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THE UNANIMITY RULE: "BLACK SWANS" AND COMMON QUESTIONS IN FLSA COLLECTIVE ACTIONS

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"I think everyone has a little black swan in them, it's just a matter of when you let it out."[1]

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[1] Interview by Christina Radish with Mila Kunis, Actress (Nov. 23, 2010), http://collider.com/mila-kunis-interview-black-swan/ [https://perma.cc/36NJ-WFQF].

INTRODUCTION

Common questions with common answers are the *sine qua non* that keeps aggregate litigation fair and efficient. In some class actions, common answers are intrinsic to both the factual circumstances and the relief requested. For example, a pilot's negligence affected either all or none of the passengers on a crashed airplane. Similarly, the prospectus, which all stock purchasers relied upon, either did or did not contain false statements. The test challenged by rejected job applicants either did or did not adversely impact the applicant pool as a whole. In these examples, liability turns on how a jury characterizes the singular event that animates the lawsuit.

Unlike the above examples, claims under the Fair Labor Standards Act (FLSA) do not typically stem from singular events. Logically, a single employee claiming unpaid overtime does not guarantee that similar employees have the same issue. Likewise, some employees may have been paid less than the minimum wage, while others may not have. Although these cases do not challenge singular events, aggregate litigation in the form of a collective action, may still be appropriate. These actions are viable if the factual similarity among discrete events would cause any reasonable jury to return a common answer regarding all members of the collective. This Article is concerned with how courts identify these cases and submit them to the jury. Specifically, how a court can find "black swans" that preclude a jury from returning a common answer.[2] Like Kunis's inner ballet

[2] The "black swan" is a metaphor describing an event that comes as a surprise, but is then rationalized in hindsight as unsurprising. The term was adapted from historical analysis in Europe, where, for over 1,500 years, black swans were not thought to exist. No one would have predicted the discovery of a black swan. This belief quickly changed when Dutch explorer Willem de Vlamingh discovered a black swan on the west coast of Australia. *See* Alireza Gharagozlou, *Cordelia Returns – Using Letters of Credit to Reduce Borrowing Costs*, 34 U. DAYTON L. REV. 305, 344-45 (2009) (providing a brief history of the black swan theory).

dancer, this Article asserts that black swans live inside many collective actions, as obstacles to the fairness and efficiency the Supreme Court has strived for.[3]

Unlike aggregate litigation under virtually all other statutes, collective actions under the FLSA are distinct from Rule 23 of the Federal Rules of Civil Procedure.[4] The Federal Rules specify a highly structured inquiry for determining the viability of a class action, all of which is reviewable by an appellate court.[5] In contrast, § 16(b) of the FLSA, which permits a plaintiff to sue on behalf of others who are "similarly situated," and consent to become "party plaintiff[s]," provides no criteria or regulatory guidance on how a court may discern whether employees fit this description.[6] Further, it provides for no appellate review of the court's decision in that regard.[7] Consequently, district courts have fashioned a common law procedure pertaining to FLSA collective actions. Yet, this common law rulemaking lacks two attributes critical to honing efficient and fair rules.

First, because district courts rarely try FLSA collective actions, most courts never experience how well or poorly these common law procedures identify cases that can be adjudicated collectively.[8] Roughly 2,500 FLSA collective actions are filed each

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[3] Justice Scalia noted that the Supreme Court's lone guidance on collective actions served one valid purpose: to increase the efficiency in trying these cases. Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 180 (1989) (Scalia, J., dissenting) ("In the end, the only serious justification for today's decision is that it makes for more efficient and economical adjudication of cases—not more efficient and economical adjudication of the *pending* case, but of *other* cases that might later be filed separately on behalf of plaintiffs who would have been perfectly willing to join the present suit instead.").

[4] *See, e.g.*, Edwards v. City of Long Beach, 467 F. Supp. 2d 986, 993 (C.D. Cal. 2006) (distinguishing FLSA collective actions from Rule 23 class actions).

[5] FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . .").

[6] Fair Labor Standards Act of 1938 § 16(b), 29 U.S.C. § 216(b) (2012).

[7] Baldridge v. SBC Commc'ns, Inc., 404 F.3d 930, 932 (5th Cir. 2005) ("[A]s the district court observed, this case involves a 'garden-variety' § 216(b) FLSA action and is not a rule 23 class action, so [the interlocutory appeal provisions of Rule 23 are] inapplicable.").

[8] *See* Joseph W. Bellacosa, *Cogitations Concerning the Special Prosecutor Paradigm: Is the Cure Worse than the Disease?*, 71 ALB. L. REV. 1, 12 (2008) ("The genius of the common law process can be tapped into to appreciate the helpful methodology of trial, error, correction, and interstitial small steps supported by healthy respect for the principle of stare decisis. . . .").

year.[9] Of those, a small fraction reach a jury, and even fewer still are reviewed by an appellate court.[10] Thus, there is limited feedback whether common law principles accurately identify cases that can be tried and submitted to a jury in the aggregate.[11] Of the few collective actions that result in a jury trial, even fewer lead to a reported decision from which judicial colleagues can learn.[12]

Yet, this feedback is essential to ensure the best-crafted rules survive and those that lead courts astray are discarded. As Professor Frederick Schauer observed:

> If in fact concrete cases are more often distorting than illuminating, then the very presence of such cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass. Such distortion may rarely be seen or appreciated by the common law judge, who focuses, as she must, on the *this-ness* of this case.[13]

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[9] LexisNexis CourtLink, Nature of Suit Strategic Profile (listing the total numbers of FLSA collective actions filed between 2012 and 2016 as 2545, 2473, 2773, 2592, and 2338 cases filed, respectively).

[10] For example, a Lexis search in the comprehensive federal courts database of "FLSA w/p "collective action" w/p trial but not "trial court" and date (geq (01/01/2016) and leq (12/31/2016)" identified 72 cases, of which two reported the results of a trial, one of which was a bench trial. *E.g.,* Galdo v. PPL Elec. Utils. Corp., No. 14-5831, 2016 U.S. Dist. LEXIS 114545 (E.D. Pa. Aug. 26, 2016); Lopez v. Setauket Car Wash, No. CV-12-6324, 2016 U.S. Dist. LEXIS 80820 (E.D.N.Y. June 14, 2016).

[11] By an "aggregate submission," we mean a jury interrogatory that constrains the jury to return the same answer for all members of the collective action.

[12] Rare indeed is the candid discussion by the district court in *Johnson v. Big Lots Stores, Inc.* regarding how, by relying on traditional criteria to decide conditional certification and decertification, the court was led to try a collective action that eluded any possible verdict. 561 F. Supp. 2d 567, 587-88 (E.D. La. 2008) ("After the Court considered all of the evidence that the parties submitted, it became obvious that it could not draw any reliable inferences about the job duties of plaintiffs as a class. It would be an injustice to proceed to a verdict on the merits that results in a binding classwide ruling based on such disparate evidence . . . A collective action is appropriate when there are common issues of fact and common issues of law. Thus, when there is agreement between the parties about what employees did, or there is a reliable showing that employees performed 'substantially similar work,' a court may properly and easily try plaintiffs' claims collectively . . . But when there are significant differences in employment experiences, as the evidence presented at trial shows to be the case here, the procedural advantages of a collective action evaporate, and the Court's confidence that a just verdict on the merits can be rendered is seriously undermined." (internal citations omitted)).

[13] Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

Accordingly, absent experience with a wide range of cases that progress to trial, there is no mechanism that nudges the common law towards procedures that fairly and efficiently identify viable collective actions.

Second, the absence of appellate review shields these procedures from critical review by appeals courts, which are likely to view these common law rules holistically. Indeed, the only guidance from the Supreme Court is to recognize a district court's power to notify potential party-plaintiffs how they may join, or "opt-in" to, a pending collective action.[14] But the Court has been silent about what findings suffice for the court to intervene in that regard. The intermediate appellate courts have hardly been more helpful, with the majority refusing to either endorse or disapprove the prevailing practice.[15]

The prevailing inquiry for "conditionally certifying" FLSA collective actions was formulated ad hoc by district court judges. If a case was not conditionally certified, any opt-in plaintiffs routinely would be dismissed. Cases that were "conditionally

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[14] Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 165 (1989).

[15] District courts in *nearly every circuit* have commented on this lack of guidance. Taylor v. AutoZone, Inc., No. CV-10-8125-PCT-FJM, 2011 U.S. Dist. LEXIS 55590, at *3 n.2 (D. Ariz. May 24, 2011) ("The FLSA does not define 'similarly situated,' and . . . the Ninth Circuit has not interpreted the term."); Seger v. BRG Realty, LLC, No. 1:10cv434, 2011 U.S. Dist. LEXIS 56117, at *4 (S.D. Ohio May 24, 2011) ("The FLSA does not define 'similarly situated,' nor has the Sixth Circuit."); Betancourt v. Maxim Healthcare Servs., Inc., No. 10 C 4763, 2011 U.S. Dist. LEXIS 43228, at *12 (N.D. Ill. Apr. 21, 2011) ("Although the Seventh Circuit has not addressed how a district court should manage collective actions, 'the majority of courts . . . have adopted a two-step process for determining whether an FLSA lawsuit should proceed as a collective action.'"); Williams v. ezStorage Corp., No. RDB-10-3335, 2011 U.S. Dist. LEXIS 43267, at *6 (D. Md. Apr. 21, 2011) ("[T]he United States Court of Appeals for the Fourth Circuit has not defined the phrase 'similarly situated'. . . ."); Simmons v. Valspar Corp., No. 10-3026 (RHK/SER), 2011 U.S. Dist. LEXIS 39340, at *6 (D. Minn. Apr. 11, 2011) ("[T]he term 'similarly situated' is not defined in the FLSA, 'and there is little circuit law on the subject.'"); Coffin v. Blessey Marine Servs., Inc., No. H-11-0214, 2011 U.S. Dist. LEXIS 29896, at *4 (S.D. Tex. Mar. 23, 2011) ("The Fifth Circuit has not definitively decided the meaning of 'similarly situated' in this context."); Simmons v. Enter. Holdings, No. 4:10CV00625 AGF, 2011 U.S. Dist. LEXIS 23984, at *5 (E.D. Mo. Mar. 9, 2011) ("Although the Eighth Circuit Court of Appeals has not decided the standard to determine whether potential opt-in plaintiffs are 'similarly situated' under *§ 216(b)*, the district courts in this circuit use a two-step analysis."); Kronick v. Bebe Stores, Inc., No. 07-4514 (RBK), 2008 U.S. Dist. LEXIS 78502, at *3 (D.N.J. Oct. 2, 2008) ("The term 'similarly situated' is not defined in the FLSA, and in the absence of guidance from the Supreme Court and Third Circuit, district courts have developed a test consisting of two stages of analysis.").

certified," would be reconsidered when the defendant moved to "decertify" the collective action.[16] If the employer prevailed, opt-in plaintiffs would be dismissed and the case would proceed as a single or multi-plaintiff action. If the court denied the motion, the great majority of cases would settle and, as noted, very few would proceed to trial. This sequence results in a common law shaped by courts concerned with progressing efficiently from A to B, and from B to C. But no mechanism ensures this is an efficient path from A to Z; trial judges rarely consider that question, and rarely confront the consequences of a misguided decision. In place of this ad hoc procedure, this Article advocates a holistic approach that begins by addressing the likelihood that a jury will be able to return common answers to questions raised by a party's pleadings. With that end-point anchoring the inquiry, this Article will reassess the criteria for deciding whether to "conditionally certify" or "decertify" a collective action.

The Rules Enabling Act (REA) and Rule 23 guide our inquiry. We refer to the principle we derive as the Unanimity Rule. This rule derives the likelihood that a jury would return the same answer for the entire collective as it would if each member of the collective submitted his or her case individually. If that likelihood is low, the Unanimity Rule is violated and so is the REA. Therefore, the key question is how to discern whether the facts presented by the representative plaintiffs can be extrapolated without exception to non-testifying plaintiffs. Alternatively, we consider whether the jury can identify those to whom those facts do not apply and then to apply a different verdict. Framed in this way, the court confronts a variant of the "black swan" problem:[17]

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[16] These terms are in quotes because this nomenclature, borrowed from Rule 23, is merely shorthand that marks courts' decisions whether to (a) assist potential opt-in plaintiffs in joining the lawsuit, and (b) subsequently reverse that decision in light of evidence obtained through discovery. Courts increasingly recognize these as misnomers. As the Supreme Court noted, "conditionally certifying" an FLSA collective action means no more than the court deciding to help give notice to those who are similarly situated to the named plaintiffs. *See Hoffmann-La Roche*, 493 U.S. at 165, 169-70.

[17] "Black swans" occupy a significant place in literature and philosophy. The phrase derives from a Latin expression; its oldest known occurrence is the poet Juvenal's characterization of something being "rara avis in terris nigroque simillima cygno" ("a rare bird, as strange to the earth as a black swan"). JUVENAL, THE SATIRES 42 (William Barr ed., Niall Rudd trans., Oxford U. Press 2d ed. 1999). When the phrase was coined, the black swan was presumed not to exist. The importance of the metaphor

Is there a segment of plaintiffs, however small, who are different enough from the collective that if the jury were constrained to return a common answer for all plaintiffs the submission would violate the Unanimity Rule? This implies that rather than assessing whether members of the collective are "similarly situated" to the named plaintiffs, in terms of the work performed, the location of the work, the supervision, and whether they are subject to a common policy or plan, courts should assess the extent of dissimilarity, *i.e.*, the prevalence of black swans, and the likelihood the Unanimity Rule will be violated.

This Article shows how the current practice for "certifying" collective actions is unlikely to find black swans and should be supplanted by a more direct inquiry. In Part I, we explain the background and history of collective actions, and how they compare to class actions under Rule 23, and mass actions under Rule 20. In Part II, we provide an overview of the plaintiff's burden of proof to certify collective actions and the employer's burden in seeking to decertify cases that were initially certified. In Part III, we explain why submitting common jury questions without first assessing the presence of black swans may violate the parties' due process rights and the Rules Enabling Act. In Part IV, we introduce the Unanimity Rule, and in Part V explain how a case may be submitted to a jury in a way that is calculated to find black swans, if they exist, and why the rule is essential to aggregate litigation. We conclude in Part VI by applying guidance from the Unanimity Rule to other aspects of class action procedure, to ensure fairness and efficiency in identifying cases that may be tried collectively.

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lies in its analogy to the fragility of any system of thought. A set of conclusions is potentially undone once any of its fundamental postulates is disproved. In this case, the observation of a single black swan would be the undoing of the logic of any system of thought, as well as any reasoning that followed from that underlying logic. John Stuart Mill used the black swan logical fallacy as a new term to identify falsification. Peter Hammond, *Adapting to the Entirely Unpredictable: Black Swans, Fat Tails, Aberrant Events, and Hubristic Models*, WARWICK ECON. RES. INST. 6 (2012), http://www2.warwick.ac.uk/fac/soc/economics/research/centres/eri/bulletin/bulletin_magazine.pdf [https://perma.cc/DZK4-B6C3].

I. WHAT IS A COLLECTIVE ACTION, AND HOW ARE THEY TRIED?

The FLSA is the primary guarantor that employees engaged in, or who work for employers engaged in, interstate commerce will receive minimum wages and overtime pay.[18] In contrast to aggregate litigation arising under the Federal Rules of Civil Procedure, the FLSA lets plaintiffs enforce their rights on behalf of themselves and others who are "similarly situated," so long as these others consent to join, or "opt-in," to the lawsuit.[19] The FLSA defines those who opt-in as "party plaintiff[s]" in their own right, which is another distinction from Federal Rule 23.[20] Beyond that, neither the statute nor its regulations give any guidance about what it means for one plaintiff to be similarly situated to another or how the court is to accommodate the rights and obligations of these party-plaintiffs.

After initially amending the law via the Portal to Portal Act, "courts have taken advantage of the lack of [a] precise statutory definition [for many terms] in which the Fair Labor Standards Act is written."[21] In pertinent part, the Portal to Portal Act amended the FLSA to state:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. 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.[22]

For the 40 years following the Portal to Portal Act, the federal government was a key litigant in enforcing the collective

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[18] *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2015), https://www.dol.gov/whd/regs/compliance/wh1282.pdf [https://perma.cc/W4HB-GHFW].

[19] *See* 29 U.S.C. § 216(b) (2012).

[20] *Id.*

[21] Note, *Fair Labor Standards Under the Portal to Portal Act*, 15 U. CHI. L. REV. 352 (1948) (providing a historical perspective on the passage of the Portal-to-Portal Act, and its effect on the FLSA).

[22] Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b) (2012)).

rights of employees under the FLSA.[23] In these cases, the government may seek injunctive relief intended to eliminate policies or practices that violate the statute.[24] Because the FLSA empowers the Secretary of Labor to sue on behalf of employees it designates as aggrieved, the procedural issues raised by these lawsuits differ from those presented in private litigation.[25] Employees are not required to opt-in to representative actions filed by the Department of Labor.[26] In addition, because injunctive relief is "indivisible" in the sense that either all employees or none are affected in similar measure by enjoining an unlawful practice,[27] the focus in these cases was not solely, or even primarily, on monetary relief, but rather on the government's power to cease unlawful practices.[28] In contrast, monetary relief is not only the primary focus in FLSA actions brought by private plaintiffs, but it is the *only* relief available.[29] For these reasons, a court adjudicating the claims of the Department of Labor was not

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[23] *See* Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 ST. LOUIS U. L.J. 7, 21-22 (2013).

[24] *See* Powell v. Florida, 132 F.3d 677, 678 (11th Cir. 1998) ("The district court properly held that the right to bring an action for injunctive relief under the Fair Labor Standards Act rests exclusively with the United States Secretary of Labor." (citing 29 U.S.C. §§ 211(a), 216(b) (1994)).

[25] Emps. of the Dep't of Pub. Health & Welfare of Mo. v. Dep't of Pub. Health & Welfare of Mo., 411 U.S. 279, 285-86 (1973) ("Section 16 (c) gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. Once the Secretary acts under § 16 (c), the right of any employee or employees to sue under § 16 (b) terminates. Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees.").

[26] 29 U.S.C. § 216(b) (2012) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title . . . .").

[27] *See* DL v. District of Columbia, 302 F.R.D. 1, 16 (D.D.C. 2013) (referencing indivisible injunctive relief in Rule 23(b) actions).

[28] *See* Maxfield v. Sinclair Int'l, 766 F.2d 788, 794 (3d Cir. 1985) (noting that no injunctive relief is available for private plaintiffs under FLSA), *cert. denied*, 474 U.S. 1057 (1986).

[29] *See* Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 491 (1992) ("Either the Secretary or the individual may sue for back wages, plus liquidated damages for an additional amount equal to the back wages. The individual who sues also may recover reasonable attorneys' fees and costs. The Secretary may, in addition to suing for back wages with liquidated damages, sue to enjoin future violations, and, in cases of willful violations, may refer the case to the Department of Justice for criminal prosecution with potential penalties of fines up to $10,000 and imprisonment for up to six months." (footnotes omitted)).

faced with deciding whether to assist in notifying represented employees.[30]

The modern landscape consists overwhelmingly of private litigation.[31] Of these cases, this Article addresses the thousands of collective actions and the accompanying need to determine whether these FLSA cases can be litigated in the aggregate and, if so, how they can be submitted to a jury. The relevant case law, originating in the 1980s, unfortunately was preceded by a wave of cases under the Age Discrimination in Employment Act (ADEA). The ADEA is one of the few statutes Congress required to be enforced through the procedures of the FLSA.[32] Yet, in substance, the ADEA is far closer to Title VII of the Civil Rights Act, and until Title VII was amended in 1991, it authorized only injunctive relief and other equitable remedies.[33] As in Title VII litigation,

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[30] Marshall v. Univ. of Tex. at El Paso, No. EP-75-CA-221, 1978 U.S. Dist. LEXIS 19710, at *5-6 (W.D. Tex. Feb. 6, 1978) ("*La Chapelle* concerned a private action brought by an individual, in which case the FLSA requires that a party 'opt in' before he be allowed to proceed against the Defendant. In a public action brought by the Secretary of Labor, on the other hand, an employee is not required to make an affirmative election to become a beneficiary of any possible relief acquired by the Secretary.").

[31] *See* Brent W. Landau, Note, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. LEGIS. 169, 194-95 (2002) ("As an initial matter, however, the federal government, by itself, simply could not handle the large volume of cases state employees bring against their employers. The United States currently litigates only a very small proportion of federal employment cases filed in federal district courts. Of 1,914 FLSA cases filed in 2000 (against both public and private defendants), the United States was plaintiff in only 382, and of 19,670 employment civil rights cases filed (including under the ADA and ADEA), the United States was plaintiff in only 425.").

[32] 29 U.S.C. § 216(b) is incorporated in the ADEA through 29 U.S.C. § 626(b), providing ADEA plaintiffs the right to bring § 216(b) collective actions as well. *See also* Hoffmann-La Roche Inc., v. Sperling, 493 U.S. 165, 167 (1989) ("Section 7(b) of the ADEA incorporates enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA), and provides that the ADEA shall be enforced using certain of the powers, remedies, and procedures of the FLSA." (citations omitted)).

[33] *See* Thompson v. Sawyer, 678 F.2d 257, 293 (D.C. Cir. 1982) ("Title VII grants the court wide discretion in formulating injunctive relief . . . ."). The Civil Rights Act of 1991 amended Title VII to permit recovery of compensatory and punitive damages; *See* Kolstad v. Am. Dental Ass'n, 108 F.3d 1431, 1437 (D.C. Cir. 1997) ("The [Civil Rights Act of 1991] provides that a plaintiff who proves intentional discrimination in violation of Title VII may recover compensatory and punitive damages in addition to equitable relief available under prior law . . . Punitive damages may be awarded 'if the [plaintiff] demonstrates that the [defendant] engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" (citing 42 U.S.C. §§ 1981a(a), 1981a(b)(1))).

these age discrimination suits often sought to enjoin a "pattern or practice" of discrimination, and compensate those who were its victims.[34] Consequently, in private litigation under the ADEA, the group of those "similarly situated" sensibly included potential victims of the pattern or practice that was pled.[35] They would be the beneficiaries of any injunction the court entered, and potentially would be entitled to back pay, liquidated damages, and any other equitable relief the court ordered to make victims whole.[36]

Subsequently, the Supreme Court in *Hoffmann-La Roche v. Sperling*, an age discrimination case, empowered courts to supervise the procedure for notifying those "similarly situated" of their right to join the lawsuit, and the means of doing so.[37] Notably, the Court emphasized its ruling was limited to affirming the district court's discretion to exercise that power, but was reserving judgment as to when or how it should be exercised.[38]

In the absence of guidance from the Supreme Court, lower courts devised rules of their own to determine whether a case should proceed as a collective action under FLSA §216(b). The most common of these is referred to as the two-step procedure, or the *Lusardi* two-step, after the widely-cited case that seems to have begun the practice.[39] The Eleventh Circuit Court of Appeals' description of this procedure is typical:

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[34] *See* Sperling v. Hoffman-La Roche, Inc., 924 F. Supp. 1346, 1356 (D.N.J. 1996) ("[A]lthough the ADEA does not explicitly provide for pattern-or-practice claims, courts have applied the law developed in the context of Title VII pattern-or-practice claims to claims of age discrimination. Therefore, opinions discussing the meaning of 'pattern or practice' in the context of Title VII are equally applicable to actions brought under the ADEA." (internal citations omitted)).

[35] *Id.* at 1349 (noting that the *Hoffman-La Roche* plaintiffs were "similarly situated" and alleged a "pattern-or-practice" of discrimination under the ADEA).

[36] *See* Lorillard v. Pons, 434 U.S. 575, 576 (1978) (explaining different methods of relief available to ADEA plaintiffs).

[37] *Hoffman-La Roche*, 493 U.S. at 167.

[38] *Id.* at 170 ("As did the Court of Appeals, we decline to examine the terms of the notice used here, or its concluding statement indicating court authorization. We confirm the existence of the trial court's discretion, not the details of its exercise.").

[39] Lusardi v. Lechner, 855 F.2d 1062, 1074 (3d Cir. 1988); *see also* Allen v. McWane, Inc., No. 2:06-CV-158 (TJW), 2006 U.S. Dist. LEXIS 81543, at *11 (E.D. Tex. Nov. 7, 2006) ("The *Lusardi* two-step approach is the prevailing test among federal courts . . . .").

> While not requiring a rigid process for determining similarity, we have sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase. The first step of whether a collective action should be certified is the notice stage. Here, a district court determines whether other similarly situated employees should be notified.
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> A plaintiff has the burden of showing a "reasonable basis" for his claim that there are other similarly situated employees. We have described the standard for determining similarity, at this initial stage, as "not particularly stringent," "fairly lenient," "flexib[le]," "not heavy," and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)." In 2007, we recounted our law and noted that at the initial stage, courts apply a "fairly lenient standard." The district court's broad discretion at the notice stage is thus constrained, to some extent, by the leniency of the standard for the exercise of that discretion. Nonetheless, there must be more than "only counsel's unsupported assertions that FLSA violations [are] widespread and that additional plaintiffs would come from other stores."
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> This first step is also referred to as conditional certification since the decision may be reexamined once the case is ready for trial.
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> The second stage is triggered by an employer's motion for decertification. At this point, the district court has a much thicker record than it had at the notice stage, and can therefore make a more informed factual determination of similarity. This second stage is less lenient, and the plaintiff bears a heavier burden.[40]

Although the *Lusardi* approach is ubiquitous in FLSA litigation, *Lusardi*, and those cases on which it relies, were decided under the ADEA.[41] The threshold issue in these cases was whether the district court should assist notifying "similarly

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[40] Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260-61 (11th Cir. 2008) (citations omitted).

[41] *Lusardi*, 855 F.2d at 1064.

situated" employees of their right to opt-in to these cases.[42] This threshold decision quickly took on the misnomer of "conditional certification," which it retains to this day in most courts.[43]

Yet, "certification" of an FLSA collective action differs in several important respects from the certification of a Rule 23 class action.[44] In a collective action, no new legal entity is created, and no lawyer is appointed to represent any group of plaintiffs.[45] Rather, each member of the collective is a "party-plaintiff" and may be represented in the lawsuit by an attorney of his or her choosing. No lawyer represents the collective as a legal entity because no such entity exists.[46] Rather, the lawyer's duty is solely to his or her client.[47] Members of the collective may pursue only monetary relief because, under the FLSA, injunctive relief is unavailable to private plaintiffs.[48] No member of the collective need be given the right to opt out of any settlement because that party's lawyer may not agree in the first place to any settlement without the client's consent.[49]

Recognizing this distinction, the Eastern District of New York noted that:

> Although the FLSA does not contain a class certification requirement, such orders are often referred to in terms of certifying a class. The certification of a FLSA collective action is only the district court's exercise of the discretionary power, upheld in [*Hoffmann-La Roche*], to facilitate the sending of

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[42] *See, e.g.*, Diaz v. Adchem Pharma Operations, No. 04-1522 (DRD), 2005 U.S. Dist. LEXIS 46384, at *10 (D.P.R. Sept. 28, 2005) (discussing the court's sponsorship of notice to opt-in plaintiffs).

[43] *See, e.g.*, *id.* at *31 (referencing "conditional certification" as the opt-in mechanism in § 216(b)).

[44] For a more general discussion of the differences between FLSA collective actions and Rule 23 class actions, see Sam J. Smith & Christine M. Jalbert, *Certification – 216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage Under the FLSA*, A.B.A. SEC. LAB. & EMP. L. (Nov. 2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf [https://perma.cc/MFM4-UQDJ].

[45] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013) ("Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action.").

[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, Powell v. Florida, 132 F.3d 677, 678 (11th Cir. 1998); Maxfield v. Sinclair Int'l, 766 F.2d 788, 794 (3d Cir. 1985).

[49] MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2003).

> notice to potential class members. As such, 'certification' is neither necessary nor sufficient for the existence of a representative action under FLSA, but may be a useful 'case management' tool for district courts to employ in 'appropriate cases. [U]nlike class certification under Fed. R. Civ. P. 23, no showing of numerosity, typicality, commonality and representativeness need be made for certification of a representative action. Rather, for conditional class certification under the FLSA, [t]he similarly situated standard is far more lenient, and indeed, materially different, than the standard for granting class certification under Fed. R. Civ. P. 23.[50]

Rule 23 of the Federal Rules of Civil Procedure is a comprehensive set of principles that govern class actions in federal court, but not collective actions under the FLSA. The Rule weeds out cases unlikely to achieve the overarching goals of judicial efficiency and due process through a rigorous inquiry.[51] Rule 23(a) requires a plaintiff to establish four elements, usually referred to as numerosity, commonality, typicality, and adequacy of representation.[52] In addition, a plaintiff must satisfy one of the requirements of one of the subsections of Rule 23(b).[53] Rule 23(b)(3), the subsection that is relevant when monetary relief is

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[50] Hernandez v. Immortal Rise, Inc., 11 CV 4360 (RRM) (LB), 2012 U.S. Dist. LEXIS 136556, at *6-7 (E.D.N.Y. Sept. 24, 2012) (citations omitted) (internal quotations omitted) (first quoting Bifulco v. Mortgage Zone, Inc., 262 F.R.D. 209, 212 (E.D.N.Y. 2009); then quoting Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010); and then Cuzco v. Orion Builders, Inc., 477 F. Supp. 2d 628, 632 (S.D.N.Y. 2007); and then Cunningham v. Elec. Data Sys. Corp., 754 F. Supp. 2d 638, 643 (S.D.N.Y. 2010)).

[51] *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'" (citations omitted)).

[52] FED. R. CIV. P. 23(a); *see, e.g.*, Anderson Living Tr. v. WPX Energy Prod., LLC, 306 F.R.D. 312, 436 (D.N.M. 2015) ("Rule 23(a) sets forth the requirements that apply to all class actions in the federal courts: numerosity, commonality, typicality, and adequacy.").

[53] FED. R. CIV. P. 23(b). In the Second Circuit and elsewhere, this proof must be made by a predominance of the evidence. *See, e.g.,* Brown v. Kelly, 609 F.3d 467, 476 (2d Cir. 2010).

primary, requires proof that a class action would be superior to other methods of fairly and efficiently adjudicating the case, and that common questions of law or fact predominate over individual issues.[54] Rule 23(c)(1)(A) requires these determinations to be made "[a]t an early practicable time."[55] The Supreme Court instructed courts to engage in a "rigorous analysis" of the pleadings, declarations, and other record evidence to assess whether plaintiffs have satisfied those burdens:[56]

> As we noted in *Coopers & Lybrand v. Livesay*, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.[57]

If a class action is certified, Rule 23(c) prescribes that the court must issue an order that defines the class, identifies class claims, and appoints class counsel.[58] Rule 23(g) indicates the factors the court must consider in making that appointment.[59] Rule 23(c) also prescribes the content of the notice the court must direct to class members after the class is certified, explaining the nature of the action and the class member's right to opt out.[60]

Rule 23(d) describes the power of the court to issue orders controlling the course of proceedings,[61] and Rule 23(e) specifies the terms under which a class action may be settled, dismissed or

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[54] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) ("An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.' The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 4:49-:50, at 195-97 (5th ed. 2012))).

[55] FED. R. CIV. P. 23(c)(1)(A).

[56] *Gen. Tel. Co.*, 457 U.S. at 161.

[57] *Id.* at 160 (internal citations omitted).

[58] FED. R. CIV. P. 23(c)(1)(B).

[59] *See* FED. R. CIV. P. 23(g).

[60] FED. R. CIV. P. 23(c)(2).

[61] FED. R. CIV. P. 23(d).

compromised.[62] Rule 23(h) concerns the attorney's fee that may be awarded to counsel and the procedures that govern that determination.[63] In 1998, Rule 23 was amended to add subsection (f),[64] which provides for a permissive interlocutory appeal, at the sole discretion of the court of appeals, from an order granting or denying class certification.[65] The rationale behind each provision of Rule 23 is clear, yet *none* of these provisions is incorporated into the FLSA or its regulations.

The vocabulary of Rule 23 class actions therefore is ill-suited to collective actions because those more closely resemble "mass actions." The Class Action Fairness Act defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact . . . ."[66] In the Congressional Record debating the Act, Senator Trent Lott noted:

> Mass torts and mass actions are not the same. The phrase "mass torts" refers to a situation in which many persons are injured by the same underlying cause, such as a single explosion, a series of events, or exposure to a particular product. In contrast, the phrase "mass action" refers to a specific type of lawsuit in which a large number of plaintiffs seek to have all their claims adjudicated in one combined trial.[67]

Further distinguishing them from class actions, collective actions require each plaintiff to retain the burden of proving his or her entitlement to relief.[68]

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[62] FED. R. CIV. P. 23(e).

[63] FED. R. CIV. P. 23(h).

[64] FED. R. CIV. P. 23 advisory committee's note to 1998 amendment.

[65] FED. R. CIV. P. 23(f).

[66] 28 U.S.C. § 1332(d)(11)(B)(i) (2012).

[67] 151 CONG. REC. S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

[68] Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 407 (D.N.J. 1988) ("At trial, each individual plaintiff must bear his or her burden of proof as to each element of an ADEA claim."); *see also* KEVIN F. O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS CIVIL COMPANION HANDBOOK § 18:1 (2015-2016 ed.) ("Instruction No. 12: CONSIDER EACH PLAINTIFF SEPARATELY. Each of the five plaintiffs asserts a separate claim against the defendant. You are instructed that each plaintiff bears the burden of proving his claim that the defendant failed to pay him overtime. You must consider each plaintiff separately, and determine

II. THE PLAINTIFF'S BURDEN OF PROOF IN MULTI-PLAINTIFF FLSA CASES

Multi-plaintiff FLSA cases adhere to the mass action model. Although these claims may raise common questions, there is no presumption that mere joinder diminishes any one plaintiff's burden of proof. Rather, whether representative evidence will suffice depends on the issue to be decided and how it may be proved. For example, an element of each plaintiff's claim may be to establish that he was employed by an enterprise engaged in interstate commerce, with sales exceeding $500,000. This monetary threshold establishes the employer as a "covered" entity.[69] If each plaintiff worked for the same employer, then it obviously would be redundant to submit the same issue to the jury for each plaintiff. Because no reasonable jury could decide that one plaintiff worked for an employer whose revenue exceeded the legal threshold whereas another did not, this issue requires only a single line on the verdict form: "Do you find from a preponderance of the evidence that Plaintiffs were employed by an enterprise engaged in commerce or the production of goods for commerce? Answer Yes or No."[70]

However, claimants under the FLSA typically raise issues that less obviously mandate a uniform answer. Consider a jury interrogatory conditioned on a finding that plaintiffs worked for a "covered" entity: "Do you find from a preponderance of the evidence that Employer failed to pay Plaintiff the overtime required by law?" Although this specific interrogatory is easily generalized to "Plaintiffs," to accommodate a collective action, whether that is appropriate depends on the evidence regarding each member of the collective action. Depending on the facts, this

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whether he has sustained the burden of proof as it applies to his claim for overtime compensation."); Johnson v. Unified Gov't of Wyandotte Cty./Kansas City, 371 F.3d 723, 730-31 (10th Cir. 2004) (affirming district court's submission of jury issue on damages for each of twenty-six FLSA plaintiffs); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07 (2010) (citing *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1020 (5th Cir. 1997) (reversing [] consolidation of [] 3,000 asbestos claims [because] trial plan lacked "safeguards . . . that [were] reasonably calculated to reflect the results that would be obtained if [the case] were actually tried")).

[69] *See* 29 U.S.C. § 203(s)(1)(A)(ii) (2012).

[70] This interrogatory would be preceded, of course, by instructions defining "an enterprise engaged in commerce or the production of goods for commerce."

interrogatory could produce different answers for different plaintiffs.

In multi-plaintiff actions under the FLSA, the norm in submitting jury interrogatories is to submit a single verdict form for each plaintiff. For example, in the 2015-16 supplement to their treatise, FEDERAL JURY PRACTICE AND INSTRUCTIONS, O'Malley, Grenig, and Lee use as their primary example *Barrios et al. v. Southern Insulation & Fireplaces LLC*, a case tried in the Western District of Oklahoma.[71] *Barrios* was a six-plaintiff case alleging that employees were entitled to unpaid overtime.[72] Before trial, one of the plaintiffs was dismissed.[73] The jury was provided "a separate verdict form for each of [t]he plaintiffs."[74] On each form, jurors were "asked to check whether, as to that plaintiff, you find in favor of the plaintiff or in favor of the defendant . . . ."[75]

The treatise discusses another example, drawn from *Lopez et al. v. Genter's Detailing Inc.*, tried in the Northern District of Texas.[76] The case began as a putative collective action but was later amended to add five employees as party-plaintiffs and drop the collective action allegations.[77] The case therefore proceeded to trial on behalf of six named plaintiffs.[78] The interrogatory submitted to the jury asked: "Do you find by a preponderance of the evidence that the defendants violated the Fair Labor Standards Act with respect to each of the following plaintiffs? Answer 'yes' or 'no' for each plaintiff."[79]

As a third example, the Tenth Circuit approved the following jury submission in a 26-plaintiff case, regarding *each* plaintiff:

> 1. Do you find that the plaintiff has proved, by a preponderance of the evidence, that when performing security patrol for the Housing Authority she was an employee of the Housing Authority, as discussed in Instruction 15?

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[71] O'MALLEY, GRENIG & LEE, *supra* note 68.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at § 18:2.
[77] *Id.*
[78] *Id.*
[79] *Id.*

> 2. Do you find that the plaintiff has proved, by a preponderance of the evidence, that the Unified Government and the Housing Authority were "joint employers," as that term is defined in Instruction 17?
>
> 3. Do you find that the plaintiff has proved, by a preponderance of the evidence, that she worked more than 43 hours in a work week for the Unified Government and the Housing Authority, as discussed in Instruction 17?
>
> 4. Do you find that the defendants have proved, by a preponderance of the evidence, that they are plainly and unmistakenly exempt from paying the plaintiff overtime by the Special Detail exemption, as discussed in Instruction 18-21?[80]

Thus, courts trying multi-plaintiff FLSA cases commonly recognize that, despite the efficiency of joining these claims for trial, each plaintiff retains the burden of establishing the merits of his or her own claim independently of co-plaintiffs. Why does this practice change when the FLSA claim is tried as a collective action? Stated differently, what findings by the court, in certifying and then denying decertification, suggest that the burdens of proof normally imposed on each plaintiff in a multi-plaintiff case can be satisfied by representative proof?

III. ARE A COURT'S DECISIONS TO CONDITIONALLY CERTIFY AND REFUSAL TO DECERTIFY A COLLECTIVE ACTION SUFFICIENT TO SUPPORT AN AGGREGATE SUBMISSION?

The REA provides that procedural rules "shall not abridge, enlarge or modify any substantive right."[81] Courts therefore may not adopt rules that permit a party who could not recover individually to recover because his individual claim is joined in a collective action. Yet, this is precisely what occurs if a court approves an aggregate submission to the jury without determining whether evidence regarding the representative plaintiff would result in the same verdict if each individual member of the collective sued alone, which is the Unanimity Rule. A multi-

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[80] Johnson v. Unified Gov't of Wyandotte Cty./Kansas City, 180 F. Supp. 2d 1192, 1200 (D. Kan. 2001), *aff'd*, 371 F.3d 723 (10th Cir. 2004).

[81] 28 U.S.C. § 2072(b) (2012).

plaintiff case avoids this problem because the jury is required to answer separate interrogatories regarding each plaintiff. What additional tests have the plaintiffs satisfied in a collective action that makes it reasonable for the court to dispense with individual findings?

An easy answer is that if they are permitted to proceed to trial, these collective actions previously were conditionally certified and then survived a motion for decertification. Consequently, one might suppose, these cases have demonstrated that they are amenable to an aggregate submission. However, those certifications stop far short of considering the Unanimity Rule. For example, the court in *Davenport v. Charter Communications* considered the standards applied by its sister courts in deciding decertification motions and concluded the inquiry is *less rigorous* than Rule 23 mandates:

> But several courts to consider the issue have held that the "rigorous analysis" required by Rule 23 does not apply with the same force in the FLSA context. *See, e.g.*, *Nobles v. State Farm Mut. Auto. Ins. Co.*, *No. 2:10-cv-04175-NKL, 2011 U.S. Dist. LEXIS 95379, 2011 WL 3794021, at *8 (W.D. Mo. Aug. 25, 2011)* (stating the "standards governing class claims under *Rule 23* . . . do not apply to collective action claims under the FLSA"); *Lillehagen v. Alorica, Inc.*, *No. SACV 13-0092-DOC (JPRx), 2014 U.S. Dist. LEXIS 67963, 2014 WL 2009031, at *6 (C.D. Cal. May 15, 2014)* ("Courts have mostly held that *Section 216(b)* collective actions are not subject to *Rule 23* class certification requirements[.]") (citing cases); *O'Brien v. Ed Donnelly Enters., Inc.*, *575 F.3d 567, 584-85 (6th Cir. 2009)* (holding the district court improperly applied "more stringent" *Rule 23*-type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated); *Lewis v. Wells Fargo Co.*, *669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009)* ("The requisite showing of similarity of claims under the FLSA is considerably less stringent than the requisite showing under *Rule 23 of the Federal Rules of Civil Procedure*" and requires only "some identifiable factual or legal nexus binds together the various claims of the class members in a way that hearing the claims together promotes judicial efficiency and comports with the broad remedial policies underlying the FLSA."); *Prescott v. Prudential Ins. Co.*, *729 F. Supp. 2d 357, 365 n.8 (D. Me. 2010)* (noting that even at the second stage of *216(b)* certification, "[t]he analysis . . . is still not a factor-by-factor

> calculus comparable to that required for certification of a *Rule 23* class" and instead "courts take a holistic view" to determine whether employees are similarly situated) (citations omitted) . . . .[82]

In light of those decisions, the court applied the following standard in deciding decertification:

> Plaintiffs need only demonstrate, based on the totality of evidence, that they are similarly situated. *See White v. 14051 Manchester Inc.*, *301 F.R.D. 368, 372 (E.D. Mo. 2014)* (discussing relevant factors to determine similarity, including "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant that appear to be individual to each plaintiff, and (3) fairness and procedural considerations," and finding the ultimate "question is simply whether the differences among the plaintiffs outweigh the similarities of the practices to which they were allegedly subjected").[83]

As the *Davenport* court illustrates, courts are disinclined even at the decertification stage to consider, much less identify, those issues that are amenable to aggregate submission and those that are not. As the *Lewis* court, cited in the above quote, suggests, the "similarity" required to litigate collectively under the FLSA generally is viewed as less stringent than Rule 23 requires. *Lewis* applies a standard—whether "some identifiable factual or legal nexus binds together the various claims"—that derives from Rule 42.[84] However, that is also the standard for joinder under Rule 20(a)—the rule that applies to multi-plaintiff litigation in which each plaintiff typically submits his or her own jury interrogatories.[85]

Indeed, courts are so wedded to the doctrinal differences between joinder requirements of the Federal Rules and the "similarly situated" requirement of § 216(b), they perceive no

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[82] Davenport v. Charter Commc'ns, LLC, No. 4:12CV00007 AGF, 2015 U.S. Dist. LEXIS 3409, at *15-16 (E.D. Mo. Jan. 13, 2015).

[83] *Id.* at *16-17.

[84] Lewis v. Wells Fargo & Co., 669 F. Supp. 2d 1124, 1127 (N.D. Cal. 2009); FED. R. CIV. P. 42(a)(1) ("(a) Consolidation. If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions . . . .").

[85] FED. R. CIV. P. 20.

inconsistency in certifying collective actions of plaintiffs who would be deemed improperly joined if they sued individually. *Grayson v. K-Mart* provides a striking example.[86] The case began as two separate multi-plaintiff cases.[87] The employer moved to sever the claims in each action, contending that the plaintiffs were improperly joined under Rule 20.[88] One court granted the motion and severed the individual claims.[89] Plaintiffs in the second case then amended their complaint to plead a collective action, and plaintiffs in the first case opted in.[90] The employer then moved to dismiss the opt-in plaintiffs, contending that if the plaintiffs were not sufficiently similar to be joined in a multi-plaintiff proceeding, then, *perforce*, they could not be joined in a representative action.[91]

The trial court certified the case for interlocutory appeal to answer "[w]hether the 'similarly situated' requirement of [§ 216(b)] is essentially the same as the requirement for joinder of additional plaintiffs under Fed.R.Civ.P. 20 and 42."[92] The Eleventh Circuit granted review and decided that the § 216(b) standard in fact "is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)."[93] The implication of course is that it is within the discretion of a district court to conditionally certify a collective action notwithstanding that these same claimants could not be properly joined under Rule 20. Yet, as one commentator observed, "it is difficult to know what could be *less* demanding than 'some common question of law or fact,' except for '*no* common question of law or fact.'"[94]

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[86] 79 F.3d 1086 (11th Cir. 1996).

[87] *Id.* at 1090-92.

[88] *Id.* at 1092.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1092-93.

[92] *Id.* at 1093.

[93] *Id.* at 1095.

[94] Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1537 (2005) (emphasis in original) (citing Stone v. First Union Corp., 203 F.R.D. 532 (S.D. Fla. 2001); *cf.* Myers v. Hertz Corp., 624 F.3d 537, 552, 556 (2d Cir. 2010) (holding that the decision to deny conditional certification is not "inextricably intertwined" with the decision to deny class certification under Rule 23).

The Eleventh Circuit steadfastly adheres to this perspective, most recently in *Morgan v. Family Dollar Stores*, despite acknowledging its ad hoc nature:

> The FLSA itself does not define how similar the employees must be before the case may proceed as a collective action. And we have not adopted a precise definition of the term.
>
> Without defining "similarly," we provided some guidance in *Dybach v. State of Florida Department of Corrections*, 942 F.2d 1562, 1567 (11th Cir.[ ]1991). There, we emphasized that before facilitating notice, a "district court should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id*. at 1567-68. Later, in *Grayson v. K Mart Corp.*, we instructed that under §216(b), courts determine whether employees are similarly situated-not whether their positions are identical. 79 F.3d 1086, 1096 (11th Cir.[ ]1996). In other words, we explained what the term does not mean—not what it does.[95]

Thus, decisions regarding FLSA certification and decertification stop far short of addressing whether the Unanimity Rule is satisfied. Yet, without that inquiry, a court cannot be assured that an aggregate submission will satisfy the REA.

IV. WHAT FURTHER INQUIRY IS NECESSARY TO JUSTIFY AN AGGREGATE SUBMISSION?

Aggregate submissions are the norm in FLSA collective actions that proceed to trial, yet as the cases we reviewed illustrate, there is scant discussion about why the commonalities identified by the court make an aggregate submission appropriate. Merely surviving a motion to decertify the collective action is not an adequate guarantee, as we have seen, because the "similarly situated" inquiry does not reflect the pertinent jury interrogatories. This raises the issue of what the court's inquiry should be, to which we respond: *Members of a collective action are "similarly situated" to the named plaintiffs, and an aggregate submission is permissible, if, and only if, no reasonable jury could*

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[95] 551 F.3d 1223, 1259-60 (11th Cir. 2008).

return a different verdict for any individual plaintiff, if the plaintiff sued alone, than it would return for the named plaintiffs.

This definition reflects the mandate of the Rules Enabling Act. If some members of the collective would be found exempt, and others non-exempt, if they sued individually, then submitting a common question to the jury, constraining it to return just one answer for the collective, must alter the substantive rights of the parties. Only if the court is reasonably satisfied the verdict with respect to every class member would be the same, regardless of whether he or she sued independently or collectively, is the representative action consistent with the Rules Enabling Act.[96]

Consider this jury interrogatory: "Has defendant met its burden of proving by a preponderance of the evidence that the plaintiffs were exempt employees under the Fair Labor Standards Act?" As framed, this question constrains the jury to provide one answer, because the verdict form contains just one line on which either "yes" or "no" may be entered. But suppose jurors unanimously believe the employer proved its exemption defense with respect to plaintiffs A through F, but not with respect to plaintiffs G through Z. May the jury enter "no" because the employer failed to prove its defense regarding most of the plaintiffs? If so, the jury's answer will allow plaintiffs (A-F) to recover merely because their claims are joined with others, the majority of whom the jury found non-exempt. That result violates the REA. Rather, the aggregate submission is appropriate only if the evidence, not the verdict form, compels the jury to decide either all plaintiffs are exempt, or none is.

The Unanimity Rule follows the Supreme Court's opinion in *Walmart Stores v. Dukes*, a gender discrimination case.[97] In addressing the "commonality" requirement of Rule 23, the Court distinguished between "common questions" and questions with "common answers," emphasizing the primacy of the latter.[98]

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[96] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1048 (2016) ("[T]he Rules Enabling Act [is violated] by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action."). As we note subsequently, this absolutist version of the Unanimity Rule may be relaxed in instances of immaterial violations.

[97] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[98] *Id.* at 350 ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities

Observing that any competently drafted complaint can raise common questions "in droves," the hallmark of a case suitable for aggregate treatment is the predominance of questions with common answers.[99] The obvious rationale is that when a question requires a common answer, there is no need to adduce individualized evidence and obtain the jury's answer with respect to each class member.

The Court noted that in some instances the potential remedy sought determines the "common answer."[100] For example, suppose the primary goal is eliminating an unlawful practice that affects all class members to varying degrees. If the class prevails, the same injunction will benefit all class members and there is no reason, and perhaps no method, to exclude anyone from the injunction.[101] Therefore, if plaintiffs seek this remedy, a jury is properly limited to a common answer in deciding the issue.

In contrast, the most important inquiries in FLSA litigation are neither inherently individualized nor facially amenable to a common answer. Although it is possible that all members of the collective, without exception, are either exempt or non-exempt, that is not inherent in the claims or the facts. In some cases, there may be considerable variation in the work performed by members of the class, so a jury might find that Plaintiff A is exempt but not Plaintiff B. On the other hand, the work may be so routinized that no reasonable juror could draw a distinction between the exempt

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within the proposed class are what have the potential to impede the generation of common answers." (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009))).

[99] *Id.*

[100] *Id.* at 360-61 ("Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.").

[101] *Id.* at 360 ("The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (internal quotations omitted)); AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 (2010) ("Litigation seeking . . . declaratory relief against a generally applicable policy or practice is already aggregate litigation in practice, because the relief that would be given to an individual claimant is the same as the relief that would be given to an aggregation of such claimants.").

status of Plaintiffs A and B. Only in that second instance is the issue appropriate for an aggregate submission.

"Misclassification," meaning an employee is wrongly considered exempt, does not, in and of itself, violate the FLSA. The violation consists of not paying overtime to employees who work more than 40 hours per week, absent an exemption.[102] If a jury finds the employer failed to prove its exemption defense, it then must determine how many overtime hours, if any, the plaintiff worked without due compensation, and how much is owed to the plaintiff as a result.[103] Under some circumstances, this question may have a common answer. For example, suppose the plaintiffs all worked on the same assembly line, which requires they work in unison. Then, the liability question plausibly has a common answer: either all worked more than 40 hours in a given week or none did.

Stillman v. Staples, Inc. further illustrates how the question of an individual's right to recover can be subsumed within the claims of the collective.[104] The jury initially was asked "[h]ave plaintiffs met their burden of proving by a preponderance of the evidence that they worked in excess of 40 hours in a week and were not paid overtime?" to which the jury responded "[y]es."[105] Then, the jury was required to decide, again for all plaintiffs, if the employer proved its "exempt[ion]" defense, to which it answered "[n]o," and found the overtime violation was "willful."[106] Finally, the jury was instructed to complete a chart "concerning the salary, hours, and the compensation that you find that the plaintiff is entitled to receive based upon the evidence that you have heard and the law as it has been given to you."[107] The chart identified each member of the collective action, and provided

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[102] 29 U.S.C. § 207(a)(1) (2012) ("[N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.").

[103] O'MALLEY, GRENIG & LEE, *supra* note 68, at § 18:1.

[104] Stillman v. Staples, Inc., No. 2:07-cv-00849, 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 15, 2009) (*Staples* involved claims, raised under the FLSA, from 343 plaintiffs).

[105] Jury Verdict at 1-2, *Staples*, 2009 U.S. Dist. LEXIS 42247 (No. 2:07-cv-00849).

[106] *Id.*

[107] *Id.*

spaces for the jury to enter the number of hours of overtime compensation due each plaintiff and the back pay owed each of the 343 individuals.[108]

In *Stillman*, the aggregate questions concerning "liability" are superfluous. The jury could have been instructed to use the same chart on which it entered its findings of back pay to also enter liability findings for or against each individual plaintiff. That would have permitted the jury to find in favor of some, none, or all plaintiffs, and whether the employer sustained its exemption defense with respect to some, none, or all plaintiffs. As submitted, there is no way to know if the jury awarded back pay to each plaintiff because it was constrained to enter a common answer regarding liability, or because it determined overtime pay was owed to each plaintiff, one by one. In the latter case, the Unanimity Rule would be satisfied. However, as submitted, the court has no way to know.

Thus, the teaching of the Third Circuit, although 70 years old, remains apt:

> If an employer who is subject to the [Fair Labor Standards Act] does not pay an employee who comes within its protection, wages in accordance with its terms, the employee has a claim against his employer. It consists of the unpaid wages, liquidated damages, attorney's fee[s]. But because an employer fails to obey the law as to employee A, it does not follow that he has not obeyed it as to employees B, C or D. B may not be engaged in interstate commerce or the production of goods for commerce, while A may. Employee C may be a salaried worker or a supervisor who does not come under the Act. Employee D may have been paid the statutory minimum and not have worked any overtime at all.[109]

More recently, the Supreme Court voiced similar concerns. In *Dukes*, it criticized a trial plan that aggregated monetary claims without providing the employer the opportunity to defend against each claim individually:

> Wal-Mart is entitled to individualized determinations of each employee's eligibility for back pay. . . . [Because the Rules

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[108] *Id.*

[109] Pentland v. Dravo Corp., 152 F.2d 851, 852-53 (3d Cir. 1945).

> Enabling Act forbids interpreting] Rule 23 . . . to "abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.[110]

Accordingly, there is an important distinction between common answers that stem from common legal questions or factual similarities, and those that result from constraining the jury from entering its findings on just one line of the verdict form.

V. THE UNANIMITY RULE IN PRACTICE AND HOW IT CAN BE IMPLEMENTED AT TRIAL

A. Rule 50 Provides a Necessary, but Not Sufficient, Test for an Aggregate Submission

In an FLSA collective action, a Rule 50 motion filed against a "represented" plaintiff, typically one who has opted in, challenges whether the evidence would sustain a verdict in favor of that plaintiff based on the "representative" evidence introduced at trial.[111] Phrased somewhat differently, if that individual plaintiff sued alone and presented the same evidence adduced by the "representative plaintiffs," typically the named plaintiffs, could that evidence sustain a verdict in favor of this represented plaintiff? If the answer is no, then the claims of this plaintiff, and presumably all others for whom the evidence is insufficient, should be dismissed. However, this is but the first hurdle—a necessary but not sufficient condition—for satisfying the inquiry of whether aggregate submission is appropriate. Surviving a Rule 50 motion does not guarantee, by itself, that a case can be tried properly with representative evidence.

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[110] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 340 (2011).

[111] FED. R. CIV. P. 50(a)(1) ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.").

B. The Unanimity Rule Provides a Sufficient Condition

The Unanimity Rule does not inquire whether a jury *may* enter a verdict in favor of each member of the collective, but the likelihood it *would* enter the same verdict if each sued individually. Certainly, after a successful Rule 50 motion, the jury cannot enter the same verdict for the representative and all represented plaintiffs, because the latter group has been dismissed. But surviving the Rule 50 motion merely indicates that *if* the jury were to find in favor of all plaintiffs, the evidence would be sufficient to support that verdict. It does not speak to the probability of that outcome. Thus, the Unanimity Rule, the sufficient condition, presents a higher bar to aggregate litigation than the Rule 50 standard, which is merely the necessary condition.

Prescribing a sufficient condition returns us to the "black swan" conundrum considered by Nassim Nicholas Taleb.[112] Taleb poses the following question: what evidence suffices to prove there are no black swans?[113] He observes correctly that the black swan hypothesis is impossible to prove by documenting the existence of any number of white swans, because the possibility always remains that the next swan observed will be black.[114] Indeed, although observers may have documented a million white swans,

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[112] *See* NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (1st ed. 2007).

[113] *Id.* at 56 ("I am saying that a series of corroborative facts is not *necessarily* evidence. Seeing white swans does not confirm the nonexistence of black swans. There is an exception, however: I know what statement is wrong, but not necessarily what statement is correct. If I see a black swan I can certify that *all swans are not white*! If I see someone kill, then I can be practically certain that he is a criminal. If I don't see him kill, I cannot be certain that he is innocent. The same applies to cancer detection: the finding of a single malignant tumor proves that you have cancer, but the absence of such a finding cannot allow you to say with certainty that you are cancer-free." (emphasis in original)).

[114] *Id.* at 56-57 ("The subtlety of real life over the books is that, in your decision making, you need be interested only in one side of the story: if you seek *certainty* about whether the patient has cancer, not *certainty* about whether he is healthy, then you might be satisfied with negative inference, since it will supply you the certainty you seek. So we can learn a lot from data—but not as much as we expect. Sometimes a lot of data can be meaningless; at other times one single piece of information can be very meaningful. It is true that a thousand days cannot prove you right, but one day can prove you to be wrong." (emphasis in original)).

just one black swan will disprove the contention that none exists.[115] And so it is with the Unanimity Rule.

No matter how many plaintiffs testify, and are subject to cross-examination and impeachment, a court can never be certain that a jury will return the same verdict with respect to the remaining plaintiffs. But "certainty" is asking too much, so the more appropriate question is when, if ever, is it reasonable to conclude there no more than a "reasonable" number of black swans likely exist?[116] In other words, short of having the jury enter a verdict regarding every non-testifying plaintiff, is there an acceptable method for a court to conclude that the black swan problem is not an impediment to entering judgment for or against the collective?

Consider the following: at the close of the evidence, the court identifies a group of randomly selected plaintiffs who have not been directly involved in the trial. We refer to this group as the "represented" plaintiffs, in contrast to those who actively participate at trial, whom we refer to as "representative" plaintiffs. The lawyers may argue to the jury the facts adduced by the representative plaintiffs, but the jury then is required to complete a verdict form regarding the represented plaintiffs as in a multi-plaintiff case. Then, consider if the Unanimity Rule is satisfied with respect to some number of represented plaintiffs, does that provide the court with sufficient confidence that, at most, a "tolerable" number of black swans exist among the remaining class members?

The answer requires us first to define a "tolerable" number. Our guidance comes from the Supreme Court's decision in *Tyson Foods*. According to Justice Thomas's dissent, the majority affirmed the decision to certify the class, despite learning that the class included 212 of 3,344 class members who were not entitled to

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[115] *See id.*

[116] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (citation omitted)).

relief, *i.e.*, 212 black swans.[117] Although the dissenters found this an insuperable obstacle to class certification, the majority affirmed the lower court's certification.[118] For purposes of this discussion, suppose we follow the *Tyson Foods* majority and tentatively accept 212/3,344, or 6.3 percent as the maximum threshold for the presence of black swans. Any higher percentage and the court must decertify the collective action. We turn next to the question of how a court is to know if the prevalence of black swans is likely to exceed 6.3 percent?

The minimum number of represented parties[119] for whom the jury must enter findings consistent with the Unanimity Rule is 11.[120] In other words, the court should submit interrogatories regarding 11 randomly chosen represented plaintiffs. If the jury finds in favor of each of them, the court may conclude that black swans are not so prevalent as to infringe the parties' due process rights. That is, more likely than not, black swans will constitute less than 6.3 percent.

If the jury finds against *any* of the 11, the court should decertify the class. At this point, the court knows the Unanimity Rule cannot be satisfied—not only because there is at least one black swan among the 11, but because it is reasonable to suppose they are prevalent to a material degree, *i.e.*, greater than 6.3 percent among the remaining represented parties, the ceiling implied by *Tyson Foods*. The jury then should be instructed to enter a verdict regarding each of the representative plaintiffs, following which the court should enter judgment on the verdicts regarding the 11 plus the representative plaintiffs.

If the verdict with respect to the 11 represented plaintiffs unanimously favors the employees, the jury then should answer

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[117] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1055 (2016) (Thomas, J., dissenting).

[118] *Id.* at 1050 ("It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.").

[119] We define "represented parties" as those members of the collective, typically those who opt-in, whose right to recover depends on the testimony and evidence adduced by the named plaintiffs and other witnesses who appear at trial. "Representative plaintiffs" are those whose testimony and evidence are presented to the jury. Typically, these will be the named plaintiffs.

[120] The probability of winning 11 verdicts if the probability of winning each is 93.7% (the complement of 6.3%) is 48.6%. Therefore, if plaintiffs prevail in all 11 trials, there is at least a 50% probability the incidence of black swans is no greater than 6.3%.

an interrogatory regarding the representative plaintiffs. If those verdicts too favor the employees, then the employees as a collective have prevailed against the employer. If the verdict regarding any representative employee favors the employer, then judgment should be entered against those individuals but in favor of the class.[121] On the other hand, if the verdicts regarding each of the 11 favor the defendant, the jury next should return verdicts regarding the representative plaintiffs. If those verdicts too favor the employer, then the employer has prevailed against the class and judgment should be entered accordingly. Alternatively, if the verdicts regarding the representative plaintiffs favor the employees, then judgment should be entered against the class, based on the verdicts regarding the 11, but in favor of those representative plaintiffs.

If we require a court to properly identify the prevalence of black swans, to a reasonable degree, then 11 random verdicts will provide sufficient guidance of how to craft a judgment in a collective action. Indeed, with this framework in mind, courts can reform certification and decertification procedures, to identify cases that are unlikely candidates for an aggregate judgment.

VI. REFORMING THE CONDITIONAL CERTIFICATION AND DECERTIFICATION INQUIRIES IN LIGHT OF THE UNANIMITY RULE

Having considered how an FLSA collective action is likely to be submitted to a jury, we return to the common law procedures regarding conditional certification and decertification, to see if they may be improved with these insights. As an initial matter, efficiency should improve if courts, from the inception of the case, focused on the jury questions raised by the parties' pleadings. This focus presumably would require plaintiffs seeking conditional certification to specify the interrogatories to which it contends the jury will return common answers. This is far different from the litany of "common questions" that frequently are cited in motions for conditional certification; rather, the requirement must be

[121] Because the verdict regarding the randomly selected plaintiffs is deemed more typical of the remaining represented plaintiffs than the "representative" plaintiff whom the jury ruled against, this equates to the view that the representative plaintiff is the one and only black swan, and he or she has been culled from the class.

stated in terms of common answers to questions likely to be posed to the jury.

The prevailing approach essentially decides this issue by addressing whether there is evidence, or perhaps just an allegation, of a common policy or plan that violates the FLSA. The equation implicit in this inquiry is that a common policy or plan will produce common effects, thus the conditionally certified class is likely to satisfy the Unanimity Rule. Although this may have superficial appeal, it loses force in its application. For example, in a misclassification case the employer may oppose conditional certification by submitting declarations and other evidence that supports the contention that employees who, despite sharing common job titles, differ in how they perform their work, contrary to the named plaintiffs' testimony.

Faced with competing declarations, most courts have ignored conflicting testimony at the conditional certification stage and certified the class based upon prima facie evidence, while indicating they may return to the issue at the close of discovery.[122] However, because most cases settle once the class is conditionally certified, to defer the issue is to avoid addressing the conflicting evidence. Moreover, and more importantly for our purposes, evaluating the conflicting testimony may be no easier with the benefit of discovery or when the employer moves to decertify the class.

Faced with the employer's controverting declarations, a court may draw one of two possible conclusions: either (a) these declarants are atypical and represent a relatively small group of employees who will not opt into the litigation, i.e., they are the only black swans, or else (b) these declarants are representative of other black swans who similarly must concede that their job

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[122] Ferreira v. Modell's Sporting Goods, Inc., No. 11 Civ. 2395 (DAB), 2012 U.S. Dist. LEXIS 100820, at *3 (S.D.N.Y. July 16, 2012) ("In exercising its discretion at the conditional certification stage, 'the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations.'") (citing Cunningham v. Elec. Data Sys., 754 F. Supp. 2d 638, 644 (S.D.N.Y. 2010)); Barnett v. Quick Test, Inc., 2012 U.S. Dist. LEXIS 47250, at *11 (N.D. Ill. Apr. 4, 2012) ("Resolution of the factual disputes is inappropriate at this stage of the collective action process."); *but see* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011) ("[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." (internal quotation marks omitted)).

duties are exempt. In the first instance, the court may assume these declarants will not opt into the litigation and because they are deemed an aberrant minority, the Unanimity Rule may apply.

In the second instance, the court would conclude that other black swans exist among potential opt-in plaintiffs. If so, there is likely a material violation of the Unanimity Rule, and the court should therefore deny conditional certification. The fundamental question therefore is whether a court can determine, at this early stage of the litigation, which of the two scenarios it is facing.

The problem with the current practice is that it confronts the court with evidence pre-selected by each party. Although aggregate litigation is premised on the representativeness of the evidence presented at trial, *i.e.*, the common proof, the certification decision is predicated on evidence that has been carefully screened by opposing parties. But what if, mirroring the trial procedure, the court weighed the testimony of random members of the putative class?

Sampling in this context differs markedly from the way it has been proposed for deciding the merits of FLSA claims. Importantly, it occurs pre-certification. At that juncture, the potential class members are not yet clients of plaintiffs' counsel, and the court can prohibit both sides from contacting these potential witnesses. Consequently, their testimony is likely to be free of the bias that an attorney's influence may bring to the surface. The court could confine discovery to this limited group, and then schedule a hearing in which testimony was limited to the salient facts. At this juncture, the court is not seeking an answer regarding the merits of the case. It merely is assessing whether the Unanimity Rule is likely to apply, making it fair and efficient to conditionally certify the class. As a result, the discovery can be narrowly targeted and the proceeding before the court can be limited. Nevertheless, at the conclusion, the court should be in a far better position to know whether a conditionally certified class might eventually obtain a unanimous verdict, for or against its claims.

CONCLUSION

FLSA collective actions are a rare breed. Neither the statute, its regulations, nor the Federal Rules prescribe procedures for conducting that litigation. District courts have filled that void by developing common law procedures that are *sui generis*. However,

when courts see no further than the next procedural fork in the road, they have limited experience with the full range of consequences that follow from rules they have crafted. As a result, these procedures are shielded from the "trial and error" process that is the crucible of the common law. Therefore, we have taken a more holistic view of FLSA and litigation and considered the findings necessary to submit a collective action to a jury and enter judgment for or against the class, consistent with due process and the REA.

The criterion by which we evaluate these procedures is the Unanimity Rule. We analogize the possibility that some members of the collective action differ from the representative plaintiffs, in terms of their right to recover, to a search for black swans—just one among the group for whom the jury enters a verdict suffices, in principle, to establish the Unanimity Rule is violated.

We propose a more practical standard—having the court identify a randomly chosen group of 11 represented plaintiffs. The jury is required to return a verdict regarding each member of this group, as if they were parties to a multi-plaintiff case. Depending on the outcomes, and the jury finding regarding the representative plaintiffs, the court may enter judgment for or against the class, or else decertify the class and enter judgment only consistent with the jury's express findings regarding individual plaintiffs.

Foreshadowing how the trial will unfold permits trial courts to engage in a much more informative procedure in deciding whether to conditionally certify an FLSA collective action. The key once again is for the court to assess random testimony, this time from members of the putative class who are off-limits to counsel for each party. The objective is not to decide the likelihood of verdicts for or against each witness, but rather to assess the likelihood that, whatever the verdict, it is likely to apply uniformly to each random witness. Based on this assessment, the court should be far more likely to distinguish accurately those cases that will result in a class-wide jury verdict from those that will not.

If trial courts adopt these procedures, they can legitimize collective actions as a proper tool to adjudicate aggregate claims. By identifying the likelihood of black swans within a potential pool of plaintiffs, a court is limiting the probability that representative evidence—and thus the collective action itself—will be insufficient to decide the plaintiffs' claims. This Article does not

seek to limit the number of collective actions, or to limit plaintiffs' rights in seeking a remedy. Instead, the Unanimity Rule respects Kunis's statement, that each collective action may hold a black swan waiting to be discovered.