section 14 (a) was intended to promote "corporate democracy" and its basic purpose is to make sure shareholders can have a say in important corporate decisions. See *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 676, 680-681 (D.C. Cir. 1970).

29108 (May 28, 1998).⁴ While giving much deference to the SEC, the Court emphasized that the District Court, not the agency, is the final decider of the applicability of the ordinary business exception in a given case. (A-28). This resolution does not run afoul of the ordinary business bar and concerns a significant social policy issue.

In arguing that the proposed resolution would improperly intrude on the management prerogatives of the Company, Wal-Mart and the various Amici act as if the proposed resolution required Wal-Mart not to sell a specific product. It does not. Rather, it requires a specific Board Committee to do precisely what Boards are supposed to do – oversee management in the development and implementation of policies. If adopted, the Board Committee would simply have added to its responsibilities the oversight and development of an additional policy. As the Court noted, if adopted the proposal “does not dictate what products should be sold or how the policies regarding sales of certain types of products should be formulated or implemented,” but instead appropriately leaves such matters as management functions to be exercised by the Wal-Mart Board. (A-20-21).

⁴ Other courts have found that SEC guidance instructive. See *Apache Corp. v. N.Y.C. Emps.Ret. Sys.*, 621 F. Supp.2d 444. (S.D. Tex. 2008) (“A clear reading of the 1998 Release informs this court’s analysis.”)

Even if this resolution did concern the ordinary business prohibition, this shareholder resolution would be appropriate since it raises a significant social policy issue. As the District Court stated:

[t]he significant social policy issues on which the Proposal focuses include the social and community effects **sales of high capacity firearms at the world's largest retailer** and the impact this could have on Wal-Mart's reputation, particularly if such a product sold at Wal-Mart is misused and people are injured or killed as a result.

(emphasis added)(A-26). Indeed, as discussed by the Court, this resolution is very similar to resolutions on other social policy issues where the SEC declined to issue a no action letter. See e.g., *Net, App. Inc.* 2014 WL 1878421 (2014) (proposal requiring establishment of a Board Public Policy Committee to oversee “the Company’s policies and practices that relate to public policy including human rights, corporate social responsibility ... and other public issues that may affect the Company’s operations, performance or reputation, and shareholder’s value”).

The District Court’s conclusions are well-supported by applicable law and the decision serves to promote sound management practices which ultimately would benefit the community at large, especially in the realm of public safety.

II. Wal-Mart and its Amici greatly exaggerate the dire consequences which will result from an affirmance of the District Court, and the opinion fosters the critical interest of public safety

The District Court stated that:

[i]f Wal-Mart's shareholders approve Trinity's Proposal, the Committee will be **obligated to "provid[e] oversight concerning the formulation and implementation of... policies and standards that determine whether or not" Wal-Mart should sell certain products.** Determining the specifics of the policy to be formulated, details about how it is to be implemented, and **assessing what products may be "especially" dangerous** or have "substantial potential to impair" Wal-Mart's reputation or "would reasonably be considered by many offensive to the family and community values integral to the Company's promotion of its brand," are all matters properly delegated to the Committee to evaluate in its discretion.

(emphasis added) (A 25). It is difficult to see how this exercise by the appropriate Committee of the Wal-Mart Board would lead to the dire consequences envisioned by Wal-Mart Amici – deluges of shareholder proposals, skyrocketing costs of preparing proxy materials, collapse of the entire annual shareholder meeting process – should the decision be upheld. *See generally Amici Briefs submitted on behalf of Defendant-Appellant Wal-Mart.* One such Amicus commented that the "Proposal provides no meaningful guidance for singling out products to which the new policy standards would be applicable." *Brief of Washington Legal Foundation* at p. 17. It is precisely this lack of specific guidance, however, which makes this resolution appropriate for consideration by shareholders. It clearly identifies the issues to be addressed and then leaves it to the Board to oversee the development and implementation of appropriate policies to address those issues.

The Trinity proposal did not arise in a vacuum. It was proposed by a concerned shareholder of Wal-Mart following the tragic events at Newtown and specifically references assault rifles and high-capacity magazines. (*Affidavit of James H. Cooper in Support of Trinity's Motion for Summary Judgment, June 13, 2014 p. 2 paragraphs 4-5*). Among the hundreds of thousands of items Wal-Mart sells, assault rifles with high-capacity magazines stand apart because of their capacity to kill large numbers of people in a very short period of time.⁵ They would doubtless be appropriate for consideration under any policy involving products sold which might impact safety of the general public and the reputation of Wal-Mart. What other products might be covered will be a function of the development and implementation of the required policy.

Mass shootings and gun violence unfortunately have become commonplace events in this society. Assault weapons “account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful.” Koper, Christopher S., U.S. Dep’t of Justice, *An Updated Assessment of the Federal Assault Weapons Ban* 4 n.1 (2004). The instant Amici would certainly support a ban on further sales by Wal-Mart of

⁵ On average, shooters who use assault weapons or large capacity magazines in mass shootings shoot 151% more people and kill 63% more people than those who do not. *Mayors Against Illegal Guns, Analysis of Recent Mass Shootings* at 3. <https://s3.amazonaws.com/s3.mayorsagainstillegals.org/images/analysis-of-recent-mass-shootings.pdf>).

assault rifles with high-capacity magazines. While upholding the District Court's opinion would not mandate that result, it would promote policies enabling Wal-Mart's management to take a very hard look at whether to continue selling such items.

CONCLUSION

For all of the foregoing reasons, the opinion of the District Court should be affirmed.

Respectfully submitted,

Dated: February 11, 2015

s/Maureen Barden _____
MAUREEN BARDEN, ESQ.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I CERTIFY, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7), that the foregoing Brief contains 2536 words, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.

Dated: February 11, 2015

 s/Maureen Barden
MAUREEN BARDEN, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Seven hard copies of this brief will be delivered to the Clerk of the Court for the United States Court of Appeals for the Third Circuit within five days of electronic filing.

Dated: February 11, 2015

 s/Maureen Barden
MAUREEN BARDEN, ESQ.

COMBINED CERTIFICATIONS

CERTIFICATE OF IDENTICAL COPIES OF BRIEF

I hereby certify that the electronic version of this brief is identical to the text version in the paper copies being delivered to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

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I hereby certify that this document was scanned using Symantec Endpoint and no viruses were detected.

CERTIFICATE OF COUNSEL

I, Maureen Barden, hereby certify that I am a member of the bar of this Court.

Dated: February 11, 2015

____s/Maureen Barden_____
MAUREEN BARDEN, ESQ.