No. 11-3866

IN THE

United States Court of Appeals for the Sixth Circuit

In re HCR MANORCARE, *et al.*,

Petitioners,

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Ohio in Case No. 09-CV-2879

BRIEF OF AMICUS CURIAE DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae DRI—The Voice Of The Defense Bar is an international organization of more than 22,000 attorneys who often represent individual and corporate defendants in civil cases carrying significant costs and liability exposure. Because of their adverse business and economic impacts, DRI and its members have a vital interest in the fair, efficient, and consistent functioning of our justice system in such cases.

DRI members regularly defend employers in collective actions brought under the Fair Labor Standards Act, 29 U.S.C. § 216(b). And they have faced the fact that conditional certification procedures for FLSA aggregate litigation in this Circuit's district courts lack fundamental fairness. In the early stages of a case, district courts in this Circuit only require a minimal factual showing—in this case, just a "colorable basis for [the] claim that a class of similarly situated plaintiffs exists"—to reach full, class-wide, merits discovery. Thus, plaintiffs, armed with the threat of exorbitant discovery costs and related burdens, may extort settlements or otherwise paralyze businesses through litigation regardless of whether their claims show any merit. That approach inverts the proper procedure and does not comport with the Federal Rules of Civil Procedure or the principles—grounded in due process and fair administration of justice—underlying the Federal Rules.

In connection with its efforts to make the civil justice system fairer, efficient, and—where national issues are involved—consistent, DRI participates as *amicus curiae* in cases that raise issues of import to its members, their clients, and to the judicial system. This is one such case. Thus, DRI urges this Court to adopt a uniform standard for the Circuit that more fairly allocates burdens between parties by requiring FLSA plaintiffs seeking discovery in aggregate litigation to prove their entitlement to aggregate litigation before merits discovery begins, just as plaintiffs must do when proceeding in a class action under Rule 23 or as joined parties under Rule 20.

INTRODUCTION

"Despite the fact that the FLSA has been on the books for more than seventy years, in the last decade there has been an explosion of FLSA suits filed against employers." 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, 433 (2010) ("Martucci"); *see also* Ann C. Hodges, *Can Compulsory Arbitration be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 206 (2003) ("class actions are increasing under the FLSA") ("Hodges"). The costs are staggering. These actions "require expensive investigation and analysis by attorneys and experts, as well as time-consuming and costly discovery even prior to a determination of whether the class should be certified." Hodges at

206-07. That is largely due to the ease with which FLSA aggregate litigation is "conditionally certified," allowing plaintiffs to obtain class-wide merits discovery without first establishing a right to aggregate litigation. The current conditional certification procedure violates the basic due process, fairness, and efficiency principles endemic to any aggregate litigation. In light of the significant costs imposed by the process—and the concomitant effects on business and the economy—this Court's review and development of an appropriate process is urgently needed. The Court should grant the writ of mandamus and impose a procedure akin to the well-vetted and fair procedures for aggregate litigation applied through Rules 20 and 23 of the Federal Rules of Civil Procedure.

ARGUMENT

I. THE IMPROPRIETY OF THE TWO-STEP FLSA CONDITIONAL CERTIFICATION PROCESS IS AN ISSUE OF EXTREME IMPORTANCE.

The district courts in this Circuit generally have applied a widely-used two-step procedure for determining whether collective action is appropriate under the FLSA. Petition at 3-4. "During the initial phase, the court makes a preliminary determination whether the employees enumerated in the complaint can be provisionally categorized as similarly situated to the named plaintiff." *Symczyk v. Genesis Healthcare Corp.*, __ F.3d __, 2011 U.S. App. LEXIS 18114, No. 10-3178 at *9 (3d Cir. Aug. 31, 2011). "If the plaintiff carries her burden at this threshold

stage, the court will 'conditionally certify' the collective action for the purpose of notice and pretrial discovery." *Id*. "After discovery, and with the benefit of 'a much thicker record than it had a the notice stage,' a court following this approach then makes a conclusive determination as to whether each plaintiff who has opted in to the collective action is in fact similarly situated to the named plaintiff." *Id*. at 11. "Should the plaintiff satisfy her burden at this stage, the case may proceed to trial as a collective action." *Id*. Thus, *before* the right to collective action has even been determined, the parties have completed a burdensome and expensive discovery process. That puts the cart before the horse.

There is no statutory provision or U.S. Supreme Court decision requiring courts to use this procedure or even suggesting that they should. Rather, as the Third Circuit recently noted, "this two-step approach is nowhere mandated." *Symczyk*, 2011 U.S. App. LEXIS 18114 at *10 n.5. Nevertheless, "it appears to have garnered wide acceptance." *Id*. Even with respect to the FLSA itself, there is no direct support for the judicially-created procedure. For its part, the FLSA simply states that plaintiffs may "maintain" a collective action if the employees they represent are "similarly situated." 29 U.S.C. § 216(b). But it offers no guidance as to the procedures that should be applicable, other than to forbid opt-out classes. *Id*. And it certainly does not suggest, in any fashion, that collective actions are to be otherwise treated differently than other forms of aggregate

litigation. Despite the lack of grounding in the statute, the summary procedure has grown of its own momentum, untested and unanalyzed.

When Congress passed the FLSA in 1938, it presumably expected the courts to apply the Federal Rules of Civil Procedure under the Rules Enabling Act passed four years before, but the courts have not done so. Instead, this two-step procedure has taken hold without the rigors imposed by those rules, without consistency in the proof required and without specific and direct appellate guidance on the level of proof required. *Id*. at 9. In fact, there is no determinative appellate authority establishing how or why this minimalist two-stage inquiry is appropriate at all.

For its part, this Court has twice noted the two step procedure. *O'Brien v. Ed Donnelly Enters*, 575 F.3d 567, 583 (6th Cir. 2009); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). But it has not undertaken the thorough review necessary to justify any procedure that is judicially created outside of the rigorously-tested confines of the Federal Rules of Civil Procedure. It simply noted the procedure as factual background without suggesting that it had considered whether the procedure was appropriate. *Id*. And because case is not authority for an issue not raised or expressly decided, *U.S. v. Valentine*, 63 F.3d 459, 464 n.1 (6th Cir. 1995), the discussion of the two-step procedure in those cases is not binding support for the procedure's legality. As noted above, though, the two-step process is widespread and district courts have clearly perceived acquiescence by

the Court and found it convincing, thereby establishing the futility of raising this issue in a district court. *Cf. U.S. v. Manfredonia*, 391 F.2d 229, 230 (2d Cir. 1968) (when argument was futile, party did not waive appellate review by failing to raise it below).

As a result of this gap in authority, businesses face onerous discovery based on a range of incredibly low standards of proof. The Third Circuit, for example, only requires a "modest factual showing" of substantial similarity to move forward to full discovery on the merits. *Symczyk*, 2011 U.S. App. LEXIS 18114, at *9. Citing only district court decisions, the court below applied what looks to be an even lower standard, requiring only a "colorable basis for [the] claim that a class of similarly situated plaintiffs exists." *Creely v. HCR ManorCare, Inc.*, No. 09-2879, Memorandum Opinion and Order, Docket No. 100 (N.D. Ohio, June 9, 2011). Neither standard is appropriate in light of due process and fairness concerns. In order to reach the burdensome merits discovery stage, the plaintiffs should have to prove that the action is appropriate for collective treatment as an initial matter, just as they do under Rules 20 or 23 in one step. But even if the two-step approach is appropriate, the incredibly low burden applied at step one cannot possibly justify subjecting employers to the exorbitant costs associated with discovery—particularly where there is no assurance that a collective action will be workable or appropriate. On this record, moreover, it is apparent that collective adjudication

will not work, yet discovery will proceed if this Court does not intervene. And it is no matter that the Court established a novel sampling technique. That is still an onerous process dependent on the basic flaws of the two-stage process—an assumption that it is appropriate for plaintiffs to engage in significant class-wide discovery without first determining, based on more than a "colorable" showing, that class treatment is appropriate.

The time is ripe for the Court to step in and take a different tack. Draconian discovery costs can force legal results even where actions have no merit. Congress passed the Private Securities Litigation Reform Act of 1995 in part to limit the rampant "'abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle,' and the 'manipulation by class action lawyers of the clients they purportedly represent.'" *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1259 (10th Cir. 2001), *quoting* H.R. Conf. Rep. No. 104-369 at 31. And, of course, the Supreme Court foreclosed the previously-accepted "no set of facts" misinterpretation of Rule 8 in part because "the success of judicial supervision in checking discovery abuse has been on the modest side." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

More fundamentally, Rule 23(f), adopted in the class action context, arose out of "a concern with asymmetric discovery burdens and the potential for extortionate litigation." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir.

2010). (Posner, J. dissenting); *see also id*. at 405 (Opinion of the Court) ("[t]he costs of discovery are often asymmetric"). "In most suits against corporations or other institutions . . . the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff." *Id*. at 411 (Posner, J. dissenting). "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." *Id*. "If no similar costs are borne by the plaintiff in complying with defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff." *Id*.; *see also* Hodges at 207 ("Because of these costs, there is substantial pressure on companies to settle class claims.").

The same extant pressure exists here. FLSA conditional certification "decisions cause defendants to suffer enormous litigation costs, ranging from providing names and addresses for notice to engaging in broad discovery." Martucci at 451. And it is "self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage' much less 'lucid instructions to juries.'" *Twombly*, 550 U.S. at 559. By then, it is far too late. The Supreme Court warned in *Twombly* that without more stringent standards for going forward, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id*.

This concern applies to the two-step process of evaluating FLSA collective actions as well.

Under that process, the plaintiff is not required to prove the statutory condition precedent to collective action until after discovery, when the parties have reached the summary judgment stage. *Symczyk*, 2011 U.S. App. LEXIS 18114 at *9. Allowing this unfair process to go on throughout the Circuit and the country without rigorous review dangerously allows an unanalyzed procedure to drive high-stakes litigation, and it runs contrary to recent movement toward creating a fairer litigation process for those that would fall victim to abuse of the process.

HCR ManorCare, Pet. at 32, the court below, Pet. Resp. at 5, and Amicus all agree that the appropriate evidentiary standard for the first step of the two-step FLSA certification procedure is unclear. If the courts choose to apply a special FLSA procedure that imposes inordinate burdens on employers, they should first thoroughly evaluate the constitutional and public policy constraints that inform the Federal Rules of Civil Procedure and other processes that dictate the course of litigation. As aggregate litigation law trends toward making the process more fair for defendants by limiting the once and still abundant opportunities for abuse by burdensome discovery, the time has come to evaluate the propriety of the two step approach—an accepted, but never tested, procedure that is wholly unfair to employers and lacks any basis in law.

In the context of HCR's writ petition, the Court has the opportunity to offer needed guidance to the district courts and correct the course on an issue frequently evades substantive appellate review. The Court should take that opportunity, and finally resolve for this Circuit the standards that a plaintiff must meet to go forward through onerous discovery in an FLSA collective action.

II. COURTS SHOULD NOT ALLOW COLLECTIVE ACTION MERITS DISCOVERY BEFORE DETERMINING WHETHER THAT CLASS TREATMENT IS APPROPRIATE.

HCR ManorCare ably describes the reasons that the Federal Rules of Civil Procedure dictate the proper procedure for conditionally certifying a collective action under the FLSA. But even if the Federal Rules of Civil Procedure did not control, the considerations underlying those rules should be weighed by the Court before allowing the district courts to continue their current practice. It is a basic precept of aggregate litigation that the court must fully resolve the propriety of combining plaintiffs *before* allowing the case to proceed through discovery collectively. Aggregate litigation "is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. __, No. 10-277 (2010) at 8. As an exception to the usual rule, the most fundamental requirements of fair and reasonable process hinge on the application of the proper concept of commonality, the "commonality of answers."

The concept of "commonality" of issues is fundamental to aggregate litigation in all forms. Joinder in an action is not permitted under the Federal Rules unless a "common" question of law or fact unites the parties whose joinder is sought with existing parties, *see* Fed. R. Civ. Proc. 20(a)(1)(B), (2)(B), and certification of a class action is not permitted without a threshold showing of "questions of law or fact common to the class," Fed. R. Civ. Proc. 23(a)(2). However, the courts have struggled for decades with concept of "commonality," sometimes adopting the idea that merely posing common issues or claims establishes commonality (the "commonality of questions"), and at other times adopting the idea that commonality is not established unless it can be shown that the circumstances permit the trier of fact to resolve issues or claims based on a common showing (the "commonality of answers").

In its recent decision in *Dukes*, the Supreme Court unequivocally resolved this debate by holding that "commonality" means "commonality of answers." *Dukes*, 562 U.S. __, No. 10-277 at 9. However, the two-step approach to FLSA collective action certification developed in the courts prior to *Dukes*—which the District Court imposed in this action—assumes that "commonality" means "commonality of questions." Thus, certification is granted on a modest showing that the members of notice group were similarly situated to the plaintiff, without

ever asking whether, assuming that the notice group chooses to assert the same claims, it would be possible to resolve "each one of those claims in one stroke."

Commonality underlies the requirement that FLSA collective actions be limited to "similarly situated" employees, 29 U.S.C. § 216(b) , as much as it underlies the requirements for a demonstration of "commonality" under Rules 20 and 23. The American Law Institute, in its *Principles of the Law: Aggregate Litigation*, concludes that commonality ensures that the collective action "does not compromise the ability of any person opposing the aggregate group in the litigation to dispute the allegations made by claimants or to raise pertinent substantive defenses." *Principles of the Law: Aggregate Litigation* § 2.07 ("*Principles of Aggregate Litigation*"). It helps ensure that the defendant's right to due process is not violated by a collective action procedure that prevents the defendant from litigating the individual disqualifying facts among plaintiffs. *Id*. at § 2.07, comment j.

Thus, it makes no sense to allow an action to proceed as a collective action without first establishing commonality. By the time discovery is complete, the employer has already endured heavy costs, if it has decided to proceed at all. And in light of the fundamental importance of commonality, a purportedly representative plaintiff should have to prove commonality exists at the "step one" stage. At the very least, the purportedly representative plaintiff should be forced to

establish probability of success on whether other employees are "similarly situated" before obtaining the benefits of conditional certification. Of course, "[i]f factual development is warranted to inform the court's determination whether to authorize aggregate treatment . . . then the court should set forth a plan whereby claimants and respondents may undertake controlled discovery of facts pertinent to that determination." *Principles of Aggregate Litigation* at § 2.02. Whether to allow "controlled discovery" is a discretionary decision of the court, and not a matter of right. *Id*. at § 2.02, comment h. It allows the court to determine whether aggregation is appropriate "as a predicate to authorization of aggregate treatment." *Id*. But if discovery is not limited to the facts pertinent to that determination, due process protection is lost. *Id*.

Indeed, Section 216(b)'s plain language supports this interpretation. It states "An action to recover the liability prescribed . . . may be maintained against any 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). If Congress intended to allow requisite proof that other employees are "similarly situated" to be presented at the *end* of the collective action, it could have phrased the right so that judgment may be entered on behalf of the plaintiff and others similarly situated. Instead, the right to collective action itself hinges on the existence of an established group of similarly situated plaintiffs. *Id*. A collective

action may only be "maintained" if that group exists. *Id*. And, of course, a court cannot know whether such a group exists until it undergoes some form of "rigorous analysis" to determine that the section 216(b) prerequisite has been satisfied. *Cf*. *Dukes* at 10.

The notion that a purportedly representative plaintiff can invoke the burdens of class-wide discovery on the merits based on a "modest factual showing," or even less, is anathema to fair and efficient administration of justice. That approach cannot be squared with the principle that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Dukes* at 10 (citation omitted).

Thus, the two-step process violates basic procedure that preserves fairness in collective actions. It should be scuttled altogether in favor of demanding proof of substantial similarity before proceeding with merits discovery as a collective action in the same manner as class certification is handled under Rule 23. But absent that, at the very least, the first step should have a significantly higher burden that has been applied by the district courts in this Circuit.

CONCLUSION

For the foregoing reasons, Amicus Curiae DRI respectfully requests that this Court grant the writ of mandamus.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ James C. Martin
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