

CASE NO. 12-20605

IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

In Re Wells Fargo Wage and Hour Employment Practices Litigation (No. III)

**ON PETITION FOR WRIT OF MANDAMUS FROM
THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION**

MULTI-DISTRICT LITIGATION CASE NO. H-11-2266

**BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER
AND VACATUR OF THE DISTRICT COURT DECISION**

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In accordance with Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Local Rule 29.2, *amicus curiae* Securities Industry and Financial Markets Association provides this supplemental statement of interested parties in order to fully disclose all those with an interest in this *amicus* brief. The undersigned counsel of record certifies that the following supplemental list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1) Securities Industry and Financial Markets Association, *amicus curiae* in this case,
- 2) Attorneys for *amicus curiae*, Michael Delikat, Trish M. Higgins, Jonathan G. Riddell, and Mark Thompson (Orrick, Herrington & Sutcliffe, LLP).

Amicus curiae Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association (SIFMA) represents the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA supports a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building public trust and confidence in the financial markets. SIFMA members have over 800,000 employees throughout the United States.

The outcome of this case will affect SIFMA and its members because the number of FLSA lawsuits has exploded in recent years, with many targeted at the financial services industry. In these suits, the financial services industry has often been subject to an FLSA certification procedure that leads to inconsistent results, inefficiencies, and unfair prejudice. SIFMA members (and all employers facing FLSA representative actions) are harmed by the current certification procedure, in which courts certify collective actions without first determining whether the action can be fairly and efficiently litigated on a representative basis.

All parties have consented to SIFMA appearing as *amicus curiae* and filing this brief.¹

¹ This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

The two-step certification procedure applied by many district courts to FLSA collective actions is flawed. Under the lenient conditional certification standard, district courts routinely conditionally certify FLSA actions with only the most cursory review – even where, as here, they are presented with extensive evidence demonstrating that the matter cannot be fairly and efficiently tried on a representative basis.

An order of conditional certification has significant consequences. It results in the court inviting potentially thousands of plaintiffs to join the action and authorizing it to proceed on a representative basis – without the court first determining whether the action is amenable to representative litigation. Instead, under the two-step process, that crucial determination is deferred until the close or near close of classwide merits discovery, at potentially enormous cost, delay, and prejudice.

This two-step procedure puts the cart before the horse. Consistent with the fundamental principles applicable to representative litigation, the district courts should be instructed to determine whether an FLSA collective action can be fairly and efficiently litigated on a representative basis *before* joining thousands of additional plaintiffs and authorizing it to proceed as a representative action.

ARGUMENT

I. THE TWO-STEP FLSA CERTIFICATION PROCEDURE APPLIED BY THE DISTRICT COURT SHOULD BE REJECTED.

Many district courts in this and other circuits have been applying a two-step certification procedure to FLSA collective actions, as first set forth in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987).² Under this procedure, courts first determine – usually based only on pleadings and pro forma affidavits – whether the action should be conditionally certified. Because a lenient standard and cursory review is applied, this first step “typically results in conditional certification of a representative class.” *Mooney*, 54 F.3d at 1214. Upon conditional certification, court-assisted notice is sent inviting potential plaintiffs to join the action, and the action proceeds forward as a representative action.

This certification procedure defers any meaningful review of whether the action is in fact amenable to representative litigation until step two, typically precipitated by the defendant filing a motion to decertify. At this stage, under the *Lusardi* methodology, the court examines factors such as the disparate factual and employment settings of the individual plaintiffs, the various defenses available to defendant that appear to be individual to each plaintiff, and fairness and procedural

² See also *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213-1216 (5th Cir. 1995) (discussing but expressly declining to adopt the *Lusardi* methodology).

considerations. *See Mooney*, 54 F.3d at 1213-14 & n.7. Many district courts, like the district court below, feel restrained from undertaking review of these factors until full merits discovery is complete or nearly complete and the matter is ready for trial.³

As explained below, this certification procedure fails to provide meaningful judicial review before allowing the action to proceed as a representative action, and results in inconsistent outcomes, inefficiencies, and unfair prejudice.

A. The Conditional Certification Standard Fails To Provide Meaningful Judicial Review Before Allowing The Action To Proceed As A Representative Action.

The conditional certification standard fails to address the fundamental issue necessary to decide whether a case should move forward as a representative action: whether liability can be determined by means of common questions with common answers. As confirmed by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), this issue is the key to determining whether representative litigation can proceed efficiently and at the same time protect the

³ *See, e.g., In re Wells Fargo Wage & Hour Employment Practices Litig. (No. III)*, No. H-11-226, 2012 WL 3308880, at *19 (S.D. Tex. Aug. 10, 2012) (second stage review occurs only when discovery is “largely complete”); *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 802-803 (S.D. Tex. 2010) (second stage review appropriate only “after discovery is largely complete and the matter is ready for trial”); *In re Bank of Am. Wage and Hour Employment Litig.*, 10-MD-2138-JWL, 2012 WL 4463285, at *2 (D. Kan. Sept. 27, 2012) (“Final certification analysis typically occurs only when merits discovery is closed (or largely complete) and the case is ready for trial.”).

due process rights of defendants. Where a case is to be litigated through representative testimony, *Dukes* confirms that the common contention “must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* A defendant must be allowed to litigate its defenses to the individual claims of class members, and “Trial by Formula” is prohibited. *Id.* at 2561.

These fundamental principles apply to any representative action, including those under the FLSA. Yet, the conditional certification standard makes no inquiry into the critical issue of whether the action can be efficiently and fairly litigated on a representative basis.

Just as the conditional certification standard ignores the critical legal issue, it also frequently results in courts ignoring critical evidence as well. Applying the lenient conditional certification standard, district courts frequently minimize or even entirely disregard evidence demonstrating that the claims of the potential plaintiffs are *not* amenable to representative litigation. Where, as here, the evidentiary record properly before the court demonstrates the futility of representative litigation, the district courts should not be permitted to disregard this evidence and conditionally certify the action.

In this action, at the time of the conditional certification motion, an extensive evidentiary record had been developed through years of interrelated litigation. Defendant presented substantial evidence showing that the putative collective action members were not similarly situated because of significant variations in how they performed their jobs. Thus, defendant argued, their claims cannot be litigated on a representative basis because individualized issues preclude common proof of liability. But the district court held that it could not consider this “merits based” evidence because it was applying the “more lenient first-stage burden.” *In re Wells Fargo Wage & Hour Employment Practices Litig.*, 2012 WL 3308880, at *27-28. Other district courts have similarly construed the lenient conditional certification standard to preclude consideration of evidence showing that the claims are not amenable to representative litigation.⁴

⁴ See, e.g., *Kress v. Price Waterhouse Coopers*, No. CIV S-08-0965 LKK, 2012 WL 1991951, at *2 (E.D. Cal. June 4, 2012) (“At this stage, the standard is fairly lenient, and the court is not required to consider defendant’s evidence, probably because the certification at this stage is conditional.”); *Sliger v. Prospect Mort.*, NO. CIV. S-11-465 LKK/EFB, 2011 U.S. Dist. LEXIS 94648, at *12 (E.D. Cal. Aug. 23, 2011) (“The documents and declarations submitted by defendant are beside the point at this [conditional certification] stage of the proceeding.”); *Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 838 (N.D. Cal. 2010) (“The fact that a defendant submits competing declarations will not as a general rule preclude conditional certification....[W]hile it may be true that the [defendant’s] evidence will later negate [the plaintiff’s] claims, that should not bar conditional certification at the first stage.”); *Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1238 (S.D. Ala. 2008) (“At most, Defendant’s evidence may create disputes of fact as to whether all hourly employees are or are not subject to the same policies. Those factual disputes may properly be addressed after discovery at the

However, consistent with the fundamental principles of representative litigation, the very point of the certification review should be to determine whether the claims can be efficiently and fairly litigated on a representative basis. To turn a blind eye to evidence directly bearing on this critical issue serves no purpose, and only delays the inevitable.⁵

B. The Two-Step Certification Procedure Leads to Inconsistent and Inefficient Outcomes.

Because the conditional certification standard does not address the fundamental issue in representative litigation (*i.e.* whether the litigation can be resolved by means of common questions with common answers) and demands that courts minimize or ignore evidence bearing on this issue, several courts *at the*

second stage of the FLSA collective action process...[when] discovery is complete and the case is ready for trial, but they do not constitute a valid basis for denying class certification today.”); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109-JTM, 2005 WL 2648054, at *2 (D. Kan. Oct. 17, 2005) (“[i]n considering whether the putative plaintiffs are similarly situated, the Court will only consider the pleadings and affidavits filed by Plaintiff because at this point, the Court is not prepared to weigh the evidence.”).

⁵ Some courts, recognizing the absurdity of minimizing or completely ignoring pertinent evidence presented in connection with a motion for conditional certification, have rejected the evidentiary limitations of the “more lenient first-stage burden” and have properly considered evidence beyond the pleadings and plaintiff’s affidavits. *See, e.g., Clay v. Huntington Ingalls, Inc.*, No. 09-7625, 2011 U.S. Dist. LEXIS 155351 at * 17 (E.D. La. Sept. 29, 2011) (“The Court is not inclined to believe that the correct course of action is to blithely certify the action with a blind eye toward deficiencies that discovery has already revealed.”); *Luksha v. TJX Cos.*, No. 2:11-cv-0135, 2012 U.S. Dist. LEXIS 111864, at *30 (D. Nev. Aug. 8, 2012) (“[T]his Court will not consider the evidence in the record supporting the Plaintiffs’ claims they are victims of a common policy or plan that violates the FLSA, while ignoring the discovery suggesting they are not.”).

same time and *on the same factual record* have simultaneously (1) denied certification of parallel state wage claims, finding that the claims were not amenable to litigation on a representative basis and yet (2) granted certification of the FLSA claims and allowed them to proceed on a representative basis. These decisions are inconsistent and unjustifiable. Where individual issues predominate and the case cannot be fairly and efficiently litigated on a representative basis, not only is class certification pursuant to Rule 23 unwarranted, but representative litigation under the FLSA is also inappropriate.

Employers in the financial services industry have been the victims of these inconsistent decisions. For example, in *In re Bank of Am. Wage & Hour Employment Litig.*, 2012 WL 4463285, at *1, plaintiffs alleged that Bank of America required its nonexempt employees to work off-the-clock in violation of the FLSA and state wage and hour laws. Following completion of the first phase of discovery related to class certification, plaintiffs moved for conditional certification of a nationwide FLSA collective action and for class certification of the parallel state off-the-clock claims. *Id.* at *1. Bank of America opposed certification of both the federal and state claims by highlighting the individualized issues inherent in plaintiffs' claims and the variations in the nature and extent of the alleged off-the-clock work. *Id.* at *14.

With respect to certification of the parallel state off-the-clock claims, the district court determined that the claims were not amenable to representative litigation. Specifically, the court found that, even assuming the Bank had an unofficial policy requiring off-the-clock work as alleged, “individual issues specific to each putative class member’s claim overpower any common questions,” *id.* at *14, “[s]ignificant individualized assessments would be required to determine whether in fact the Bank is liable to each putative class member,” *id.* at *35, and “class treatment is simply not workable in this context, *id.* at *36. Therefore, the court denied certification of the state off-the-clock claims.

Yet at the same time, the court granted conditional certification of the FLSA off-the-clock claims, and authorized court-assisted notice inviting over 200,000 employees to join the action. The court explained that under the lenient conditional certification standard – which it felt compelled to follow – the sole issue was whether “plaintiffs have satisfied their minimal burden of providing substantial allegations that the Bank maintained an unofficial policy requiring off-the-clock work.” *Id.* at *14. The court refused to even consider the Bank’s arguments and evidence which demonstrated (as the court found in the class certification context) that, even if there were such an unofficial policy, individualized issues precluded representative litigation. *Id.* at * 27. Rather, the court stated that in the FLSA context, the determination of whether individualized

issues preclude representative litigation *must* await the close of full merits discovery – even where, as in that case, discovery related to class certification had already been completed and the court had already determined with respect to parallel state claims that individualized issues *did* preclude representative litigation. *Id.* at *5-6.

In another case brought against an employer in the financial services industry, the district court reached a similarly inconsistent result. In *In re RBC Dain Rauscher Overtime Litig.*, 703 F. Supp. 2d 910, 913 (D. Minn. 2010), plaintiff securities brokers brought a putative nationwide collective action and class action against RBC Capital Markets Corporation alleging overtime violations of the FLSA and state wage and hour laws. Plaintiffs moved for class certification of the state overtime claims and conditional certification of the FLSA overtime claims. The central issue in that litigation, as here, was whether the plaintiffs were exempt from overtime requirements. The court denied plaintiff’s motion for class certification of the state overtime claims because individual issues relating to eligibility for overtime exemptions predominated over any question of law or fact common to the claims. *Id.* at 968. The court held that the trier of fact would be required to engage “in a painstaking and fact-intensive inquiry with respect to each individual plaintiff’s actual, day-to-day work duties in order to determine whether

the plaintiff qualifies for the exemption,” and that the claims were “not suitable for class treatment.” *Id.* at 969.

With respect to the FLSA overtime claims, the court likewise recognized that “any determination of whether a particular employee is exempt will require a fact-intensive examination of the particular employee's work duties.” *Id.* at 965. Nevertheless, the court granted the plaintiffs’ motion for conditional certification of a nationwide collective action. The court explained that under the lenient conditional certification standard, the plaintiffs need only present “substantial allegations” that they have “similar duties and responsibilities” and a “similar system of compensation.” *Id.* at 965. Under the court’s interpretation of the FLSA two-step process, this minimal showing was sufficient to “allow[] the plaintiffs to proceed as a class throughout discovery,” *id.* at 963, and only upon completion of full merits discovery would the court engage in a “fact intensive inquiry” as to whether representative litigation was indeed proper, *id.* at 965.

Thus, despite having made an express determination in the very same order that the overtime claims were “unworkable for class treatment” and would require “a painstaking and fact-intensive inquiry with respect to each individual plaintiff's actual, day-to-day work duties,” the court nonetheless entered an order authorizing court-assisted notice to a nationwide group of potential plaintiffs and allowing the

action to proceed on a representative basis.⁶ The court in *RBC Dain Rauscher* did not attempt to explain why claims not suitable for class treatment could be maintained as a collective action. This is no doubt because it could not – a nationwide collective action that requires “a fact-intensive examination of the particular employee’s work duties” is just as unmanageable as a class action that requires the same.⁷

These decisions dramatically illustrate the flaws of the two-step FLSA certification process, which defers any meaningful review of the propriety of representative litigation until the eve of trial – even when the court not only can but *has* determined that those very type of claims cannot be fairly and efficiently litigated on a representative basis.

⁶ Following the order granting conditional certification of the FLSA claims and denying certification of the parallel state wage claims, the action settled for \$5.05 million. *See In re RBC Dain Rauscher Overtime Litig.*, 06-cv-03093 (D. Minn. Feb. 23, 2012).

⁷ Employers outside the financial services industry also have been the victims of similar inconsistent and wasteful outcomes resulting from the lack of meaningful review at the conditional certification stage. *See, e.g., Young v. Dollar Tree Stores, Inc.*, No. 11-cv-01840, 2012 WL 3704997 (D. Colo. Aug. 24, 2012) (order denying class certification) and *Young v. Dollar Tree Stores, Inc.*, No. 11-cv-01840, 2012 WL 3705005 (D. Colo. Aug. 24, 2012) (order granting conditional certification of FLSA claims). These simultaneous orders in the *Young* matter denied class certification of a retail assistant store manager’s parallel state overtime claims but granted conditional certification of his FLSA overtime claims. In granting conditional certification, the court refused to look beyond the allegations of the complaint and the plaintiff’s affidavit, despite the fact that the other evidence presented convinced the court that the parallel state claims were not amenable to resolution on a representative basis.

C. The Two-Step Certification Procedure Creates Significant Inefficiencies And Unfair Prejudice.

The two-step certification procedure – which defers any meaningful review of whether the action is amenable to representative litigation until full merits discovery is completed and the matter is ready for trial – wastes the courts’ and the parties’ time and resources and results in unfair prejudice for all parties.

1. Defendant-Employers Are Especially Prejudiced by the Two-Step Certification Procedure.

Due to the lenient standard, the court’s determination at the first stage typically results in conditional certification of a representative class. And because the court is restrained from revisiting this determination until discovery is complete or largely complete, defendants are left with two undesirable choices after conditional certification is granted: (1) engage in expensive and disruptive classwide discovery on certification and merits issues until the very eve of trial; or (2) settle. Considering the tremendous costs and business disruption associated with discovery, especially e-discovery, in representative actions, the pressure to settle in these situations is heavy. *See Williams v. Accredited Home Lenders, Inc.*, 1:05-CV-1681-TWT, 2006 WL 2085312, at *5 (N.D. Ga. July 25, 2006) (noting the "mind-boggling" discovery costs in FLSA lawsuit with a proposed collective action class of 1,000 employees); William C. Martucci & Jennifer K. Oldvader, *Addressing the Wave of Dual-Filed Federal FLSA and State Law “Off-the-Clock”*

Litigation, 19 Kan. J. L. & Pub. Pol’y 433, 451 (2010) (FLSA conditional certification “decisions cause defendants to suffer enormous litigation costs, ranging from providing names and addresses for notice to engaging in broad discovery”; these costs following conditional certification “can result in enormous pressure on defendants to settle.”).⁸

At least one court in this circuit has recognized the settlement pressure and unfair prejudice to defendants resulting from application of the lenient conditional certification standard. In *Clay*, 2011 U.S. Dist. LEXIS 155351, at *13, the court warned against being unduly permissive at the conditional certification stage because of consequences that decertification will not undo. Specifically, the court noted that employers may be burdened by actions that are no more than a “frivolous fishing expedition conducted by the plaintiff at the employer's expense.” *Id.* at *15. The court further noted that “notice can also create settlement pressure early in the action...because it signals the potential expansion of the case and the

⁸ See also *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (“With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical....[T]he costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.”); Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am.U.L. Rev. 515, 541 (2009) (conditional certification in FLSA actions results in settlement pressure because it “signals the potential expansion of the case and the need for significant and expensive class-wide discovery”).

need for significant and expensive class-wide discovery.” *Id.* Thus, “[i]f a court is especially lenient at the notice stage then certification may leverage significant settlements even in marginal cases.” *Id.*

Large national employers, such as those in the financial services industry, may face pressure to settle for significant sums rather than engage in drawn out and expensive classwide discovery, regardless of how strong their decertification or merits arguments may be. The costs of proceeding through full merits discovery in cases involving thousands or, as here, tens of thousands of potential plaintiffs can be enormous, and that alone provides plaintiffs leverage in even the most marginal of cases. Under the current two-step certification process, there is simply no cost-effective and expeditious mechanism for defendants to have what should be a threshold issue adjudicated: whether the case can be fairly resolved on a representative basis. Hence, just a single plaintiff can commence an action and obtain conditional certification of nationwide FLSA claims on behalf of thousands of employees with only the thinnest of support,⁹ and thereby exert tremendous

⁹ See, e.g., *Neagley v. Atascosa County EMS*, No. CIV.A.SA04CA0893XR, 2005 WL 354085, at *3 (W.D. Tex. Jan. 7, 2005) (granting conditional certification based solely on the allegations in plaintiff’s complaint); *Harrington v. Educ. Mgmt. Corp.*, No. 02 Civ. 0787, 2002 U.S. Dist. LEXIS 8823, at *6 (S.D.N.Y. May 16, 2002) (providing notice to nationwide collective action class based on allegations in complaint and named plaintiff’s affidavit only); *Robertson v. LTS Mgmt. Services LLC*, 642 F. Supp. 2d 922, 926 (W.D. Mo. 2008) (noting that the court may grant conditional certification based on the affidavit of a single employee).

settlement pressure. Indeed, this ease with which plaintiffs can obtain conditional certification and dramatic expansion of their claims, and the settlement leverage that comes with it, undoubtedly is a major factor leading to the explosion of FLSA actions filed in recent years.

Where the defendant chooses not to settle, the other alternative is full merits discovery until finally reaching the belated decertification stage – a waste of money, time and resources where, as here, the evidentiary record at a much earlier point demonstrates that the action simply cannot be litigated on a representative basis. *See, e.g., Richter v. Dolgencorp, Inc.*, No. 7:06-cv-1537, 2012 U.S. Dist. LEXIS 151268, at *2-3 (N.D. Ala. Oct. 22, 2012) (granting decertification after over five years of post-conditional certification litigation – 265 docket entries entered between order granting conditional certification and order granting decertification).¹⁰

2. The Two-Step Certification Procedure Also Harms Opt-In Plaintiffs.

Defendants are not the only parties harmed by the two-step procedure. Plaintiffs – specifically, opt-in plaintiffs – are also harmed. Under the lenient standard, conditional certification is typically granted. As a result, many cases will be conditionally certified that have little or no chance of surviving a decertification

¹⁰ *See also Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 588 (E.D. La. 2008) (decertifying action after nearly three years of litigation including a full bench trial encompassing seven days and 43 hours of live trial testimony).

motion. Plaintiffs who opt into these lawsuits will expend their time and energy participating in the actions only to have their claims later dismissed.

Opt-in plaintiffs are active participants in collective action litigation. As an initial matter, an opt-in plaintiff must file a signed written consent to join the action. Many opt-in plaintiffs file declarations in support of motions, and they are also often required to participate in discovery.¹¹ Thus, an opt-in plaintiff may spend significant time and energy participating in a collective action. Those efforts, however, are all for naught if the court grants decertification. At that point, their claims will be dismissed and they will be back at square one.¹² These plaintiffs must now file individual suits if they wish to pursue their claims. For these plaintiffs, the two-step certification procedure serves only to delay resolution of their claims and wastes their time and energy.

¹¹ See, e.g., *Daniel v. Quail Int'l*, No. 3:07-cv-53, 2010 WL 55941, at *1 (M.D. Ga. Jan 5, 2010) (permitting individualized discovery of thirty-six opt-in plaintiffs); *Renfro v. Spartan Computer Serv., Inc.*, No. Civ.A. 06-2284-KNV, 2008 WL 821950, at *3-4 (D. Kan. March 26, 2008) (overruling objections to order denying motion for protective order as to twenty-seven noticed depositions); *Ingersoll v. Royal & Sunalliance USA, Inc.*, No. C05-1774, 2006 WL 2091097, at *3 (W.D. Wash. July 25, 2006) (permitting depositions of thirty-four opt-in plaintiffs).

¹² When a court declines to certify a class under the FLSA, the claims of the opt-in plaintiffs can no longer proceed as such. Hence, the court must dismiss the claims of the opt-in plaintiffs without prejudice, leaving only the named plaintiff's claims to be adjudicated. *Mooney*, 54 F.3d at 1214 ("If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice.").

3. The Two-Step Certification Procedure Wastes Judicial Resources.

The two-step certification procedure also wastes judicial resources. Due to the lenient conditional certification standard, courts will certify cases that will eventually be decertified. However, because of the restrictive nature of the two-step procedure, a defendant cannot move for decertification until discovery is complete or nearly complete. During the interim period, the court will spend significant time and resources adjudicating motions, holding conferences, and addressing other procedural issues. This waste of judicial resources could be avoided if the court engaged in a meaningful review at an earlier time.

Several courts have recognized the inefficiencies and waste of judicial resources that result from application of the two-step certification procedure. In *Basco v. Wal-Mart Stores, Inc.*, No. CIV.A. 00-3184, 2004 WL 1497709, at *5 (E.D. La. July 2, 2004), the court declined to apply the lenient conditional certification standard, recognizing that the “aim of collective actions is to promote judicial economy.” The court held that to “create a collective action class, including the cost associated with that, when a Court is convinced that there is insufficient support for same prior to its certification would be an exercise in futility and wasted resources for all parties involved.” *Id.* Similarly, in *Baroni v. BellSouth Telecommunications, Inc.*, No. CIV.A. 02-009, 2004 WL 1687434 (E.D. La. July 27, 2004), a collective action brought pursuant to the Age Discrimination

in Employment Act, the court declined to apply the lenient conditional certification standard due to concerns about efficiency and waste of judicial resources. The court noted that “generic application of the two-step rule would result in the conditional certification of the collective action along with notice to prospective class members and an opt-in period.” *Id.* at *10. The court, however, chose not to apply that standard, stating that “in the interest of judicial economy and conservation of the parties’ resources the Court shall proceed to the second step of the collective certification process.” *Id.* at *11.¹³

Deferral of meaningful review until decertification also runs afoul of the court’s obligation to avoid “‘stirring up” litigation through unwarranted solicitation.”¹⁴ Unless and until plaintiffs make a showing that a manageable collective action exists, the court should not indulge plaintiffs’ requests for

¹³ See also *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (“It would be a waste of the Court’s and the litigants’ time and resources to notify a large and diverse class only to later determine that the matter should not proceed as a collective action because the class members are not similarly situated.”).

¹⁴ See *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264, 267 (D. Minn. 1991) (“The courts, as well as practicing attorneys, have a responsibility to avoid the ‘stirring up’ of litigation through unwarranted solicitation.”); *Harriel v. Wal-Mart Stores, Inc.*, No. 11-2510, 2012 U.S. Dist. LEXIS 97527, *19-20 (where evidence on conditional certification shows that work experiences differ significantly among potential collective action members, “any court-facilitated notice to a nationwide opt-in class would constitute little more than solicitation on behalf of Plaintiff’s cause.”); *Clay*, 2011 U.S. Dist. LEXIS at 155351 at *17 (“Via the conditional certification process Plaintiffs are asking this federal court to put its imprimatur on their claims.”).

assistance in their efforts to locate potential plaintiffs to expand the scope of the litigation, nor put its judicial imprimatur on court-assisted notice inviting those potential plaintiffs to join the action.

For all these reasons, this Court should reject the two-step certification procedure, with its lenient conditional certification standard as applied by the district court below.

II. AN FLSA CERTIFICATION PROCEDURE THAT PROVIDES FOR EXPEDITIOUS MEANINGFUL REVIEW SHOULD BE ADOPTED

An FLSA certification procedure that calls for meaningful review addressing whether common answers to common questions exist at the *earliest* feasible opportunity would cure the problems associated with the current two-step procedure.

For example, where plaintiffs contend – as here – that they have been misclassified as exempt employees, the central liability determination will be whether an exemption under the FLSA applies. Therefore, the inquiry on certification is whether the class members are so similarly situated that the applicability of the exemption can be decided for all members in one stroke, which generally turns on whether there are material variations in how they perform their jobs. Just as in the Rule 23 context, this determination is not a merits determination and need not await extensive discovery. And, just as in the Rule 23

context, the court can certainly phase discovery as appropriate so that this determination can be made fairly and yet at the earliest practicable time.

Deferring this determination until the eve of trial out of blind allegiance to a two-step procedure serves no purpose and causes significant harm. This Court should take this opportunity to instruct the district courts to determine whether collective action litigation can be resolved on a representative basis *before* facilitating the joinder of thousands of additional party plaintiffs.

CONCLUSION

The Order of the District Court granting Plaintiffs' motion to conditionally certify an FLSA collective action should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that this brief is double-spaced, utilizes 14-point proportionately spaced Times New Roman typeface, and contains 5,292 words.

Dated: October 30, 2012

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