CASE NO. 18-3143

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

DANIEL FERRERAS ET AL.,
Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.
Defendant-Appellant.

On Appeal From the Order Granting Class Certification
by the United States District Court for the District of New Jersey,
Civil Action No. 2:16-cv-2427 (JLL)(JAD)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and does not have a parent company. No publicly held corporation has a 10% or greater ownership in *amicus curiae*.

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

Defendant-Appellant consents to the filing of this *amicus curiae* brief. Plaintiffs-Appellees do not consent to the filing of this brief. *Amicus curiae* has contemporaneously filed a motion for leave to file this brief.[1]

IDENTITY AND INTEREST OF AMICUS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving class actions.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

The District Court certified a class after finding that Plaintiffs' "allegations" and "initial evidence" established a common *question*, without concluding that this question was susceptible to a common *answer*. The District Court acknowledged that individualized inquiries for each class member might be necessary—but certified the class on the theory that it could always be decertified later on. Those holdings contradict the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber and its members have a strong interest in ensuring that federal district courts comply with those standards.

SUMMARY OF ARGUMENT

Plaintiffs allege that they should have been paid for time spent at work outside of their regularly scheduled shifts. Whether their claims have merit turns on whether they were actually conducting authorized work during this time—an inherently individualized inquiry that should have foreclosed class certification. The District Court nonetheless certified the class based on Plaintiffs' allegation that American Airlines, Inc. ("American") had a general "policy" of discouraging employees from seeking compensation for off-shift work. The District Court further reasoned that the class could always be decertified after discovery if it turned out that individual issues predominated. The court's reasoning would permit class actions to be certified in virtually any wage-and-hour case. So long as the plaintiff can allege a general "policy" applicable to all class members, the plaintiff could obtain class

certification even if individualized hearings would be necessary to establish the defendant's liability.

As American ably explains in its opening brief, the District Court's order certifying the class contradicts Supreme Court precedent and must be reversed. The Chamber agrees with American's arguments. The Chamber writes separately to highlight three reasons why the District Court's certification decision is erroneous.

First, by prematurely certifying a class without rigorously testing whether it satisfies Rule 23, the District Court bound scores of differently situated plaintiffs to the outcome of a single suit. Such improperly certified classes harm defendants by pressuring them to settle questionable claims to avoid the low probability of a massive judgment. But such improperly certified classes also harm plaintiffs with meritorious claims for two reasons. First, plaintiffs with meritorious claims will be forced to share any recovery with plaintiffs who do not. Second, the recovery of all plaintiffs—including those with meritorious claims—will decrease because class counsel will have the incentive to accept a deeply discounted settlement to avoid the increased risk that the class will lose on the merits or be decertified along the way.

Second, the District Court certified the class based on a fundamental misunderstanding of *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016). In *Tyson Foods*, the Court held that certification was proper when (a) the entire plaintiff class presents a question with a common *legal* answer, and (b) the entire plaintiff class

presents common *evidence* that would allow a court to resolve the defendant's liability to all plaintiffs in the same proceeding. Neither of those circumstances is present here. There are no common questions that can yield common answers, and all employees will have to proffer individualized evidence in order to prove their claims.

Third, the District Court should not have certified this class because it is not ascertainable. The ascertainability requirement may be conceptualized as an application of the superiority and predominance requirements of Rule 23. When a class is not ascertainable, mini-trials are inevitably necessary to determine who may share in any recovery—thus eliminating the efficiency that class actions are intended to provide. In that scenario, class litigation is not superior to individualized litigation, and common issues do not predominate over individual issues. Here, Plaintiffs cannot prove ascertainability. Although American has records of when its employees clocked in and out, those records do not show whether employees worked while off-shift. Thus, those records do not establish that *any* employee—let alone them all—is a class member.

ARGUMENT

I. By Certifying the Class Without Verifying that Rule 23 Was Satisfied, the District Court Prejudiced Not Only American, But Also Class Members with Meritorious Claims.

Plaintiffs are employees who were paid for work done during their regularly scheduled shifts but allege that they should have been paid for additional time they purportedly spent working before or after their shifts, or during lunch breaks. As American explains, these allegations cannot be adjudicated on a class-wide basis, because there is no way for the District Court to resolve the claim of *any* plaintiff without conducting an individualized inquiry. That is because the merit of an employee's claim depends on what that employee was doing outside of her shift. If the employee was conducting authorized work, she should get paid. If the employee was watching television or attending to personal matters, she should not get paid. There is no way to determine whether American is liable to any employee without determining what that particular employee was doing outside of her regularly scheduled hours—an inherently individualized inquiry.

In holding that class certification was appropriate, the District Court reasoned: "whether American's hourly-paid employees engage in personal activities, rather than work-related activities, during the time periods raised by the plaintiffs is to be addressed during discovery, and does not merit a denial of class certification." Order at 11. It relied on an inapposite decision holding that an opt-in collective action

could be "conditionally certified" under the Fair Labor Standards Act ("FLSA") and reasoned that evidence of individualized issues was "more appropriate for decertification or summary judgment." *Id.* at 10.

As American correctly argues, this analysis is clearly wrong. Collective actions under the FLSA differ from class actions under Rule 23. The "sole consequence of conditional certification" of a collective action under the FLSA "is the dissemination of court-approved notice to potential collective action members." *Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 224 (3d Cir. 2016). That is why a court may conditionally certify a collective action under the FLSA without first undertaking the rigorous analysis required by Rule 23. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74-75 (2013). By contrast, "[P]laintiffs wishing to proceed through a[n opt-out] class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Thus, at the class certification stage, "[the court] must resolve all factual or legal disputes relevant to class certification." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012) (quotation marks omitted). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotation marks

omitted). The District Court's conclusion that the factual disputes could be addressed "during discovery" was therefore incorrect: those disputes must be addressed *before* the class is certified.

This case powerfully illustrates the wisdom of the Supreme Court's requirement that the plaintiff not only plead, but also prove, the requirements of Rule 23 before class certification. The premature certification of the class not only harms a defendant's interests, but it also harms the interests of any class members with meritorious claims.

Premature class certification harms defendants (almost always businesses) for well-known reasons. "[T]he certification decision is typically a game-changer, often the whole ballgame," for plaintiffs and defendants alike. *Marcus*, 687 F.3d at 591 n.2. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to

abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). In view of the well-known *in terrorem* effect of class certification on defendants, rigorous application of Rule 23's requirements before class certification is warranted.

But premature class certification also harms class members with meritorious claims for at least two reasons. First, because the District Court did not adequately verify that the requirements of Rule 23 had been satisfied, it is highly unlikely that all members of the plaintiff class actually engaged in uncompensated work; many employees who are nominally members of the plaintiff class may well have been watching television when not on shift. Yet, because neither Plaintiffs nor the District Court identified any method of distinguishing between class members who worked when off-shift and class members who did not, any class action settlement would inevitably be distributed to all class members, including those with meritless claims. This means that any plaintiff who can actually prove he engaged in uncompensated work will be forced to share any recovery with the legions of plaintiffs in the class

who did no such work. Put another way, the award to plaintiffs with meritorious claims will be diluted by the flood of invalid claims by plaintiffs who should never have been included in the class in the first place.

Plaintiffs cannot now claim that they will devise some method of identifying the plaintiffs with meritorious claims after class certification. If Plaintiffs had a mechanism for doing so, they would have presented it to the District Court at the class certification stage. Now that the class has been certified, class counsel lacks any incentive to undertake this difficult effort, because it gets a share of the overall recovery, regardless of which class members share in the award. American also lacks any incentive to undertake this difficult effort, because it cares about its total liability, not the identity of the recipients. The only people who care about who actually worked off-shift are the absent class members with meritorious claims—yet they are not participating in the litigation, and will have their claims forever barred by a class action settlement. This is why the Court must determine commonality and predominance before, not after, class certification.

Further, there is a second, independent mechanism by which premature class certification harms absent class members. By certifying a class that includes so many claims by people who did not work without compensation (or cannot prove they did), the District Court increases the risk that the class ultimately will lose on the merits or be decertified along the way. Indeed, the District Court's explicit

statement that it might decertify the class based on information that arises during discovery creates grave risks for class counsel. *See* Order at 11 (suggesting that Defendants could seek decertification based on evidence showing that "employees engage in personal activities, rather than work-related activities, during the time periods raised by the plaintiffs"); *Angeles v. US Airways, Inc.*, 2017 WL 587658, *4 (N.D. Cal. Feb. 13, 2017) (decertifying class where post-certification discovery showed that "employees were donning, doffing, chatting, reading, napping, watching TV, and maybe even grilling" at supposedly compensable times). That risk in turn makes class counsel anxious to negotiate a quick settlement, and willing to take a deep discount, to avoid the risk of losing everything if the class is decertified or its claims flounder at trial. As a result, if there is a quick settlement, the amount of money to be shared by all class members will be lower because the class settlement amount will be discounted by the prospect that the class might ultimately be decertified. In other words, class members with meritorious claims lose money in two different ways. The numerator—the total class settlement—is lower because of the risk of decertification. And the denominator—the number of people who share in the class recovery—is greater because the class includes members that were not harmed.

Nor does the typical justification for class litigation—that individual class members will lack the incentive to litigate—apply to this case. Of course, Rule 23

contains no exceptions for scenarios in which individual litigants will lack the incentive to litigate. To the contrary, its requirements must be met in all cases. But in any event, here, individual litigants with meritorious claims do have an incentive to litigate on their own. New Jersey law allows plaintiffs to recover attorney's fees for successful wage-and-hour lawsuits. *See* N.J.S.A. § 34:11-56a25. Plenty of lawyers would pursue a wage-and-hour suit for an employee who worked off-shift and was not paid. Yet all those employees will lose their claims forever by virtue of the District Court's class certification—and even if there is a settlement, they will receive pennies on the dollar.

For these reasons, it is critical to ensure that certification occurs only after the district court rigorously applies the requirements of Rule 23. The District Court's failure to do so here warrants reversal.

II. The Supreme Court's Recent *Tyson Foods* Decision Illustrates the District Court's Error In Certifying The Class Here.

In its certification order, the District Court cited *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), for the proposition that it could certify a class, despite "individualized variations among the members … as to their reasons for working through meal breaks, for clocking in early or clocking out late, or for working off the clock," because "the named plaintiffs allege that American had a company-wide policy in place at one location … to avoid paying its employees for all of the time that they worked." Order at 11-12. The District Court then described *Tyson Foods*

as a case where the predominant issue was "whether all employees, who were subject to the same timekeeping systems, were being unlawfully deprived of compensation." *Id.*

That fundamentally misunderstands *Tyson Foods*. The Supreme Court's reasoning in *Tyson Foods* establishes that the class in this case should *not* have been certified.

In *Tyson Foods*, plaintiffs sought overtime pay for time spent "donning and doffing" protective gear before, during, and after their shifts. 136 S. Ct. at 1042-43. Tyson Foods agreed that each putative class member had actually donned and doffed at those times, and had not been compensated for it. But Tyson Foods argued that individual issues predominated because the particular protective gear, the amount of time to don and doff it, and the number of hours worked per week was different for each individual plaintiff. *Id.* at 1044-45.

The Court held that class treatment was appropriate for two reasons. First, all plaintiffs raised the same "central dispute" that was "common to all class members"—whether the donning and doffing that all plaintiffs had indisputably engaged in was compensable work under the circumstances. *Id.* at 1045-46. Second, all plaintiffs relied on the same "representative evidence" that allowed all plaintiffs' claims to be resolved in one fell swoop. *Id.* at 1043-44.

Neither of the circumstances that made common issues predominant in *Tyson Foods* are present here. First, the dispute in *Tyson Foods* boiled down to a question that was common to all class members: was donning and doffing compensable activity, or not? An answer to that question would be relevant to all class members, not just one. Here, there is no analogous question that can be answered in a way that resolves all class members' liability. Plaintiffs have not shown that the uncompensated work they allegedly performed was part of a daily routine engaged in by all employees, such as donning and doffing protective gear. The record here reflects that each plaintiff undertook different tasks, at different times, for different durations, under different circumstances, and utilized the overtime exception process differently. Whether one class member engaged in compensable work off-shift is wholly irrelevant to whether any other class member engaged in compensable work off-shift. *See Angeles*, 2017 WL 587658, at *4 (distinguishing *Tyson Foods* on this basis).

Plaintiffs cannot avoid this reasoning merely by claiming that American had a "company-wide policy" of discouraging payment for off-shift work. Plaintiffs are not seeking a declaratory judgment that any particular company-wide policy is illegal. They are seeking damages on the ground that specific individuals engaged in authorized work while off-shift and were not paid for it. Regardless of whether American had a company-wide policy of discouraging employees from getting paid

for off-shift work, an employee cannot recover damages unless she *actually* worked off-shift. Determining whether an employee actually worked off-shift requires an individualized hearing and cannot be resolved on a class-wide basis.

Second, in *Tyson Foods*, there was a single piece of evidence that could resolve the claims of all employees simultaneously. Thus, a collective trial would merely have replicated the trials that would have occurred for every individual employee. Here, by contrast, Plaintiffs do not purport to rely on the same representative evidence to show how much time each class member supposedly spent working without compensation. So each individual plaintiff "'will need to present evidence that varies from member to member,'" and a particular piece of evidence will not "'suffice for each member to make a prima facie showing.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 William Rubenstein, NEWBERG ON CLASS ACTIONS § 4:50, pp. 196-97 (5th ed. 2012)). Thus, individual issues predominate, and the class should not have been certified.

The Court should reverse the District Court's order and provide guidance to the bench and bar as to the significance of *Tyson Foods*. In particular, the Court should make clear that *Tyson Foods* requires a focused analysis of whether a single piece of evidence could establish class-wide liability under the specific circumstances of the case. *Tyson Foods* does not hold that the mere assertion of a

general "policy" supports class certification when no piece of evidence could establish class-wide liability.

III. The Court Should Reaffirm That Ascertainability Is Required For Class Certification, and Hold That This Class Is Not Ascertainable.

Under this Court's precedents, a class must be ascertainable before it can be certified. For a class to be ascertainable, plaintiffs must show that there is "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013).

Although binding circuit precedent imposes an ascertainability requirement, individual members of this Court have questioned whether such a requirement is consistent with Rule 23. *See, e.g., City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434, 443 (3d Cir. 2017) (Fuentes, J., concurring). The Court should reaffirm that its precedents are correct, and that those precedents require reversal of the class certification order in this case.

Rule 23 does not expressly state that a class must be ascertainable. But it does expressly include superiority and predominance requirements, and those requirements are not met, as a matter of law, when the court cannot figure out who is in the class. First, class actions involving unascertainable classes are not "superior" to individualized litigation. They are not the best method "for fairly and efficiently adjudicating the controversy," with a view toward "the likely difficulties

in managing" the case as a class action. Fed. R. Civ. P. 23(b)(3). This is because the conclusion of the class action, litigant-by-litigant disputes will ensue to determine who is even *in* the class—eliminating the very efficiencies that class actions are designed to promote. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (ascertainability requirement ensures that "the parties can identify class members in a manner consistent with the efficiencies of a class action").

Further, as this Court has emphasized, the ascertainability requirement has other virtues. It helps "allow potential class members to identify themselves for purposes of opting out of a class." *Id.* at 306. It also "ensures that a defendant's rights are protected" by allowing individual defenses to be asserted and a particular plaintiff's inclusion in the class to be challenged. *Id.* Again, these are the considerations that are relevant to Rule 23's superiority requirement—which is why ascertainability is properly viewed as an application of that rule.

For similar reasons, common questions will not predominate when a class is unascertainable. Fed. R. Civ. P. 23(b)(3). If plaintiffs cannot offer an administratively feasible method for identifying absent class members, then the only way to test each plaintiff's claim to class membership would be to conduct a series of individualized mini-trials to decide whether each plaintiff has a claim in the first place—which means that individual issues, rather than common issues, predominate.

This is a paradigmatic example of a case where the class is not ascertainable. The District Court remarked that "American's timekeeping records reflect when employees clock in and clock out each day, and thus it should be a straightforward task to determine the number of hours that employees actually worked and the unpaid compensation they may be owed as a result." Order at 17. Yet the class was not defined based on when employees were clocked in, but rather whether employees were denied compensation in violation of New Jersey law because they actually performed work off-shift. Under that class definition, American's timekeeping records do not disclose whether *any* employee—let alone all employees—is or is not a class member. Thus, those records do not provide an "administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes*, 725 F.3d at 355; *see also Carrera*, 727 F.3d at 309 (finding a class unascertainable when corporate records plaintiff relied on did not reveal who was in the class); *City Select*, 867 F.3d at 440 (rejecting certification when "there was no evidence that 'a single [class member],' let alone the whole class, could be identified" through proffered corporate records).[2]

[2] *See also Hargrove v. Sleepy's LLC*, 2018 WL 1092457, *6-8 (D.N.J. Feb. 28, 2018) (rejecting certification when the corporate records plaintiff relied on made "assessing the size [of the class], as proposed by the Plaintiff, tenuous or speculative"); *In re: Tropicana Orange Juice Marketing and Sales Practices Litig.*, 2018 WL 497071, *9-12 (D.N.J. Jan. 22, 2018) (same).

Because the District Court certified an unascertainable class, "significant benefits of a class action are lost" in this case. *Carrera*, 727 F.3d at 307 (citing *Marcus*, 687 F.3d at 593).

- Class members will not be able to identify themselves for purposes of opting out because employees are unlikely to recognize whether they are covered by the proposed class definition.

- American will be unable to challenge assertions of class membership without individualized fact-finding or mini-trials, and those proceedings will undermine any efficiencies from proceeding as a class.

- The final judgment will cover many people who do not hold valid claims, which will reduce the recovery of plaintiffs with valid claims (if any). *See supra* Part I.

This Court should reaffirm that the ascertainability requirement is a correct application of Rule 23, and hold that it was not satisfied here.

CONCLUSION

The District Court's class certification order should be reversed and the case remanded for further proceedings.

Dated: February 7, 2019

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a) and 32(g), and Local Rules 31.1(c) and 28.3(d), the undersigned counsel certifies as follows:

1. I am a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 4,145 words, excluding the parts of the brief exempted by Rule 32(f).

3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

4. The text of the electronic brief is identical to the text in the paper copies.

5. A virus detection program, Microsoft Security Essentials, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so desires, I will provide an electronic version of the brief and/or copy of the work or line print-out.

Dated: February 7, 2019

Respectfully Submitted,

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that that on February 7, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. Ten hard copies of the foregoing brief were sent to the Clerk's Office via overnight delivery. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: February 7, 2019

/s/ Adam G. Unikowsky