

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re WELLS FARGO BANK, N.A., et al.,
Petitioners.

On Petition for Writ of Mandamus
from the United States District Court
for the Southern District of Texas

BRIEF FOR THE SECRETARY OF LABOR AND THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS
AND URGING DISMISSAL OF THE PETITION FOR WRIT OF MANDAMUS

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The Secretary of Labor ("Secretary") and the Equal Employment Opportunity Commission ("EEOC") submit this brief as *amici curiae* in support of Respondents, employees who brought a collective action pursuant to section 16(b) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 216(b).

STATEMENT OF THE ISSUE

Like most other courts, the district court applied a fairly lenient standard to determine whether the names and addresses of employees who may be similarly situated to Respondents are discoverable and whether they should receive notice of the collective action so that they may decide whether to opt in to

it. At the close of discovery, the district court will conduct a more rigorous analysis of whether Respondents and the employees who opt in are indeed similarly situated such that the collective action should be certified for trial. The issue is whether this Court should issue a writ of mandamus to vacate the district court's decision and to direct it to apply a new standard that approves discovery regarding, and notice to, potential opt-in employees only after conclusively determining that they and Respondents are similarly situated for trial.

INTEREST AND AUTHORITY

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary and the EEOC to file this brief.

The Secretary administers and enforces the FLSA, and the EEOC administers and enforces the Equal Pay Act and the Age Discrimination in Employment Act ("ADEA"). The Secretary and the EEOC bring their own actions to enforce those statutes pursuant to sections 16(c) and 17 of the Act. See 29 U.S.C. 216(c), 217.

Private parties bring actions to enforce those statutes pursuant to section 16(b) of the Act. See 29 U.S.C. 216(b); 29 U.S.C. 206(d)(3); 29 U.S.C. 626(b). Section 16(b) provides that such actions may be brought collectively on behalf of similarly situated employees. See 29 U.S.C. 216(b). Private actions, especially collective actions, are an important and effective

complement to the Secretary's and the EEOC's own enforcement. To preserve the efficacy of section 16(b) collective actions, the Secretary and the EEOC have a substantial interest in ensuring that private parties be able to obtain discovery regarding, and send notice of the collective action to, similarly situated employees.

STATEMENT OF THE CASE

A. Section 16(b)'s Right to Proceed Collectively and the Certification of Collective Actions

Section 16(b) establishes liability for violations of the FLSA's minimum wage and overtime requirements and gives employees a private right of action to recover damages. See 29 U.S.C. 216(b). Specifically, Congress conferred on employees, through section 16(b), the "right" to bring an FLSA action individually and on behalf of "other employees similarly situated." 29 U.S.C. 216(b); see Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989) ("Congress gave employees . . . the right to bring actions to recover amounts due under the FLSA."). The right to sue collectively has been integral to the FLSA's enforcement since its enactment. See Fair Labor Standards Act of 1938, § 16(b), 52 Stat. 1060, 1069 (1938). That "explicit statutory direction of a single [FLSA] action for multiple [FLSA] plaintiffs," Hoffmann-La Roche, 493 U.S. at 172, allows plaintiffs "the advantage of lower individual costs to

vindicate rights by the pooling of resources" and benefits the judicial system by allowing the "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity," id. at 170. Section 16(b) sets forth Congress' "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." Id.

Section 16(b) also confers on employees "the right . . . to become a party plaintiff to any [collective] action." 29 U.S.C. 216(b). To opt in as a "party plaintiff" and be bound by a collective action, an employee must give written consent and file it in court. 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."). No motion or reliance on any federal rule is required because an employee's right to opt in to a collective action derives from section 16(b). See id. An employee who opts in commences his action for statute-of-limitations purposes on the "date on which [his] written consent is filed in the court." 29 U.S.C. 256(b).

Federal courts almost uniformly apply a two-step approach when determining whether to certify an FLSA collective action. See infra, pgs. 20-24. The first step is the "notice" or "conditional certification" step. If the named plaintiff makes a sufficient showing that the employees identified in the

complaint are similarly situated, the court may conditionally certify the collective action. In other words, the court authorizes discovery of the names and addresses of the employees who could potentially opt in and the mailing of notice to them. In Hoffmann-La Roche, the Supreme Court confirmed that section 16(b) grants courts the discretion to authorize such discovery regarding, and notice to, similarly situated employees. See 493 U.S. at 170 ("Section 216(b)'s affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure.").

At the first step, the court applies a fairly lenient standard to determine whether the employees are similarly situated because the only issue at stake is whether discovery will be permitted regarding, and notice will be sent to, potential opt-ins. Specifically, the named plaintiff must make a minimal showing that there is a reasonable basis for alleging the FLSA violation, there are similarly situated employees who have been harmed by the alleged violation, and those other employees want to opt in.

The second step is generally triggered after discovery is completed by the employer's motion for decertification. At that

second step (the "decertification" or "joinder" step), the court conclusively determines whether the collective action should be certified for trial. The court rigorously analyzes whether the named plaintiff and the employees who opt in are similarly situated and considers such factors as the disparate factual and employment settings of the employees, the defenses available to the employer which appear to be individual to each employee, and fairness and procedural considerations.

B. Procedural History

This case involves several FLSA actions that were consolidated in one multidistrict litigation proceeding. See District Court's Aug. 10, 2012 Order ("Order"), Docket No. 81, 1-2. Respondents allege that their employers ("Wells Fargo") wrongfully classified them and similarly situated employees as exempt from the FLSA's overtime requirements. See id. at 2-3. Respondents moved for conditional certification of their collective action and sought discovery of the names and addresses of similarly situated employees and authorization to send them notice. See id. at 3-5.

The district court granted the motion and authorized discovery regarding, and notice to, similarly situated employees. The district court noted that, although this Circuit has declined to adopt a standard for certifying FLSA collective actions, "most federal courts (including this court) have

adopted" the two-step approach. Order, 33. The district court characterized the first step as the "notice stage," and it stated that at this stage it decides "whether to certify the class conditionally and give notice to potential class members." Id. The decision "is made using a fairly lenient standard, because the court often has minimal evidence at this stage of the litigation." Id. (internal quotation marks omitted). Applying that standard, the district court determined that Respondents met their burden of preliminarily showing that the employees are similarly situated. See id. at 41-50. It ordered Wells Fargo to provide the names and addresses of similarly situated employees, authorized notice to them as potential opt-ins, and established a period of time for those who wish to participate to file their written consents with the court. See id. at 50-52. Recognizing that it had not conclusively certified the collective action, the district court stated: "Nothing in this order shall be construed to limit or waive any parties' right to seek modification or any other relief from the court relating to this order." Id. at 52.

Wells Fargo petitioned this Court for a writ of mandamus to vacate the conditional certification decision.¹ Wells Fargo

¹ Wells Fargo could not appeal the conditional certification decision. See Baldridge v. SBC Commc'ns, Inc., 404 F.3d 930, 931-33 (5th Cir. 2005) (conditional certification decisions are not collateral orders that may be appealed).

seeks to eliminate the two-step approach for certifying FLSA collective actions. It contends that the two-step approach is inconsistent with Federal Rules of Civil Procedure 20 and 23 and the "principles of aggregate and representative litigation" recognized in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). It also argues that certification (conditional or otherwise) should not be granted applying a lenient standard because that standard fails to determine whether the employees are similarly situated. According to Wells Fargo, certification of a collective action and sending out notice is permissible only after a determination that the employees are indeed similarly situated and that the action will proceed collectively to trial (in other words, there should be only one step). In determining whether employees are similarly situated, it argues that courts should apply Rule 23 as interpreted in Dukes and certify the collective action only if the employees are similarly situated in such a manner that they can all be joined in one proceeding and be bound by a common answer.

ARGUMENT

The district court conditionally certified Respondents' FLSA collective action; however, that label does not convey the actual relief ordered. Consistent with Hoffmann-La Roche, the district court permitted discovery of the names and addresses of employees who may be similarly situated to Respondents and

authorized notice of the collective action to them; it did not certify a class. See Order, 50-52. The issue thus is whether a writ of mandamus is warranted to vacate the standard applied here to permit such judicially-sanctioned discovery and notice.

I. THE CRITERIA FOR MANDAMUS ARE NOT SATISFIED

A writ of mandamus is a drastic and extraordinary remedy. See Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 380 (2004). Mandamus may issue only if: (1) the petitioner has no other adequate means to attain the desired relief, (2) the petitioner has demonstrated a clear and indisputable right to mandamus, and (3) even if the first two requirements are met, the court in its discretion is satisfied that mandamus is appropriate under the circumstances. See id. at 380-81; In re Dean, 527 F.3d 391, 394 (5th Cir. 2008).

Courts of appeals have refused to issue mandamus to vacate district courts' conditional certification decisions. An employer recently filed a similar mandamus petition in the Sixth Circuit after a district court conditionally certified a collective action and authorized notice to similarly situated employees. The Sixth Circuit summarily denied that petition. See In re HCR ManorCare, Inc., No. 11-3866, 2011 WL 7461073 (6th Cir. Sept. 28, 2011), cert. denied, 132 S. Ct. 1146 (2012); see also McElmurry v. U.S. Bank Nat'l Ass'n, 495 F.3d 1136, 1142

(9th Cir. 2007) (dismissing employees' mandamus petition seeking review of conditional certification decision).

Wells Fargo does not satisfy the stringent criteria for mandamus. First, Wells Fargo may attain adequate relief from the district court, whose order is expressly subject to modification and who will later consider decertification of the collective action. In Baldrige, this Court relied on the conditional certification decision being "subject to revision before the district court addresses the merits" and the district court's stated intent "to consider decertification before trial begins" to rule that the district court had not conclusively determined the issue and that the possibility of relief from conditional certification was still available. 404 F.3d at 931-32. Second, Wells Fargo cannot demonstrate a clear and indisputable right to vacating the district court's decision because: the relief ordered is plainly permissible under Hoffmann-La Roche; as discussed infra, the two-step approach is consistent with and furthers the FLSA's right to proceed collectively; and even if the district court applied the correct standard in an incorrect manner to the evidence before it, such misapplication would not merit mandamus. Third, Wells Fargo has not shown circumstances that make mandamus appropriate here. In Baldrige, this Court rejected the employer's argument that the vast expenses and pressure to settle that it allegedly faced

from the conditionally certified collective action militated in favor of allowing it to appeal the conditional certification decision. See 404 F.3d at 932. This Court dismissed such "policy concerns" as "not relevant to § 216(b) collective actions in the absence of an applicable procedural rule or act of Congress." Id. This reasoning applies here as well.

II. THE TWO-STEP APPROACH FOR CERTIFYING FLSA COLLECTIVE ACTIONS IS CONSISTENT WITH AND FURTHERS THE FLSA'S RIGHT TO PROCEED COLLECTIVELY

A. The Principles Underlying Hoffman-La Roche Support Applying the Two-Step Approach.

The district court, as permitted by Hoffmann-La Roche, authorized discovery regarding employees who may be similarly situated to Respondents and notice of the collective action to them. See Order, 50-52. Although the Secretary and the EEOC focus on how the fairly lenient standard applied by the district court when permitting such discovery and notice furthers section 16(b)'s right to proceed collectively, Hoffmann-La Roche's reliance on Rules 26 and 83 in recognizing that such discovery and notice are permissible also supports application of the two-step approach.

Rule 26 authorizes discovery of information that "is relevant to any party's claim or defense," including information that may not be admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible

evidence." Fed. R. Civ. P. 26(b)(1); see Crosby v. La. Health Serv. & Indem. Co., 647 F.3d 258, 262 (5th Cir. 2011) (scope of discovery under Rule 26(b)(1) is broad). The Supreme Court in Hoffmann-La Roche determined that the names and addresses of other employees who may opt in to the collective action are discoverable:

The District Court was correct to permit discovery of the names and addresses of the discharged employees. Without pausing to explore alternative bases for the discovery, . . . we find it suffices to say that the discovery was relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case.

See 493 U.S. at 170.

In addition, courts have wide discretion to manage cases, especially complicated cases. Rule 83 provides, under the subheading, "Procedure When There Is No Controlling Law," that a "judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules." Fed. R. Civ. P. 83(b). Thus, "Rule 83 endorses measures to regulate the actions of the parties to a multiparty suit." Hoffmann-La Roche, 493 U.S. at 172. "This authority is well settled, as courts traditionally have exercised considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" Id. at 172-73 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)). Applying Rule 83 and these case

management principles to section 16(b) collective actions, the Supreme Court determined that section 16(b)'s "affirmative permission for employees to proceed on behalf of those similarly situated must grant the court the requisite procedural authority to manage the process of joining multiple parties." Id. at 170; see id. at 170-71 (in section 16(b) collective actions, "the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"). And the Supreme Court further determined that courts' managerial responsibility in section 16(b) collective actions to oversee joinder includes authorizing notice to potential opt-ins and establishing a period of time for them to join the collective action in response to the notice. See id. at 170-72.

B. Determining Early in Litigation under a Fairly Lenient Standard Whether to Authorize Notice of the Collective Action to Similarly Situated Employees Is Consistent with and Furthers the FLSA's Right to Proceed Collectively.

1. For section 16(b)'s rights to bring a collective action and to opt in to another's collective action to have full effect, those employees who have the right to opt in to the collective action must be aware of it. Notice to similarly situated employees accomplishes that by allowing them, if they desire, to exercise their right to opt in. The benefits of collective actions (including the efficient resolution of common

issues in one proceeding) "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." Hoffmann-La Roche, 493 U.S. at 170. Without notice and the possibility of others joining, section 16(b)'s rights would have little meaning.

2. Notice earlier in an FLSA collective action as a preliminary step results in the court's knowing the make-up of the putative collective of employees when it ultimately determines whether they are similarly situated for trial. Cf. Hoffmann-La Roche, 493 U.S. at 171-72 ("A trial court can better manage a major [FLSA] action if it ascertains the contours of the action at the outset."); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995) (at second step after notice, court "has much more information on which to base its decision" whether employees are similarly situated), overruled on other grounds by Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Indeed, because FLSA collective actions are opt-in, see 29 U.S.C. 216(b), the court does not determine whether an abstract class of employees is similarly situated, but instead determines whether the named plaintiff(s) and the employees who opt-in are similarly situated. See, e.g., Marshall v. Amsted Rail Co., No. 10-cv-0011-MJR-SCW, 2012 WL 5499431, at *5 (S.D. Ill. Nov. 13, 2012) (pursuant to employer's decertification motion, analyzing

"whether the 476 opt-in Plaintiffs are similarly situated to the 2 named/representative Plaintiffs"); Bifulco v. Mortgage Zone, Inc., 262 F.R.D. 209, 212 (E.D.N.Y. 2009) (at second step, court determines whether opt-ins are similarly situated to named plaintiff).

By contrast, if a one-step approach were applied, the court would first determine whether the employees are similarly situated for trial, and if so, it would then authorize notice. In such case, the court would conclusively determine whether a group of employees is similarly situated for trial without knowing who will make up that group (because notice and an opportunity to opt in have not yet occurred). "[U]nless and until the Plaintiffs know after discovery who the potential opt-in plaintiffs are, the [c]ourt cannot determine whether Plaintiffs are similarly situated." Evans v. Lowe's Home Ctrs., Inc., No. 3:CV-03-0438, 2004 WL 6039927, at *2 (M.D. Pa. Jun. 17, 2004); see Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 406 (D.N.J. 1988) (delaying notice to potential opt-in employees until after conclusively determining that they are similarly situated for trial "would condemn any large [FLSA collective action] to a chicken-and-egg limbo in which the class could only notify all its members to gather together after it had gathered together all its members"). Thus, it is consistent with section 16(b) and more logical to first facilitate the

joinder of the employees who wish to participate in the collective action (by authorizing notice and a period of time to opt in) and then to determine whether they are similarly situated to the named plaintiff(s) for trial.

3. Notice relatively early in the litigation is important because a plaintiff's filing of an FLSA collective action does not toll the Act's statute of limitations for similarly situated employees who later opt in. See 29 U.S.C. 256. An employee who opts in to a collective action is considered to have commenced the action on the date on which his written consent is filed with the court. See 29 U.S.C. 256(b). To the extent that notice is not authorized until later in the litigation, employees who opt in at that point may have a diminished recovery or no recovery because the statute of limitations continued to run for them after the action was filed.²

4. Courts are correct to apply a fairly lenient standard to determine whether employees are similarly situated for purposes of authorizing discovery and notice of the collective action. See Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 193 (3d Cir. 2011) ("We believe the 'modest factual showing'

² Although these statute-of-limitations concerns may not apply here because the parties apparently reached a tolling agreement, these concerns are generally present in FLSA collective actions and support the need for a relatively early determination of whether notice is warranted.

standard – which works in harmony with the opt-in requirement to cabin the potentially massive size of collective actions – best comports with congressional intent and with the Supreme Court's directive [in Hoffmann-La Roche]."³ The determination at the first step involves only whether discovery and notice should be authorized. See Order, 33 (referring to first step as "notice stage"), 50-51; see also Zavala v. Wal Mart Stores Inc., 691 F.3d 527, 536 (3d Cir. 2012) (conditional certification "is not really a certification" and is actually the court's exercise of its discretionary power, upheld in Hoffmann-La Roche, to facilitate notice to potential opt-in employees); Myers v. The Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010) ("while courts speak of 'certifying' a FLSA collective action," conditional certification is only the court's exercise of discretionary power to facilitate notice to potential class members), cert. denied, 132 S. Ct. 368 (2011); Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1261 n.40 (11th Cir. 2008) (under two-step approach, conditional certification is "synonymous" with decision to notify potential collective action members), cert. denied, 130 S. Ct. 59 (2009). Thus, the standard for conditional certification "should remain a low standard of proof because the purpose of this first stage is

³ Symczyk is pending before the Supreme Court (No. 11-1059) and was argued on December 3, 2012.

merely to determine *whether* 'similarly situated' plaintiffs do in fact exist." Myers, 624 F.3d at 555 (emphasis in original).

Moreover, success at the conditional certification/notice step does not mean that the collective action is certified and does not give the employees any advantage when the court ultimately decides at the second step whether they are similarly situated. See Myers, 624 F.3d at 555 n.10 (conditional certification "is neither necessary nor sufficient for the existence of a representative action under [the] FLSA"); Lacy v. Reddy Elec. Co., No. 3:11-cv-52, 2011 WL 6149842, at *2 (S.D. Ohio Dec. 9, 2011) ("Conditional certification is meant only to aid in identifying similarly situated employees. It is not a final determination that the case may proceed as a collective action."). Consistent with section 16(b), Wells Fargo will not face a collective action at trial unless the district court determines later in the case, having already authorized notice, that Respondents and the opt-in employees are similarly situated. See Order, 33-34. At that second step, the employees continue to bear the burden and must show that they are in fact similarly situated. See Zavala, 691 F.3d at 537; Morgan, 551 F.3d at 1261. And contrary to Wells Fargo's assertion, the prospect of "decertification" is real, and courts are not hesitant to decertify collective actions even if they previously authorized notice. See, e.g., Zavala, 691 F.3d at 538

(affirming "decision to deny final certification"); Espenscheid v. DirectSat USA, LLC, No. 09-cv-625-bbc, 2011 WL 2009967, at *1 (W.D. Wis. May 23, 2011) (decertifying collective action into which approximately 1,000 employees had opted in); Johnson v. Big Lot Stores, Inc., 561 F.Supp.2d 567 (E.D. La. 2008) (decertifying nationwide collective action).⁴

Finally, although the standard is fairly lenient at the notice step, the district court correctly recognized that it is "not automatic." Order, 41. Indeed, district courts in this Circuit regularly deny or deny in part conditional certification motions. For example, Wells Fargo defeated such a motion several months ago. See Griffith v. Wells Fargo Bank, N.A., No. 4:11-CV-1440, 2012 WL 3985093 (S.D. Tex. Sept. 12, 2012). Additional recent denials include: Lopez v. Bombay Pizza Co., No. H-11-4217, 2012 WL 5397192, at *3 (S.D. Tex. Nov. 5, 2012) (granting in part and denying in part conditional certification motion and limiting conditionally certified class to one job title); Vallejo v. Northeast I.S.D., No. SA-12-CV-270-XR, 2012 WL 5183581, at *1-2 (W.D. Tex. Oct. 17, 2012) (denying

⁴ Recent decisions decertifying FLSA collective actions include: Marshall, 2012 WL 5499431; Richter v. Dolgencorp, Inc., No. 7:06-cv-1537-LSC, 2012 WL 5289511 (N.D. Ala. Oct. 22, 2012); Camilotes v. Resurrection Health Care Corp., No. 10-cv-366, --- F.R.D. ---, 2012 WL 4754743 (N.D. Ill. Oct. 4, 2012); Knott v. Dollar Tree Stores, Inc., Nos. 7:06-CV-1553-LSC & 7:08-CV-693-LSC, --- F.Supp.2d ---, 2012 WL 4341816 (N.D. Ala. Sept. 19, 2012).

conditional certification motion); Carey v. 24 Hour Fitness USA, Inc., No. H-10-3009, 2012 WL 4857562, at *4 (S.D. Tex. Oct. 11, 2012) (denying conditional certification motion). Contrary to Wells Fargo's suggestion, courts do not grant conditional certification motions in a pro forma fashion.

Because the fairly lenient standard applied here to authorize discovery regarding, and notice to, potential opt-in employees is consistent with and furthers the FLSA's right to proceed collectively, Wells Fargo cannot demonstrate a clear and indisputable entitlement to the relief that it requests – a requirement for mandamus.

C. Courts Almost Uniformly Apply the Two-Step Approach.

The four courts of appeals (the Second, Third, Sixth, and Eleventh Circuits) that have ruled on the two-step approach in the context of the FLSA have each approved it. See Myers, 624 F.3d at 554-55 (two-step approach is "sensible"); Zavala, 691 F.3d at 535-37 ("we affirm" use of two-step approach); HCR ManorCare, 2011 WL 7461073, at *1 ("[w]e have . . . implicitly upheld" two-step approach); Morgan, 551 F.3d at 1260-62 ("we have sanctioned" two-step approach); see also Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102-05 (10th Cir. 2001) (affirming application of two-step approach to section 16(b) collective action brought pursuant to ADEA).

A few courts (but no courts of appeals) have applied Rule 23's requirements when evaluating whether to send court-approved notice to similarly situated employees. See, e.g., Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 268-69 (D. Colo. 1990). Shushan, the case most commonly cited for the position that Rule 23 should apply when determining whether employees are similarly situated under section 16(b), was effectively overruled by the Tenth Circuit in Thiessen.⁵ Indeed, Wells Fargo does not identify a single case in which a court applied Rule 23 to determine whether employees are similarly situated under section 16(b).

This Court has discussed, but not ruled on, the two-step approach. In Mooney, this Court reviewed a district court decision that, applying the two-step approach, determined that the employees were not similarly situated. See 54 F.3d at 1214-

⁵ In Thiessen, the district court had applied the two-step approach to determine whether employees were similarly situated under section 16(b) in an ADEA collective action. See 267 F.3d at 1102-03. The Tenth Circuit noted that alternatives to the two-step approach were to apply Rule 23 (citing Shushan) or Rule 23 as it existed prior to its 1966 amendments. See id. at 1103. The Tenth Circuit ruled that the two-step approach "is the best of the three approaches because it is not tied to the Rule 23 standards." Id. at 1105. It rejected Rule 23's application because "Congress clearly chose not to have the Rule 23 standards apply to class actions under the ADEA, and instead adopted the 'similarly situated' standard." Id. "To now interpret this 'similarly situated' standard by simply incorporating the requirements of Rule 23 (either the current version or the pre 1966 version) would effectively ignore Congress' directive." Id.

16. This Court discussed both the two-step approach and the Rule 23 approach outlined in Shushan, see id. at 1213-14, and affirmed the decision because there was no abuse of discretion regardless which approach applied, see id. at 1216. It expressly stated, however, that it was not sanctioning either approach. See id.; see also Acevedo v. Allsup's Convenience Stores, Inc., 600 F.3d 516, 518-19 (5th Cir. 2010) ("We have not ruled on how district courts should determine whether plaintiffs are sufficiently 'similarly situated' to advance their claims together in a single § 216(b) action.").

However, this Court has affirmed district court decisions applying the two-step approach. See Mooney, 54 F.3d at 1214-16; Roussell v. Brinker Int'l, Inc., 441 Fed. Appx. 222, 226-27 (5th Cir. 2011) (affirming, under abuse of discretion standard, district court's decision applying two-step approach and decertifying most of a collective action). This Court has also noted that FLSA collective actions "typically proceed in two stages." Sandoz v. Cingular Wireless, LLC, 553 F.3d 913, 915 n.2 (5th Cir. 2008) (citing Mooney, 54 F.3d at 1213-14). And it has rejected attempts to apply Rule 23 to section 16(b) collective actions. See LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 (5th Cir. 1975) (ADEA action cannot be brought as Rule 23 class action because "[t]here is a fundamental, irreconcilable difference between the class action described by

Rule 23 and that provided for by [section 16(b)]," and "[i]t is crystal clear that [section 16(b)] precludes pure Rule 23 class actions in FLSA suits"); see also Donovan v. Univ. of Tex. at El Paso, 643 F.2d 1201, 1206 (5th Cir. 1981) (Rule 23 does not apply to Secretary's enforcement action; FLSA's enforcement procedure "constitutes a congressionally developed alternative to [Rule 23's] procedures," and the difference between it and Title VII's enforcement procedure "highlights even more why Rule 23 is not needed in FLSA suits").

Moreover, district courts in this Circuit routinely apply the two-step approach. See, e.g., Vallejo, 2012 WL 5183581, at *1 (two-step approach is "prevailing analysis used by federal courts"); McCarragher v. The Ryland Group, Inc., No. 3-11-55, 2012 WL 4857575, at *3 (S.D. Tex. Oct. 11, 2012) (district courts in Fifth Circuit generally follow two-step approach);⁶ McKnight v. D. Houston, Inc., 756 F.Supp.2d 794, 800-01 (S.D. Tex. 2010) ("Most courts, including district courts in this circuit, use [two-step approach].").

District courts in other circuits where the courts of appeals have not addressed the two-step approach also generally apply it. See, e.g., LaFleur v. Dollar Tree Stores, Inc., No.

⁶ Like Wells Fargo, the employer in McCarragher has filed a mandamus petition with this Court (No. 12-41212) seeking to vacate a conditional certification decision.

2:12-cv-00363, 2012 WL 4739534, at *3 (E.D. Va. Oct. 2, 2012) (federal courts, including courts in Fourth Circuit, apply two-step approach); Arnold v. DirecTV, Inc., No. 4:10-CV-352-JAR, 2012 WL 4480723, at *2 (E.D. Mo. Sept. 28, 2012) (courts in Eighth Circuit "consistently apply" two-step approach); Hawkins v. Alorica, Inc., No. 2:11-cv-00283-JMS-WGH, --- F.R.D. ---, 2012 WL 4391095, at *6 (S.D. Ind. Sept. 25, 2012) (courts in Seventh Circuit "typically use" two-step approach); Johnson v. VCG Holding Corp., 802 F.Supp.2d 227, 233-34 (D. Me. 2011) (two-step approach is "general practice" in First Circuit); Guifu Li v. A Perfect Franchise, Inc., No. 5:10-CV-01189-LHK, 2011 WL 4635198, at *4 (N.D. Cal. Oct. 5, 2011) (courts in Ninth Circuit use two-step approach).

This Court's reluctance to decide the issue and the almost uniform acceptance of the two-step approach by district courts within this Circuit and by courts elsewhere argue against mandamus.

D. Rule 23's Standard for Class Actions Does Not Apply to Section 16(b) Collective Actions.

1. Although the Federal Rules of Civil Procedure apply generally to FLSA actions, Rule 23 has no applicability to section 16(b) collective actions. The Advisory Committee Notes accompanying the 1966 amendments to Rule 23 state: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected

by Rule 23, as amended." Fed. R. Civ. P. 23 Advisory Committee Notes (1966); see Knepper v. Rite Aid Corp., 675 F.3d 249, 257 (3d Cir. 2012) (during creation of modern Rule 23 in 1966, the Advisory Committee on Civil Rules "disclaimed any intention" for the new Rule 23 to affect section 16(b)). The 1966 amendments to Rule 23 created the modern version of the rule in place today, and the disavowal of any application to section 16(b) collective actions is dispositive of any argument that Rule 23 should apply.

2. Moreover, Rule 23 provides a standard for *certifying* representative parties to proceed to trial on behalf of all members of a defined class. See Fed. R. Civ. P. 23(a)-(b). Rule 23's certification standard thus would not apply to the discovery and notice decisions at issue here even if it were applicable to section 16(b) collective actions (which it is not). Again, although the district court conditionally certified the collective action, the relief actually ordered was the discovery of the names and addresses of employees who may be similarly situated and notice of the collective action to them. See Order, 50-52. The district court did not certify a collective action, and Rule 23's class certification standard is simply not relevant to discovery and notice decisions.

3. Section 16(b)'s history further refutes Rule 23's application. The FLSA was enacted in June 1938 and became

effective in October 1938. See Fair Labor Standards Act of 1938, § 15(a), 52 Stat. at 1068. Congress enshrined directly in the Act the right of employees to proceed collectively and defined the scope of collective actions as including those employees who are similarly situated. See id., § 16(b), 52 Stat. at 1069. The Rules Enabling Act – which authorized the Supreme Court to prescribe general rules of civil procedure – had been enacted in 1934. See 48 Stat. 1064 (1934). In December 1937, the Supreme Court completed developing the rules, and they were reported to Congress in January 1938 as required by section 2 of the Rules Enabling Act. See 82 L. Ed. 1565 (1937); see also Fraser v. Doing, 130 F.2d 617, 620 (D.C. Cir. 1942) (rules became effective in September 1938). Thus, Congress could have relied on Rule 23 to govern FLSA collective actions had it so desired.

In 1947, Congress significantly amended section 16(b) by enacting the Portal-to-Portal Act. See Portal-to-Portal Act, § 5, 61 Stat. 84, 87 (1947). In addition to collective actions, section 16(b) had originally permitted representative actions whereby an employee would "designate an agent or representative" – who was not an employee and who had no claim himself – to bring an action on behalf of others. Fair Labor Standards Act of 1938, § 16(b), 52 Stat. at 1069. The Portal-to-Portal Act eliminated such representative actions, preserved collective

actions by employees on behalf of themselves and similarly situated employees, and placed an express opt-in requirement on collective actions. See Portal-to-Portal Act, § 5, 61 Stat. at 87; see also Hoffmann-La Roche, 493 U.S. at 173 ("In enacting the Portal-to-Portal Act . . . the requirement that an employee file a written consent was added. . . . Congress left intact the 'similarly situated' language providing for collective actions, such as this one."). When amending the FLSA by means of the Portal-to-Portal Act, Congress reaffirmed employees' right to proceed collectively on behalf of others and continued to define the scope of collective actions as including those other employees who are similarly situated. Congress did not rely on or refer to Rule 23, and has not done so on the numerous occasions since 1947 when it has amended the FLSA. "While Congress could have imported the more stringent criteria for class certification under [Rule 23], it has not done so in the FLSA." O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 584 (6th Cir. 2009).

4. The Rules Enabling Act does not support Wells Fargo's argument. The Rules Enabling Act grants the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts," 28 U.S.C. 2072(a), but prohibits "[s]uch rules" from "abridg[ing], enlarg[ing] or modify[ing] any substantive right,"

28 U.S.C. 2072(b). As discussed above, the two-step approach applied to certification of collective actions is a specific implementation of section 16(b)'s statutory rights; it is not a general rule of practice and procedure prescribed pursuant to the Rules Enabling Act and thus is not subject to its prohibition. The Rules Enabling Act further provides that "[a]ll laws in conflict with such rules shall be of no further force or effect." Id. However, section 16(b) became effective after the rules did and does not conflict with Rule 23 for purposes of the Rules Enabling Act in any event because, as discussed above, Rule 23 disclaims any application to section 16(b) collective actions and Congress chose to define the scope of section 16(b) collective actions without reliance on or reference to Rule 23.

5. The Supreme Court's analysis of Rule 23's commonality requirement in Dukes does not change the fact that Rule 23 does not apply to FLSA collective actions. In Dukes, the Supreme Court considered whether "one of the most expansive class actions ever" should be certified pursuant to Rule 23, 131 S. Ct. at 2546, and determined that the class did not satisfy Rule 23's commonality requirement, id. at 2550-57. It concluded that, "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" the class could not be certified because the employer would "not

be entitled to litigate its statutory defenses to individual claims." Id. at 2561. Thus, Dukes cautions that application of Rule 23's commonality requirement cannot abridge an employer's substantive rights (which would be a violation of the Rules Enabling Act). FLSA collective actions, however, are different: Rule 23 disclaims any application to them; the FLSA's history shows that Congress declined to apply Rule 23 to them; and the fact that the two-step approach is not a general rule of practice and procedure but instead derives from section 16(b) means that it is not subject to the Rules Enabling Act's prohibition.

6. Courts of appeals have rejected Rule 23's application to section 16(b) collective actions both before and after Dukes. In LaChapelle, this Court rejected an attempt to apply Rule 23 to a section 16(b) collective action. See 513 F.2d at 288 (ADEA collective action cannot be brought as Rule 23 class action because "[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [section 16(b)]"). The Third Circuit recently reaffirmed the two-step approach as the standard for certifying FLSA collective actions and rejected any approach based on Rule 23. See Zavala, 691 F.3d at 536 ("It is clear from the statutory text of the FLSA that the standard to be applied on final certification is whether the proposed collective plaintiffs are

'similarly situated.'"). The Sixth Circuit rejected the exact arguments made by Wells Fargo, including reliance on Dukes, when denying a similar mandamus petition. See In re HCR ManorCare, 2011 WL 7461073, at *1. In O'Brien, the Sixth Circuit had previously noted that Congress "could have imported" Rule 23's "more stringent criteria for class certification" but "has not done so in the FLSA," and ruled that the district court erred by "implicitly and improperly appl[ying] a Rule 23-type analysis" – "a more stringent standard than is statutorily required." 575 F.3d at 584-85. The Seventh Circuit has stated that "collective actions are not subject to Rule 23 or mentioned in any other federal rule of civil procedure" and are certified and decertified "unaffected by the absence of a governing rule of procedure." Espenscheid v. DirectSat USA, LLC, 688 F.3d 872, 877 (7th Cir. 2012). It is "clear" to the Eleventh Circuit that "the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under [Rule 23]." Grayson v. K Mart Corp., 79 F.3d 1086, 1096 n.12 (11th Cir. 1996). And in Thiessen, the Tenth Circuit held that Rule 23 did not apply to an ADEA collective action because "Congress clearly chose not to have the Rule 23 standards apply . . . and instead adopted the 'similarly situated' standard." 267 F.3d at 1105.

District courts in this Circuit, in addition to the district court here, have rejected the argument based on Dukes that Rule 23 applies to certification of section 16(b) collective actions. See, e.g., Richardson v. Wells Fargo Bank, N.A., No. 4:11-cv-00738, 2012 WL 334038, at *2 n.8 (S.D. Tex. Feb. 2, 2012) ("The Court does not rely on [Dukes] because Rule 23 certification requirements do not apply to FLSA collective actions."); McCarragher, 2012 WL 4857575, at *4 n.1 ("[T]he majority of Courts addressing the issue have held that Dukes is inapplicable to FLSA collective actions."). District courts elsewhere have similarly rejected that argument. See, e.g., Brand v. Comcast Corp., No. 12 CV 1122, 2012 WL 4482124, at *3 n.3 (N.D. Ill. Sept. 26, 2012) (Rule 23 certification standard applied in Dukes does not apply to FLSA collective action); Smith v. Pizza Hut, Inc., No. 09-cv-01632-CMA-BNB, 2012 WL 1414325, at *5 (D. Colo. Apr. 21, 2012) ("[N]umerous courts have rejected the argument that Dukes alters the standard to certify a FLSA collective action."); Chapman v. Hy-Vee, Inc., No. 10-CV-6128-W-HFS, 2012 WL 1067736, at *3 (W.D. Mo. Mar. 29, 2012) (Dukes "has not impacted rulings within this circuit" in section 16(b) cases). Thus, courts have overwhelmingly rejected the argument that Rule 23 applies to FLSA collective actions, even after Dukes, and neither this argument nor Wells Fargo's other arguments provide a basis for issuing mandamus.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for writ of mandamus.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Respondents and Urging Dismissal of the Petition for Writ of Mandamus:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2010 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,975 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor and the Equal Employment Opportunity Commission as *Amici Curiae* in Support of Respondents and Urging Dismissal of the Petition for Writ of Mandamus was served this 3rd day of January, 2013, via this Court's ECF system and by pre-paid overnight delivery, on the following:

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