

**CERTIFICATION – 216(b) COLLECTIVE ACTIONS v. RULE 23 CLASS ACTIONS  
& ENTERPRISE COVERAGE UNDER THE FLSA**

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This paper addresses two topics: 1) 216(b) collective action certification versus Rule 23 class action certification, and 2) enterprise coverage under the FLSA.

**CERTIFICATION: 216(b) v. RULE 23**

Employees bringing collective actions under section 216(b) of the Fair Labor Standards Act (“FLSA”)<sup>1</sup>, and those bringing class actions under Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”) must obtain certification in order for their action to proceed as a “collective action” or “class action.” The certification processes and standards for collective actions and class actions differ. The following explores the basic differences between the two certification processes and incorporated standards therein, as well as brings attention to the

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<sup>1</sup> 29 U.S.C. §216(b) is also incorporated in the ADEA through 29 U.S.C. § 626(b), providing ADEA plaintiffs the opportunity to bring 216(b) collective actions as well. *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 169-70 (1989).

recent Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*, which reversed the district court's order, affirmed on appeal, granting Rule 23 class certification in a Title VII gender discrimination case, and the potential impact *Dukes* may have on 216(b) collective action certifications. 564 U.S. \_\_\_, 131 S. Ct. 2541, 2011 U.S. LEXIS 4567, 2011 WL 2437013 (June 20, 2011).

#### Section 216(b) Collective Action Certification

Section 216(b) of the FLSA provides a private cause of action against an employer "by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.*" 29 U.S.C. § 216(b) (emphasis added). Unlike class actions under Rule 23, collective actions under the FLSA require putative class members to opt into the case. *See id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). These opt-in employees are party plaintiffs, unlike absent class members in a Rule 23 class action. *See* 7B Wright, Miller, & Kane, *Federal Practice and Procedure* § 1807 at 474 n.13 (3d ed. 2005).

The decision to certify an opt-in class under § 216(b), like the decision to certify a class under Rule 23, remains soundly within the discretion of the district court. *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001)(citations omitted). For a putative collective action under 29 U.S.C. 216(b) to be certified and thus permitted to proceed to trial as a collective action, employees bringing the action must demonstrate they are similarly situated. 29 U.S.C. § 216(b). The FLSA, however, does not define "similarly situated," nor does it prescribe a method for certifying a collective action. *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009). Notwithstanding, the majority of courts utilize a two-stage process to determine whether

plaintiffs and potential opt-ins are similarly situated and may therefore proceed to trial collectively.<sup>2</sup>

*The First Stage (Notice/Conditional Certification)*

At the first stage, known as the “notice” or “conditional certification” stage, the court determines whether notice of the action should be issued to potential opt-in plaintiffs<sup>3</sup> and whether the action should proceed initially as a collective action. *See, e.g., White v. MPW Indus. Serv., Inc.*, 236 F.R.D. 363, 366 (E.D. Tenn. 2006); *Laroque v. Domino’s Pizza, LLC*, 557 F. Supp. 2d 346, 352 (E.D.N.Y. 2008); *De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 662-63 (E.D. Pa. 2001), *rev’d on other grounds*, 342 F.3d 301 (3d Cir. 2003). The court bases its determination at this stage on the plaintiffs’ ability to make a threshold showing that plaintiff(s) and members of the proposed collective action are “similarly situated.” *See, e.g., Quinteros v. Sparkle Cleaning, Inc.*, 532 F. Supp. 2d 762, 772, n.6 (D. Md. 2008); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v.*

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<sup>2</sup> *See Id.*; *Wynn v. National Broadcasting Co., Inc.*, 234 F. Supp. 2d 1067, 1082 (C.D. Cal. 2002) (noting that the majority of courts prefer this approach); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (finding the two-tiered approach to certification of § 216(b) opt-in classes to be an effective tool for district courts to use); *Trezvant v. Fidelity Employer Servs. Corp.*, 434 F. Supp. 2d 40, 43 (D. Mass. 2008) (explaining the majority of courts addressing this issue in the First Circuit have adopted the “two-tier” approach); *Nobles v. State Farm Mutual Automobile Ins. Co.*, 2:10-cv-04175-NKL, p. 17 (W.D. Mo. Aug. 25, 2011) (“the majority of district courts in the Eighth Circuit use the two-step analysis adopted in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995)”); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102, 1105 (10th Cir. 2001) (discussing three different approaches district courts have used to determine whether potential plaintiffs are “similarly situated” and finding that the two-stage approach is arguably the best of the three approaches because it is not tied to the Rule 23 standards); *Basco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 12441, \*11-12 (E.D. La. July 2, 2004) (citing D. Bergen and L. Ho, “Litigation of Wage and Hour Collective actions under the Fair Labor Standards Act” 7 *Employee Rts. & Emp. Pol’y J.* 129, 134 (2003) (Given the direction of the Tenth and Eleventh Circuits and the great weight of district court authority, a consensus has been reached on how section 216(b) cases should be evaluated. It is clear that the two-step ad hoc approach is the preferred method for making the similarly situated analysis and that the similarly situated standard does not incorporate Rule 23 requirements).

<sup>3</sup> In *Hoffman-LaRoche, Inc. v. Sperling*, the Supreme Court held that district courts may authorize and facilitate notice in pending §216(b) collective actions. 493 U.S. 165, 169-70 (1989).

*Costa*, 539 U.S. 90 (2003); *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 892 (N.D. Iowa 2008). Plaintiffs need only make a “modest factual showing” that members of the proposed collective action are similarly situated. *See, e.g., Hoffman v. Sbarro*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997); *Trezvant v. Fidelity Employer Servs. Corp.*, 434 F. Supp. 2d at 43; *Dominguez v. Don Pedro Rest.*, 2007 WL 271567, at \*4 (N.D. Ill. Jan. 25, 2007). In fact, courts generally require little more than substantial allegations, supported by declarations or discovery, that plaintiffs and putative members of the proposed collective action are similarly situated.

*Lewis v. Wells Fargo Co.*, 669 F. Supp. 2d 1124, 1127 (N.D.Cal. 2009) citing *Thiessen*, 267 F.3d at 1102. Plaintiffs need only show that they and the putative class members are “similar, not identical.”<sup>4</sup> *See, e.g., Pendlebury v. Starbucks Coffee Co.*, 518 F. Supp. 2d 1345, 1362 (S.D. Fla. 2007); *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-47 (6th Cir. 2006). Generally, courts have found that “similarly situated” employees have similar (not identical) job duties and pay provisions (*Morgan v. Family Dollar*, 551 F.3d 1233, 1259-60 (11th Cir. 2008)), or are victims of a single decision, policy, practice, or plan (*Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)), however not all circuits require the latter to find that the putative class members are similarly situated (*see, e.g., O'Brien*, 575 F.3d at 584; *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 (11th Cir. 1996); *Barron v. Henry Cnty. Sys.*, 242 F. Supp. 2d 1096, 1103 (M.D. Ala. 2003)). *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 364 (D. Me. 2010).

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<sup>4</sup> As reasoned in *Pendlebury v. Starbucks Coffee Co.*: “every class under § 216(b) will have differences; however, class members need only be similar, not identical. If Defendant's contentions that the class must be similar in almost all respects was to prevail, the intent behind class certification under §216(b) would be frustrated and the statute's class provisions would be effectively emasculated.” 518 F. Supp. 2d at 1362.

At this first stage, courts apply a “fairly lenient standard” that typically results in certification. *Lewis v. Wells Fargo Co.*, 669 F.Supp.2d at 1127 citing *Wynn*, 234 F. Supp. 2d at 1082. However, because the similarly-situated standard is subjected to different evidentiary standards depending on if the inquiry takes place when: (1) plaintiffs seek court-facilitated notice early in the litigation prior to substantial discovery; or (2) plaintiffs seek notice after discovery has closed or the defendant seeks to decertify a previously certified class prior to trial, some courts have applied the less lenient stage-two standard when substantial discovery has been conducted prior to the motion for conditional certification. *See, e.g., Basco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 12441, \*12-13 (E.D. La. July 2, 2004), *Valcho v. Dallas Cnty. Hosp. Dist.*, 574 F. Supp. 2d 618, 622 (N.D. Tex. 2008). If the court conditionally certifies the class, putative class members are given notice of the action and the opportunity to opt-in. *Mooney v. Aramco Servs. Co.*, 54 F.3d at 1214. The action then proceeds as a representative action throughout discovery. *Id.*

#### *The Second Stage*

The second stage of collective action certification typically occurs at the close of discovery upon the filing of a defendant’s motion for decertification. *Lewis v. Wells Fargo Co.*, 669 F.Supp.2d at 1127 citing *Thiessen*, 267 F.3d at 1102. Here, the court determines whether the action should be certified as a collective action and proceed to trial as such. *Mooney v. Aramco Servs. Co.*, 54 F.3d at 1214. This stage utilizes a more stringent standard than the first for determining whether the plaintiffs and opt-in plaintiffs are similarly situated, however, as with the first stage, plaintiffs need only establish that they and the opt-ins are “similarly,” not “identically” situated. *Lewis v. Wells Fargo Co.*, 669 F.Supp.2d at 1127, *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. 298, 300 (D. Md. 2007). In the second-stage analysis,

courts generally consider three factors: (1) the disparity or similarity of the factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant and whether those may be asserted collectively or individually as to each plaintiff, and (3) fairness and procedural considerations. *See, e.g., id., Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1018 (D. Minn. 2007).

With regard to the first factor, plaintiffs must establish that their “factual claims and employment backgrounds are sufficiently similar to warrant collective treatment.” E. Kearns, *The Fair Labor Standards Act*, 2<sup>nd</sup> Ed., Vol. II., p. 19-154, BNA Books, 2010. There must be “meaningful identifiable facts or [a] legal nexus that bind the claims.” *Falcon v. Starbucks*, 580 F. Supp. 2d 528, 535 (S.D. Tex. 2008). In this regard, to the extent they are relevant to the case, courts consider the class members’ job duties, geographic locations, employer supervision, and compensation, and may take into consideration the existence of a common employer policy, practice or plan that allegedly violates the FLSA. *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. at 300; *Reyes v. Texas EZPawn, L.P.*, 2007 WL 101808, at \*2 (S.D. Tex. Jan. 8, 2007); *Smith v. Micron Elec., Inc.*, 2005 WL 5336571, at \*2 (D. Idaho Feb. 4, 2005).

With regard to the second factor, the more a defendant’s defenses are general defenses that apply to the entire class, the more certification is warranted, whereas, the more a defendant’s defenses are individualized to each plaintiff, the more decertification is warranted. *Rawls v. Augustine Home Health Care, Inc.*, 244 F.R.D. at 300. Said another way, where claims can be proven through common proof and representative evidence, decertification is not proper. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d at 1264. However, where courts must conduct detailed inquiries into the claims of each plaintiff based on defendant’s individualized defenses,

decertification is likely to be granted. *See, e.g., King v. West Corp.*, 2006 WL 118577, at \*15 (D. Neb. Jan. 13, 2006).

With respect to the third factor, courts consider whether it is fair to both parties, as well as procedurally feasible, to adjudicate the action collectively, keeping in mind § 216(b)'s primary objectives of 1) lowering the burden on individual plaintiffs by pooling resources, and 2) promoting judicial efficiency by resolving in one proceeding common issues of law and fact arising from the same cause of action. *Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1025 (D. Minn. 2007), *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. at 170. Where employees are not similarly situated, courts have granted decertification due to serious due process concerns with an employer having to defend its position based on representative proof. *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 587 (E.D. La. 2008). However, as the FLSA is a remedial statute that should be broadly construed, courts have held that close calls regarding collective treatment should be resolved in favor of certification. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d at 1265, *Falcon v. Starbucks*, 580 F. Supp. at 541.

#### Rule 23 Class Action Certification

To obtain class certification, the party seeking class certification must “affirmatively demonstrate” that all requirements of Rule 23(a) are met, and that the class is maintainable pursuant to Rule 23(b). *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, 131 S. Ct. 2541, 2011 U.S. LEXIS 4567, \*12, 21 (June 20, 2011); *Sullivan v. Am. Express Publ. Corp., Time, Inc.*, 2011 U.S. Dist. LEXIS 70377, \*4 (C.D. C.A. June 30, 2011); *see also* FED. R. CIV. P. 23 including Rule 23(a)(“Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members *only if*: [requirements 1-4 then listed]) emphasis added. First, under Rule 23(a), the plaintiff must demonstrate that:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

*Dukes*, 2011 U.S. LEXIS 4567, at \*12 (citing FED. R. CIV. P. 23(a)).

Second, if Rule 23(a) is satisfied, a party seeking class certification must then demonstrate that the proposed class satisfies at least one of the three requirements identified in Rule 23(b). *Dukes*, 2011 U.S. LEXIS 4567, at \*12; *see also* Rule 23(b) (“A class action may be maintained if Rule 23(a) is satisfied and if: [23(b) requirements 1-3 then listed]”). Rule 23(b) is satisfied if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b).

As the Supreme Court noted, “Rule 23 does not set forth a mere pleading standard,” hence “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous

parties, common questions of law or fact, etc.” *Dukes*, 2011 U.S. LEXIS 4567, at \*21.

Furthermore, certification is proper only if, after conducting a “rigorous analysis,” the district court finds that party seeking certification has satisfied the Rule 23(a) prerequisites. *Id.* This “rigorous analysis” will often “entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.* As such, the district court “can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.” *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009).

#### *Requirements Under Rule 23(a)*

##### 1. Numerosity

To qualify for certification, the class must be “so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1). Impracticability “does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.” *Harris v. Palm Springs Alpine Estates*, 329 F.2d 909, 913-914 (9th Cir. 1964). As a general rule, courts have held that “classes of forty or more are considered sufficiently numerous.” *Sullivan*, 2011 U.S. Dist. LEXIS 70377 at \*6 (C.D. C.A. June 30, 2011); *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3rd Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d at 1267. Further, to satisfy the numerosity requirement, “a plaintiff need not show the precise number of members in the class,” however, “mere allegations of numerosity are insufficient to meet this prerequisite.” *Vega*, 564 F. 3d at 1267 quoting *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983).<sup>5</sup>

##### 2. Commonality

Plaintiffs must also demonstrate that “there are questions of law or fact common to the

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<sup>5</sup> See *Vega*, 564 F. 3d at 1267-68(holding, despite record-evidence that T-Mobile employed thousands of sales representatives nationwide, that the district court abused its discretion by finding the numerosity requirement was satisfied with respect to the Florida-only class when the record was “utterly devoid of any showing” of the number of retail sales associates T-Mobile employed during the class period in Florida who would comprise the membership of the class.)

class.” FED. R. CIV. P. 23(a)(2). “[E]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement.” *Dukes*, 2011 U.S. LEXIS 4567 at \*36, 52.

“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.* at \*19 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)).

“This does not mean merely that they have all suffered a violation of the same provision of law,” rather, “their claim(s) must depend upon a common contention...that [] is capable of classwide resolution.” *Dukes*, 2011 U.S. LEXIS 4567 at \*19. This means the “determination of [the] truth or falsity [of the common contention] will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at \*19-20. As the Supreme Court has clarified, “[w]hat matters to class certification . . . is not the raising of common ‘questions’ -- even in droves -- but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation” *Id.* at \*20.

### 3. Typicality

To obtain class certification, plaintiffs must further demonstrate “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3). “[A] sufficient nexus [must] exist[] between the claims of the named representatives and those of the class at large.” *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 679 n.72 (11th Cir. 2010) (citations omitted). However, “when there is a ‘strong similarity of legal theories,’” “[t]he typicality requirement may be satisfied despite substantial factual differences.” *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009). As noted by the Supreme Court, the commonality, typicality, and adequacy-of-representation requirements “tend to merge” with each other, as all three “serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named

plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Dukes*, 2011 U.S. LEXIS 4567, \*20 at n.5 (citing *Falcon*, 457 U.S. at 157-58 n.13).

#### 4. Representative Party

Finally, under Rule 23(a), plaintiffs must demonstrate that “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). Because class members are bound by any judgment in a Rule 23 class action unless they opt out, this requirement protects the due-process interests of unnamed class members. *Lane v. Page*, 272 F.R.D. 558, 571 (D.N.M. 2011) citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5, (1996)(characterizing adequacy of representation as a constitutional requirement); *Lile v. Simmons*, 143 F. Supp. 2d 1267, 1277 (D. Kan. 2001)(“Due process requires that the Court ‘stringently’ apply the competent representation requirement because class members are bound by the judgment (unless they opt out), even though they may not actually be aware of the proceedings.”). Furthermore, in addition to concerns raised by the commonality and typicality requirements, the adequacy requirement “also raises concerns about the competency of class counsel and conflicts of interest” between representatives and members of the proposed class. *Dukes*, 2011 U.S. LEXIS 4567 \*20 at n.5 (citing *Falcon*, 457 U.S. at 157-58 n.13).<sup>6</sup>

#### *Requirements Under Rule 23(b)*

In addition to establishing the requirements of Rule 23(a), Plaintiffs must also satisfy one

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<sup>6</sup> See also, *Friedman-Katz v. Lindt & Sprungli, Inc.*, 270 F.R.D. 150, 156 (S.D.N.Y. 2010)(To prove adequacy, the Plaintiff must demonstrate that (1) the class counsel is qualified, experienced, and generally able to conduct the litigation and (2) that the class members must not have any interests antagonistic to one another.); and Fed. R. Civ. P. 23(g)(1)(A)(As to the adequacy of Plaintiff's counsel, a court must consider “(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.”)

of the three requirements of Rule 23(b).<sup>7</sup> “Where the plaintiff seeks to certify a class under Rule 23(b)(3), the Rules demand ‘a close look at the case before it is accepted as a class action.’” *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554 (5th Cir 2011) citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). “To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must ‘predominate over any questions affecting only individual members’; and class resolution must be ‘superior to other available methods for the fair and efficient adjudication of the controversy.’” *Amchem*, 521 U.S. at 615 (1997) (quoting Rule 23(b)(3)). In analyzing Rule 23(b)(3)’s predominance and superiority criteria, Rule 23(b)(3) directs a court to look closely at the following pertinent nonexhaustive factors:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action.

*Id.* at 615-616; Fed. R. Civ. P. 23(b)(3).

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<sup>7</sup> The focus of this section will be on class actions that are predominantly actions for damages (generally governed by Rule 23(b)(3)), as opposed to actions that are predominantly for injunctive relief (generally governed by Rule 23(b)(2)). E. Kearns, *The Fair Labor Standards Act*, 2<sup>nd</sup> Ed., Vol. II, p. 20-46, n. 133, BNA Books, 2010; see also *Dukes*, 2011 U.S. LEXIS 4567 at \*38, 42 (stating that individualized monetary claims belong in Rule 23(b)(3), and holding that claims for monetary relief may not be certified under Rule 23(b)(2) unless the monetary relief is incidental to the injunctive or declaratory relief). Rule 23(b)(2) permits class actions for declaratory or injunctive relief where “the party opposing the class has acted or refused to act on grounds generally applicable to the class.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Prime examples include civil rights cases against parties charged with unlawful, class-based discrimination. *Id.* Rule 23(b)(1)(A) contemplates “cases where the party is obliged by law to treat the members of the class alike ([for e.g.] a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity ([for e.g.] a riparian owner using water as against downriver owners).” *Id.* Rule 23(b)(1)(B) “includes, for example, ‘limited fund’ cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims.” *Id.*

The predominance criterion “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation,” and is “far more demanding” than Rule 23(a)’s commonality requirement. *Amchem*, 521 U.S. at 623-24. The focus here is on “the relationship between the common and individual issues.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Id.* (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1778 (2d ed.1986)). However, certification is inappropriate where plaintiffs must “introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims.” *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) citing *Klay v. Humana, Inc.*, 382 F.3d at 1241, 1255 (11th Cir. 2004), however, *cf. Hamelin v. St. Luke's Healthcare*, 2011 U.S. Dist. LEXIS 56923, \* 37 (N.D.N.Y. March 8, 2011)(“The existence of individualized claims for damages, alone, is not a barrier to class certification on grounds of manageability”) and *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008) (“the need for individualized damages determinations does not, in and of itself, require denial” of a motion for class certification).

Finally, the superiority requirement is satisfied if ““a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”” *Amchem*, 521 U.S. at 615. In other words, “[w]here classwide litigation of common issues [would] reduce litigation costs and promote greater efficiency, a class action [might] be superior to other methods of litigation.” *Valentino v.*

*Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). “This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.” *Hanlon*, 150 F. 3d at 1023.

### 216(b) Certification Compared with Rule 23 Certification

The vast majority of courts have held that § 216(b) collective actions are not subject to Rule 23 class certification requirements, rather, the requirements for § 216(b) collective action certification are independent of, and unrelated to, the requirements for Rule 23 class certification.<sup>8</sup> In so holding, courts have noted that Congress clearly chose not to have the Rule 23 standards apply to 216(b) collective actions, and instead adopted the “similarly situated” standard. *Thiessen*, 267 F.3d at 1105; *see also O'Brien*, 575 F.3d at 584 (“While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA.”) Therefore, to interpret 216(b)’s “similarly situated” standard as incorporating the requirements of Rule 23 “would effectively ignore Congress’ directive.” *Thiessen*, 267 F.3d at 1105; *see also O'Brien*, 575 F.3d at 585-86 (finding that “applying the criterion of predominance undermines the remedial purpose of the collective action device.”)

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<sup>8</sup> *See Lewis v. Wells Fargo Co.*, 669 F.Supp.2d 1124, 1127 (N.D.Cal. 2009); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996); *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 364 (D. Me. 2010); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010) (“[t]he clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under § 216(b)”); *Basco v. Wal-Mart Stores, Inc.*, 2004 U.S. Dist. LEXIS 12441, \*11-12 (E.D. La. July 2, 2004)(stating, “it is clear... the similarly situated standard does not incorporate Rule 23 requirements”); *Nobles v. State Farm Mutual Automobile Ins. Co.*, 2:10-cv-04175-NKL, p. 17 (W.D. Mo. Aug. 25, 2011)(stating the “standards governing class claims under Rule 23 ... do not apply to collective action claims under the FLSA.); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008); *O'Brien*, 575 F.3d at 584-85 (holding the district court implicitly and improperly applied a Rule 23-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated); *La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 289 (5th Cir. 1975) (stating that Rule 23 and FLSA class actions are “mutually exclusive and irreconcilable), however, *cf. Sushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266-67 (D. Colo. 1990)(employing Rule 23 criteria in a 216(b) certification analysis under the FLSA).

Furthermore, 216(b) certification analysis “is not a factor-by-factor calculus comparable to that required for Rule 23 class certification.” *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 364 (D. Me. 2010). Rather, “when certifying a collective action, courts take a holistic view: ‘as more legally significant differences appear amongst the opt-ins, the less likely it is that the group of employees is similarly situated.’” *Id.* Moreover, “[t]he requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure.” *Lewis v. Wells Fargo Co.*, 669 F.Supp.2d at 1127 citing *Wertheim v. Arizona*, 1993 U.S. Dist. LEXIS 21292, \*2-3, 1993 WL 603552, \*1 (D.Ariz. Sept. 30, 1993) (citations omitted); *O’Brien*, 575 F.3d at 584-85. To obtain 216(b) collective action certification, a plaintiff need only show “some identifiable factual or legal nexus [that] binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA” *Wertheim v. Arizona*, 1993 U.S. Dist. LEXIS 21292 at \*3, whereas a plaintiff seeking Rule 23 class certification must affirmatively demonstrate, to a degree sufficient to satisfy the “rigorous analysis” the district court is required to apply, that all Rule 23(a) prerequisites are met and that the class may be maintained under at least one of the Rule 23(b) requirements. *Dukes*, 2011 U.S. LEXIS 4567 at \* 12, 21. In fact, many courts require Rule 23 class action plaintiffs to establish by a preponderance of the evidence all Rule 23 criteria before they will grant class certification.<sup>9</sup>

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<sup>9</sup>*Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d at 364 citing *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010) (“The Rule 23 requirements must be established by at least a preponderance of the evidence.”); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 257-58 (3d Cir. 2009) (same); *Alaska Elec. Pension Fund v. Flowsolve Corp.*, 572 F. 3d 221, 228 (5th Cir. 2009) (“loss causation...must be established at the class certification stage by a preponderance of all admissible evidence”); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (holding that a trial court “must perform a full Daubert analysis before certifying the class if the situation warrants”); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, 131 S. Ct. 2541, 2011 U.S. LEXIS 4567, at \* 27-28 (June 20, 2011) (stating, “The District Court concluded

Wal-Mart v. Dukes and its Potential Impact on 216(b) Collective Actions

On June 20, 2011, the United States Supreme Court decided *Wal-Mart v. Dukes*, a Rule 23 class action case brought on behalf of approximately 1.5 million former and current female employees of Wal-Mart<sup>10</sup> alleging gender discrimination under Title VII for failure to provide equal pay and failure to promote. *Dukes*, 2011 U.S. LEXIS 4567 at \* 7. Plaintiffs alleged that Wal-Mart's local managers exercised the broad discretion afforded to them by Wal-Mart over pay and promotions disproportionately in favor of male employees, resulting in unlawful disparate impact discrimination against Wal-Mart's female employees, and that Wal-Mart's refusal to "cabin its managers' authority" in this regard constituted unlawful disparate treatment discrimination. *Id.* at \*11. Plaintiffs further alleged that Wal-Mart's "corporate culture" of bias against women infected its managers' discretionary decision-making, "making every woman at the company the victim of one common discriminatory practice." *Id.* at \*11-12. The plaintiffs sought declaratory and injunctive relief, back pay and punitive damages. *Id.* at \*11. The district court certified the class finding plaintiffs satisfied Rule 23(a) and (b)(2) requirements, and the Ninth Circuit substantially affirmed. *Id.* at \*15.

The Supreme Court, however, granted certiorari and reversed, holding that class certification was improper as plaintiffs failed to meet Rule 23(a)'s commonality requirement.<sup>11</sup> *Id.* at \*17, 37, 51. In so doing, the Court explained that Rule 23(a)(2) requires plaintiffs demonstrate that class members "have suffered the same injury," not "merely that they have all

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that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. [citation omitted] We doubt that is so.")

<sup>10</sup> Class members held a "multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Dukes*, 2011 U.S. LEXIS 4567 at \*37.

<sup>11</sup> The Court also held that plaintiffs' claims for backpay were improperly certified under FED. R. CIV. P. 23(b)(2) since claims for monetary relief which are not incidental to the injunctive or declaratory relief sought may not be certified under 23(b)(2), rather they belong under 23(b)(3). *Id.* at \*38, 42.

suffered a violation of the same provision of law,” and that class members’ “claims must depend on a common contention” that is “capable of classwide resolution.” *Id.* at \*19. It clarified that “it is not the raising of common questions” that matters to class certification, but rather the “capacity of a classwide proceeding to generate common *answers...*” *Id.* at \*20. The Court found that because plaintiffs failed to identify any “specific employment practice” that tied their claims (consisting of millions of employment decisions) together, a classwide proceeding would not be able to “produce a common answer to the crucial question *why was I disfavored.*” *Id.* at \*24, 34. In so ruling, the Court noted that although plaintiffs identified the “existence of delegated discretion,” they failed to identify a “common mode of exercising discretion that pervade[d] the entire company.” *Id.* at \*31, 34. Instead, the managers’ discretion was exercised “in a largely subjective manner” with only “limited corporate oversight.” *Id.* at \*8. “Merely showing that Wal-Mart’s policy of discretion [] produced an overall sex-based disparity” did not satisfy Rule 23(a)(2)’s commonality requirement “without some glue holding the alleged *reasons* for all [the millions of employment] decisions together. *Id.* at \*24, 34.

*Wal-Mart v. Dukes and 216(b) Collective Actions*

Since the Supreme Court’s decision was rendered, the majority of courts that have addressed *Dukes*’ application to 216(b) collective actions have held that *Dukes* does not apply to 216(b) collection actions. In *Creely v. HCR ManorCare*, the court considered the impact of *Dukes* on the FLSA action pending before it and concluded that it did not apply. 2011 U.S. Dist. LEXIS 77170, \*3, 6 (N.D. Oh. July 1, 2011). In so doing, the court reasoned that the *Dukes* decision turned on Rule 23(a)(2)’s “commonality” requirement, however, under Sixth Circuit law, Rule 23(a)(2)’s “commonality” requirement is distinct from the FLSA’s “similarly situated” requirement as the Sixth Circuit has “expressly declin[ed] to apply Rule 23’s standard to FLSA

claims.” *Id.* at \*4 citing *O’Brien v. Ed Donnelly Enters.*, 575 F.3d at 584. In the Sixth Circuit, FLSA collective action plaintiffs have been deemed similarly situated where “their claims were unified by common theories of defendants’ statutory violations,” even though “proof of a violation as to one particular plaintiff [did] not [necessarily] prove that the defendant violated any other plaintiff’s rights.” *Id.* citing *O’Brien* at 585. Furthermore, the *Creely* court determined that *Dukes*’ gender-based Title VII claims were “fundamentally distinct” from the FLSA claims before it since the FLSA claims before it “[did] not require an examination of the subjective intent behind millions of individual employment decisions,” rather, “the crux of [FLSA] case [was] whether the company-wide policies, as implemented, violated [p]laintiffs’ statutory rights.”<sup>12</sup> *Id.* at \*4-5.

In *Butcher et. al. v. United Airlines, Inc.*, after the *Dukes* decision was rendered, the defendant moved for reconsideration of the court’s order granting conditional certification of the FLSA collective action. Case No. 1:09-cv-11681-NG, electronic order Dkt. 42 (D. Mass. July 22, 2011). In denying the defendant’s motion, the court stated that the defendant’s citation to *Dukes* in support thereof was “misplaced”; “*Dukes* does not involve the FLSA, and its holding does not apply to conditional certification.” *Id.* The court noted that, “[i]t is well settled that Rule 23 is more stringent than § 216(b) generally ... and especially so at the conditional certification stage.” *Id.* citing *Lewis v. Wells Fargo Co.*, 669 F. Supp. 2d, 1124, 1127 (N.D. Cal. 2009) (The requisite showing of similarity of claims under the FLSA is considerably less

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<sup>12</sup> The *Creely* court also found that the second holding in *Dukes* - that the class was improperly certified under Rule 23(b)(2) - did not apply to FLSA collective actions as the Supreme Court’s holding rested largely on concerns that Rule 23(b)(2)’s lack of notice and opt-out procedures violated plaintiffs’ due process rights. *Id.* at \*5 citing *Dukes*, 2011 U.S. LEXIS 4567, \*38-43. These same concerns, however, do not arise in FLSA collective actions as 216(b) requires plaintiffs to opt-in to participate in the collective action, ensuring that “plaintiffs who wish to preserve their individual claims may readily do so.” *Id.* at \*5-6.

stringent than the requisite showing under Rule 23 of the Federal Rules of Civil Procedure, quoting *Wertheim v. Arizona*, 1993 WL 603552, at \*1 (D. Ariz. 1993)).

The court in *Sliger et al. v. Prospect Mortgage, LLC et al.* also refused to extend *Dukes*' Rule 23 analysis to FLSA collective action certification determinations, rejecting the defendant's argument that Rule 23's commonality standard and the "similarly situated" standard of 216(b) are "entirely consistent." 2011 U.S. Dist. LEXIS 94648, \* 7-8, n. 25 (E.D. Cal. Aug. 24, 2011). Rather, after citing a string of cases holding that Rule 23 class action standards are distinct from 216(b) collective action standards,<sup>13</sup> the court declined defendant's invitation to apply *Dukes* to the FLSA collective action certification analysis as doing so would be "inconsistent with the Ninth Circuit's apparent view that the Rule 23 standards should not be used." *Id.*

Courts have further held that *Dukes* may not be applicable to wage claims. For example, in *Bouaphakeo v. Tyson Foods*, the court found *Dukes*' "holdings and analysis largely inapplicable to and/or distinguishable" from the wage case before it in denying the defendant's motion to decertify the Rule 23 class action. 2011 U.S. Dist. LEXIS 95814, \*5 (N.D. Iowa Aug. 25, 2011). The court distinguished *Dukes* in the wage context finding that unlike *Dukes*, there was a common answer available to the question of whether the defendant's compensation system violated the law (and in particular whether the defendant paid the workers for all work performed), because, unlike *Dukes*, the wage case "involve[d] a company wide compensation policy that [was] applied uniformly throughout defendant's entire [] facility." *Id.* at \*10-11. The court explained that if it was determined that plaintiffs' activities constituted "'work' for which

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<sup>13</sup> The court cited: *McElmurry v. U.S. Bank Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007) ("A 'collective action' differs from a class action"); accord, *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010) ("[t]he clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under § 216(b)"); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009) (relying upon the "structural distinctions between a FLSA collective action and a Rule 23 class action" in deciding that an appeal by FLSA named plaintiffs was moot). *Id.* at \*7.

plaintiffs [were] entitled to compensation, then such a determination [would be] applicable to all such situated plaintiffs.” *Id.* at \*11. As the court noted, the wage case was “not like *Dukes* where each alleged Title VII violation involved an inquiry into the individual decisionmaker's subjective thought process.” *Id.*

Similarly, in *Ramos v. SimplexGrinnell LP*, the court found that *Dukes* had “little bearing” on the plaintiffs’ wage claims. 2011 U.S. Dist. LEXIS 65593, \*15-16 (E.D.N.Y. June 21, 2011). Whereas in *Dukes*, plaintiffs could not “bridge[] the ‘conceptual gap’ between an individual’s claim of injury and the existence of a class of persons who [] suffered the same injury” where the “challenged pay and promotion decisions were ‘generally committed to local managers’ broad discretion, which [was] exercised in a largely subjective manner,” the court noted that with regard to wage claims before it, “there is little discretion or subjective judgment in determining an employee’s right to be paid prevailing wages; the right arises automatically, by operation of law...” *Id.*

Some courts, however, have indicated that *Dukes* is instructive in 216(b) collective action certification determinations. For example, in *Macgregor v. Farmers Ins. Exchance*, although the court recognized that “collective actions under the FLSA are ‘not subject to the provisions generally associated with class actions under FRCP 23 (such as numerosity, commonality, and typicality),’ it nevertheless found *Dukes*’ reasoning “illuminating” in its decision to deny conditional certification of the proposed 216(b) collective action. 2011 U.S. Dist. LEXIS 80361, \*13 (D.S.C. July 22, 2011).<sup>14</sup> In *Macgregor*, the plaintiffs alleged the defendant employer failed

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<sup>14</sup> The court in *Sliger et al. v. Prospect Mortgage, LLC et al.*, however, refused to apply *Dukes* to the 216(b) collective action certification analysis in the FLSA case before it, despite the defendant’s citation to *Macgregor* to supposedly support its position that the standards for Rule 23 and 216(b) are “entirely consistent.” 2011 U.S. Dist. LEXIS 94648, \* 7-8, n. 25 (E.D. Cal. Aug. 24, 2011). The court did not find that *Macgregor* stood for this proposition, rather, it noted that in *Macgregor*, “the facts, construed in the

to compensate them (and others similarly situated) for overtime, however, they failed to provide “even ‘modest factual support’ of an unwritten policy contradictory to [the defendant’s] stated policy to pay employees for overtime.”<sup>15</sup> *Id.* \*2, 12. Rather, the facts showed only “isolated supervisor misconduct” which would not support a finding that plaintiffs “were victims of a common policy or plan that violated the law,” and therefore “similarly situated” for purposes of 216(b) certification. *Id.* at \*7, 12. In fact, the facts presented suggested the suit would involve nothing more than “inquiries into independent supervisor decisions regarding each individual [plaintiff’s] requested, approved, and refused hours.” *Id.* at \*14-15. As such, the court found that, as similarly reasoned in *Dukes*’ (which held that class certification was improper), “if there is not a uniform practice but rather decentralized and independent action by supervisors that is contrary to the company’s established policies, individual factual inquiries are likely to predominate and judicial economy [would] be hindered rather than promoted by certification of a collective action.” *Id.* at \*14.

Similarly, the court in *Ruiz v. Serco, Inc.* found *Dukes* instructive in its determination to deny the FLSA plaintiffs’ motion for conditional certification of its proposed collective action under 216(b). *Ruiz v. Serco, Inc.*, 2011 U.S. Dist. LEXIS 91215 (D. Wis. Aug. 5, 2011). Plaintiffs in *Ruiz* alleged the defendant employer misclassified them as administratively exempt, thereby denying them the overtime compensation to which they were entitled under the FLSA. *Id.* at \*11. The *Ruiz* court found, however, that “although ‘[t]he requirements of conditional certification are lenient,’ the plaintiffs failed to provide enough evidence “to satisfy their burden at this stage.” *Id.* at \*18. The court noted that *Dukes* was “instructive” in its finding since,

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light most favorable to plaintiffs, demonstrated only ‘isolated supervisor misconduct,’ and thus the case was inappropriate even for conditional certification.” *Id.* at \*7.

<sup>15</sup> The court noted that, had they provided such modest factual support, “collective treatment might [have been] appropriate.” *Id.* at \*12.

“although collective actions under the FLSA are not subject to the provisions generally associated with class actions under Fed. R. Civ. P. 23 (such as numerosity, commonality and typicality), the Court’s discussion of the propriety of class actions generally provides guidance in deciding when certification of a collection action under the FLSA is appropriate.” *Id.* at \*18-19.

In applying *Dukes*’ rationale that it is the “capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation” rather than “the raising of common questions” that matters to class certification, the *Ruiz* court noted that it was not enough for the plaintiffs “to raise a common question as to whether they and other employees with some similar job duties were properly classified as exempt,” “[r]ather, the answer to that question must be susceptible to proof that can be extrapolated to the class plaintiffs seek to represent.” *Id.* at \*19. Ultimately, the court denied conditional certification because it found it would be difficult for the collective action “to generate common answers in light of the individualized inquiries arising from the wide variations in duties, experience, responsibility, discretion and supervisors on the part of the potential class members.” *Id.* It also denied conditional certification due to plaintiffs’ failure to show that they and potential class members were victims of a common policy or plan. *Id.* at \*20, 26-27. The court reasoned that, since local program directors assigned plaintiffs’ exemption classifications on a decentralized basis, as explained in *Dukes*, “a company-wide policy giving discretion to local managers or program directors is not a ‘policy’ capable of evaluation on a class-wide basis.” *Id.* at \*20, 24, 25.

Unlike the courts in *Ruiz* and *Macgregor*, the court in *Spellman v. American Eagle Express, Inc.* held that *Dukes* did not affect its 216(b) conditional certification analysis and ultimate determination that the FLSA action should be conditionally certified. Case No. 2:10-cv-01764-JS, Dkt. 81, p. 1, n.1 (E.D. Pa. July 21, 2011). The court noted that *Dukes* was a Rule 23 class action where the Supreme Court held certification of the class was improper since plaintiffs had failed to meet Rule 23(a)(2)’s commonality requirement, whereas, the action before it was an

FLSA collective action. *Id.* Collective actions, it noted, are distinct from Rule 23 class actions as, unlike Rule 23 class actions, they require plaintiffs affirmatively opt in to participate. *Id.* The court implied, however, that although *Dukes* did not affect its analysis or finding that plaintiffs had made the modest factual showing that they were similarly situated required in stage one, *Dukes* might affect its analysis at the second stage. *Id.* It instructed that at the second stage, it would conduct “a specific factual analysis of each employee’s claim to ensure that each proposed plaintiff is an appropriate party” and at that stage, the defendant “may argue that *Dukes*’s analysis of what constitutes a “common question” is persuasive to this Court’s analysis of whether an FLSA collective action should be certified.” *Id.*

Although there is some dissension among the courts with regards to *Dukes*’ applicability to 216(b) collective actions, most courts have found that *Dukes* does not apply to FLSA collective action certification determinations as the majority of courts have long held that Rule 23 standards and requirements do not apply to 216(b) collective actions.

### **ENTERPRISE COVERAGE UNDER THE FLSA**

Employees are covered under the FLSA in one of two instances: individual coverage or enterprise coverage. Individual coverage lies where the employee is engaged in commerce or the production of goods for commerce. 29 U.S.C. § 207(a)(1). Enterprise coverage lies where the employee works for an enterprise engaged in commerce or in the production of goods for commerce. *Id.* For a business to be covered by and thus required to meet the obligations of the Fair Labor Standards Act (“FLSA”), it must constitute an “enterprise” as defined by 29 U.S.C. § 203(r)(1), and meet the requirements under 29 U.S.C. § 203(s)(1). To constitute an “enterprise,” a business must be engaged in “related activities” that are performed for a “common business purpose,” through “common control” or a “unified operation.” 29 U.S.C. § 203(r)(1). To invoke

FLSA coverage, such an enterprise must be “engaged in commerce or in the production of goods for commerce.” 29 C.F.R. § 779.234; 29 U.S.C. § 203(s)(1). An enterprise is so engaged if it has employees engaged in commerce or in the production of goods for commerce, or has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and has an annual gross volume of sales made or business done of at least \$500,000.<sup>16</sup> 29 U.S.C. § 203(s)(1)(A).

Important Development: The Eleventh Circuit Clarifies the Parameters of Enterprise Coverage under the FLSA

On August 31, 2010, the Eleventh Circuit issued an opinion in six consolidated appeals that clarifies when an employee is covered by the Fair Labor Standards Act under the enterprise coverage prong of the FLSA. *See Polycarpe v. E & S Landscaping Service, Inc.*, 616 F.3d 1217 (11th Cir. 2010). In the consolidated appeals, the employees worked as landscapers, security-system technicians, and construction workers and were employed by “local service providers” some of whom also provided products to their customers. *Id.* at \*2. In each of the consolidated cases, the plaintiffs argued that they were covered by the FLSA pursuant to the enterprise coverage provisions of the FLSA.

*The Enterprise Coverage Provision of the FLSA*

The Eleventh Circuit noted that “[a]n employer falls under the enterprise coverage section of the FLSA if it 1) ‘has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person’ and 2) has at least \$

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<sup>16</sup> In addition, an enterprise is considered to be engaged in commerce or in the production of goods for commerce if it is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether any of the aforementioned is public or private or for profit or not for profit), or if it is an activity of a public agency. 29 U.S.C. § 203(S)(1)(B), (C).

500,000 of ‘annual gross volume of sales made or business done.’” 29 U.S.C. § 203(s)(1)(A). *Id.* at \*5-6. The language in Section 203(s)(1)(A), “or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person” is referred to as “the handling clause.” *Id.* The court stated that the handling clause allows the FLSA “potentially to reach retail and service businesses that were otherwise locally focused.” *Id.* at \*7. The court noted that under the handling clause the focus is on whether an employer has two or more employees (not necessarily the plaintiffs) handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person. *Id.*

*The “Coming To Rest Doctrine” Is Not Applicable*

The court began its analysis by rejecting the applicability of the “coming to rest doctrine” to the handling clause. The coming to rest doctrine would hold that goods or materials can lose their interstate quality if the items have already come to rest within a state before intrastate purchase by a business. The court held that the coming to rest doctrine is inapplicable in the enterprise coverage context because the FLSA “was designed to regulate enterprises dealing in articles *acquired intrastate* after travel in interstate commerce.” *Id.* at \*8-9 (citations omitted, emphasis in original). The court indicated that the proper analysis is to determine where the goods or materials were produced, not where the items were purchased. *Id.* at \*9. Under this analysis, an employer that purchases goods or materials from its local Home Depot is covered by the FLSA if it has two or more employees handling, selling, or otherwise working on these goods or materials as long as the goods or materials were produced in another state or produced in the same state for interstate commerce.

*The Interplay of “Goods” and “Materials”*

The court next addressed “the interplay of the terms ‘goods’ and ‘materials’ under the handling clause.” The court explained that it is necessary to parse out the different meanings of these terms in the handling clause because “goods” is defined expansively under Section 203(i) of the FLSA, but “does not include goods after their delivery into the physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.” *See id* at \*10, *quoting* 29 U.S.C. § 203(i). This concept is called the “ultimate-consumer exception.” *Id.* The court determined that when Congress added the words, “or materials” in the handling clause, Congress meant to differentiate goods, some of which are subject to the ultimate-consumer exception from materials, which are “never” saddled with this exception. *Id.* at \*11-12. The court used three different principles of statutory construction to arrive at this result. First, the court noted that Congress included the ultimate-consumer exception in the definition of goods, but not materials and when Congress uses particular language in one section of an act, but not in another, it is presumed Congress did this intentionally. *Id.* at \*12. Second, the court noted that it must not ignore the definition Congress gave to goods because it is a court’s job to give meaning to all of the enacted language. *Id.* at \*13. Third, the court indicated that in determining the correct understanding of “materials,” the court should “disfavor the construction that would cause an overlap with the definition of ‘goods.’” *Id.*

Because Congress provided no definition of the word, “materials,” the court looked to the ordinary definition of this term. *Id.* at \*14. The court adopted the definition that “materials” means “the tools or other articles necessary for doing or making something.” *Id.* The court noted that the FLSA’s legislative history supported this construction in that the Senate Report accompanying the 1974 amendments that added the term, “materials,” described materials as being “goods consumed in the employer’s business, as e.g., the soap used by a laundry.” *Id.* at

\*17. The court also noted that after the addition of the term, “materials,” into the handling clause, several courts of appeals have concluded that service businesses that used interstate goods or materials in their commercial activity were covered by the FLSA and Congress had not acted to overturn these decisions. *Id.* at \*19 n. 6. The court also found that the Department of Labor’s amicus brief that was filed in this case supported its construction of the term, “materials” and found that the DOL’s brief was “persuasive authority” under *Christensen v. Harris Cnty.*, 120 S.Ct. 1655, 1663 (2000). *Id.* at \*21.

#### *The Definition of “Materials”*

The court held that “whether an item counts as ‘materials’ will depend on two things: 1) whether, *in the context of its use*, the item fits within the ordinary definition of ‘materials’ under the FLSA [i.e., the item is a tool or other article necessary for doing or making something] and 2) whether the item is being used commercially in the employer’s business [i.e. the item must have a significant connection with the employer’s commercial activity].” *Id.* at \*22. The item must be used “regularly and recurrently” not only on “isolated or sporadic occasions” such that the item is used routinely by the business. *Id.* at \*23, n. 7.

#### *The Court’s Examples*

Before applying the adopted definition of “materials” the court gave some examples of how the definition should be applied. The court stated that “where a restaurant uses interstate cooking equipment as an article to perform its commercial activity of serving food, the restaurant is engaged with ‘materials’ that will subject the business to FLSA coverage.” *Id.* at \*22. The court explained that when a caterer uses china dinner plates that are produced out of state while providing catering services, the plates are “materials” because the plates have a significant connection to the employer’s commercial business. The court contrasted this scenario with an accounting firm that uses the same plates as decorations mounted on the wall of its lobby and

stated that the accounting firm would not be using “materials” under the FLSA handling clause because the plates have no significant connection to the employer’s accounting work. *Id.* at \*24. In the accounting firm scenario, the plates are “goods” that are subject to the ultimate-consumer exception because the accounting firm is the ultimate consumer. *Id.* at \*25, n. 8.

*Applying the Definitions to the Consolidate Cases*

The court next applied the definitions of “goods” and “materials” to the six consolidated cases. The court noted that three of the courts erred in applying the coming to rest doctrine. *Id.* at \*27. In the first case, the employees installed shutters purchased locally that had been made in Columbia. In the second case, the employees installed burglar alarms and other components purchased locally that had been manufactured out of state. In the third case, the employees made home repairs using items that plaintiffs purchased locally that had been manufactured out of state. The court stated that the proper “inquiry for enterprise coverage under the FLSA is whether the ‘goods’ or ‘materials’ were in the past produced in or moved interstate, not whether they were most recently purchased intrastate.” *Id.* at \*29.

Two of the cases involved landscaping companies whose employees used lawn mowers, edger blades, trucks, pencils, and gasoline, which the court indicated might bring the defendants under the FLSA pursuant to the handling clause. On remand, the district courts were instructed to determine whether these items are “goods” that are not subject to the ultimate-consumer exception (because they are sold to a customer) or “materials” (because they are tools or other articles necessary for doing or making something, even if used in the employer’s business).

In the sixth case, the court did not apply the handling clause because it found that the employer did not have an annual gross volume of sales made or business done of not less than \$500,000.

## Comments on the Decision

### *The Polycarpe Decision Is A Victory for Workers*

First, the court clarified that the “coming to rest doctrine” has no applicability to “goods” or “materials” in the enterprise coverage context. Therefore, the fact that an item is purchased locally is immaterial to the analysis. This means that if an employer purchases an interstate item from a local retail store like Home Depot and that item is then passed on in the routine commercial business to its customers, then enterprise coverage is secured. For example, in one of the cases consolidated in *Polycarpe*, the employer purchased building materials from Home Depot that were used in repairing homes. If the employee establishes that two or more employees regularly used these items and they were acquired by Home Depot from out of state sources or these items were produced within the state for out of state use, then enterprise coverage is achieved. In this scenario, it does not matter whether the items are considered “goods” or “materials” because they are sold to a customer who is not the ultimate consumer of the items.

Second, the court adopted a reasonable definition of “materials.” The distinction between “goods” and “materials” becomes important when the interstate items are used in the employer’s business, but not sold to an ultimate consumer, i.e. the employer is the ultimate consumer of the item. In this scenario, the employee must establish that the item is a “tool or other article necessary for doing or making something” and is “being used commercially in the employer’s business.” It should be demonstrated that the item has a significant connection with the employer’s commercial activity. The item must be used “regularly and recurrently” not only on “isolated or sporadic” occasions such that the item is used routinely by the business. To establish enterprise coverage for a lawn care business, the employee must establish that two or

more employees used interstate items such as the trucks or lawn mowers in the lawn care business' commercial operations. This should not be a difficult task.

*Suggestions For FLSA Litigation Where Enterprise Coverage Is At Issue*

In cases where enterprise coverage is at issue, the first step to achieving coverage is to make sure that enterprise coverage is pleaded properly. The complaint should allege specifically that the employer has two or more employees who handle, sell, or otherwise work on goods or materials that have been moved in or produced for commerce and that the employer has the requisite \$500,000 in annual gross volume of sales made or business done for each year of liability. If the employer admits these allegations, the facts should be confirmed during a Rule 30(b)(6) deposition and/or a stipulation of coverage should be obtained.

If the employer does not admit these allegations and/or pleads an affirmative defense that there is no enterprise coverage, then significant discovery is warranted. First, the discovery should identify what the commercial business is that the employer performs. Second, the discovery should be designed to identify interstate "goods" that are passed on to the employer's customers and interstate "materials" that are used in the employer's business. Plaintiffs' discovery should include broad interrogatories and comprehensive document requests followed by a Rule 30(b)(6) deposition designed to address these issues. Plaintiffs should also consider taking a Rule 34 inspection of land and videotaping the premises of the employer including its vehicles, its computers, and other items that may be interstate items that are used to do something or make something related to the employer's business. One can expect that most employers who meet the \$500,000 requirement of gross receipts will also routinely use interstate items such that enterprise coverage will easily be achieved.

*A Possible Dark Cloud On the Horizon*

In *Polycarpe*, the Eleventh Circuit noted that the defendants in two of the consolidated cases had asserted that some of the plaintiffs were “illegal immigrant workers.” *Id.* at 32 n. 16. The Eleventh Circuit indicated that it decides “nothing today about the FLSA’s application to ‘illegal immigrant workers’” because the district courts had made no findings about the plaintiffs’ immigration status. *Id.* This issue is likely to be addressed by the Eleventh Circuit soon. In *Josendis v. Wall to Wall Residence Repairs, Inc.*, No. 09-12266, the Eleventh Circuit recently requested that the DOL file a letter brief stating its position regarding “whether an illegal immigrant plaintiff can invoke the rights and protections of the Fair Labor Standards Act under any circumstances, and if so, whether the plaintiffs illegal immigrant status limits his remedies under the Fair Labor Standards Act in any way.” The DOL answered this question with a strong letter brief indicating that it is the DOL’s longstanding position that undocumented workers are entitled to minimum wages and overtime pay for work performed under the FLSA. *See Patel v. Quality Inn South*, 846 F.2d 700, 703-06 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).