IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

Case No. 18-8023

DANIEL FERRERAS ET AL.,

Plaintiff-Respondents,
v.

AMERICAN AIRLINES, INC.,

Defendant-Petitioner.

On Rule 23(f) Petition Challenging 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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER'S RULE 23(F) PETITION

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CERTIFICATE OF INTERESTED PERSONS

To *amicus curiae*'s knowledge, there are no interested persons other than those identified in the petition.

/s/ Adam G. Unikowsky

CORPORATE DISCLOSURE STATEMENT

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

/s/ Adam G. Unikowsky

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IDENTITY AND INTEREST OF AMICUS[1]

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 three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community.

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 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.

[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.

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 working* 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 had a general "policy" of discouraging employees from seeking compensation for off-shift work. It further reasoned that the class could always be decertified after discovery if it turned out that individual issues predominated. Those holdings contradict Supreme Court precedent, which holds that a plaintiff seeking class certification must *prove*—not just allege—that Rule 23 is satisfied.

The District Court's decision warrants this Court's immediate review. The court's reasoning would permit class actions to be certified in virtually any wage-and-hour class action. So long as the plaintiff can allege a general "policy" applicable to all class members, the plaintiff could obtain class certification—regardless of whether individualized hearings would be necessary to establish the defendant's liability. Further, a court's mere promise that it would consider decertifying the class after discovery is not a valid ground for certifying a class and is, moreover, little comfort to defendants facing enormous settlement pressure. The Court should grant review and reverse that far-reaching ruling.

ARGUMENT

I. The District Court Erred In Certifying The Class.

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. Plaintiffs do not allege that this additional work was part of a daily routine engaged in by all employees, such as donning and doffing work attire. Nor do they offer any other method for determining whether any particular employee engaged in unpaid work like Plaintiffs allege they did.

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 his shift. If the employee was working, he should get paid. If the employee was watching television or attending to personal matters, he 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 his regularly scheduled hours—an inherently individualized inquiry. Thus, it is "impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question": whether the employee worked without getting

paid. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011). For that straightforward reason, Plaintiffs cannot establish commonality or predominance.

Nor does the class meet this Court's ascertainability requirement. As the Petition explains, the proposed subclasses are "fail-safe" classes: they consist of people who were *not paid for work* performed off-shift. Order at 7. Such classes are not ascertainable. If an employee worked off-shift, he is a class member. If he watched television off-shift, he is not. There is no way to ascertain which employee is in which category.

II. The District Court's Contrary Rationales Are Wrong and Warrant Immediate Review.

In reaching its contrary conclusion that the class may be certified, the District Court made multiple errors of law. Those errors warrant immediate review by this Court because they threaten broad damage if applied in other cases. Indeed, the District Court's reasoning, if followed by other courts, could elevate virtually every individual wage-and-hour claim into a class action and would render this Court's ascertainability requirement a dead letter.

A. The District Court's "Conditional Certification" Is Wrong and Warrants Immediate Review.

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.

This analysis squarely contradicts binding precedent. In contrast to plaintiffs seeking an opt-in collective action under the FLSA, "[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).

That is for good reason. "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). Because "the certification decision is typically a game-changer, often the whole ballgame," for plaintiffs and defendants alike, *Marcus*, 687 F.3d at 591 n.2, a defendant's only meaningful opportunity to test the plaintiff's assertion that an identifiable class exists is at the certification stage.

This Court's immediate review is warranted to correct the District Court's error. The District Court's reasoning has far-reaching implications. In *any* case where evidence supporting class certification is lacking, a plaintiff could point to the District Court's decision as authority for the proposition that the class could be "conditionally" certified nonetheless. The Court should grant review to reaffirm that "conditional" certification is not permissible.

B. The District Court's Reliance on American's Purported "Policy" Is Wrong and Warrants Immediate Review.

As an additional basis for class certification, the District Court relied on Plaintiffs' allegation of a company "policy" that "in theory permits a supervisor to authorize compensation for work performed outside a scheduled shift, but in practice discourages employees from seeking such authorization when they actually work additional hours." Order at 9. Relying on *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), it stated that "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," and the "individualized variations" among the class members "should not defeat the certification of this action as a class action." Order at 11-12.

That analysis was also wrong. The fact that Plaintiffs' allegations include the words "company-wide policy" does not establish that a class can be certified. 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 worked 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 he *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.

Tyson Foods confirms rather than undermines this limitation. In *Tyson Foods*, the plaintiffs alleged that *all* employees within the putative class engaged in a daily and routine task of donning and doffing protective gear, and that the employer had a "policy not to pay" for the time spent donning and doffing. 136 S. Ct. at 1042. But the mere allegation of a policy was *not* the basis for the Court's decision to uphold class certification. Rather, the Court confirmed that "[t]o be entitled to recovery . . . each employee must prove that the amount of time spent

donning and doffing," and "the central dispute in th[e] case" was therefore whether plaintiffs had identified a class-wide method for establishing the amount of this uncompensated time as to each individual. *Id.* at 1046. The Court held that the plaintiffs in *Tyson Foods* met that burden by "introduc[ing] a representative sample," which the defendant did not challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* at 1047. The Court further reasoned that "[i]f the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action." *Id.* at 1046-47. Thus, "[r]ather than absolving the employees from proving individual injury, the representative evidence [in *Tyson Foods*] was a permissible means of making that very showing." *Id.* at 1047.

Plaintiffs made no comparable showing in this case that each individual class member could have established liability on the basis of the same piece of evidence. They simply asserted that American had a "policy" of discouraging payment for off-shift work. Thus, unlike in *Tyson Foods*, there is no practical way to adjudicate American's liability to each class member in a single proceeding.

Again, this Court's immediate review is warranted because the District Court's decision has far-reaching implications. Its reasoning would allow class certification in virtually every wage-and-hour class action through artful pleading.

In virtually any case, no matter how disparate the class members' individual circumstances, it will be possible to define some vague company "policy" of refusing to pay employees their rightful wages. And in any such case, the District Court's reasoning would support class certification—regardless of whether the plaintiffs had any way of establishing class-wide liability without individualized hearings.

The Court should grant review to reaffirm that *Tyson Foods*' carefully circumscribed holding does not support the District Court's lax approach to class certification. *Tyson Foods* made clear that its holding was not intended to "absolve[e any] employees from proving individual injury," but, rather, turned on the existence of "representative evidence [that] was a permissible means of making that very showing." 136 S. Ct. at 1047. The Court should confirm that *Tyson Foods* requires a focused analysis of whether a single piece of evidence could establish class-wide *liability*. It does not hold that evidence of a general "policy" supports class-wide certification when individual questions predominate.

C. The District Court's Analysis of Ascertainability Is Wrong and Warrants Immediate Review.

Finally, this Court should grant review to correct the District Court's misunderstanding of the ascertainability requirement. In holding that the class was ascertainable, the District Court held 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.

This reasoning is not only wrong, but would render the ascertainability requirement a dead letter. The District Court reasoned that it could ascertain the employees who clock in early and clock out late. But those employees might—or might not—be in the proposed subclasses, which are defined as persons who *actually worked* off-shift without getting paid. *E.g.*, Order at 7 ("All putative members of Subclass 1 were allegedly not paid for work done while clocked in if they worked before and after their scheduled shift times."). Thus, the District Court held that it could ascertain which employees *might* be in the plaintiff class—not which employees *would* be in the plaintiff class.

This approach would allow ready evasion of the ascertainability requirement. In any case in which ascertaining the class members is difficult, the court could simply define a broader class to whom the employer *might* be liable, whose members could mechanically be ascertained. That would defeat the purpose of the ascertainability requirement, which ensures that the *class members themselves* can be readily identified.

This Court should correct this departure from circuit precedent and hold that if the class members themselves cannot be ascertained, certification is inappropriate. "Ascertainability" is best conceptualized as a specific application of

the predominance and superiority requirements of Rule 23(b)(3). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). A plaintiff cannot satisfy predominance without offering an administratively feasible method for identifying absent class members, because otherwise, the only way to test each plaintiff's claim to class membership would be to conduct a series of individualized mini-trials as to whether each plaintiff has a claim in the first place.

Ascertainability also gives effect to Rule 23's superiority requirement, *i.e.*, that a class action represents the best available method "for fairly and efficiently adjudicating the controversy," with a view toward "the likely difficulties in managing" the action as a class action. Fed. R. Civ. P. 23(b)(3). A class without identifiable class members is hardly superior to individual litigation because where "injury determinations must be made on an individual basis …, adjudicating the claims as a class will not reduce litigation or save scarce judicial resources." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001).

This case illustrates the need for the ascertainability requirement. A ruling that American is liable to the class would be the beginning, not the end, of the case. The District Court would then have to conduct a series of mini-trials to determine

which employees worked off-shift—yielding the very type of individualized inquiries that are incompatible with class action treatment. The Court should grant review to reaffirm that circuit law requires that the class members *themselves* must be ascertainable, and that Plaintiffs have not met that burden.

CONCLUSION

The petition for leave to appeal should be granted.

March 27, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because it contains 2,589 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2018, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky