CASE NUMBER:

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MATTHEW ROACH, **MELISSA LONGO**, **GARRETT TITCHEN**, and **CHRISTINA APPLE**,
Plaintiffs-Appellants,

v.

T.L. CANNON CORP., d/b/a Applebee's, et al.,
Defendants-Appellees,

_____

On appeal from the U.S. District Court for the Northern District of New York
(Hon. Thomas J. McAvoy, U.S. District Judge)

_____

PETITION TO APPEAL CLASS CERTIFICATION DECISION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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INTRODUCTION

This Court and federal courts around the country have long held that common issues can "predominate" over individual issues, and thus a class action can be certified under Federal Rule of Civil Procedure 23(b)(3), where the common issues pertain to liability but damages must be assessed individually. The district court's denial of class certification in this case, concerning a putative class of employees of an Applebee's restaurant chain who were denied wages to which federal and New York law entitled them, rests on the view that this longstanding and widespread principle of black-letter law has been upended sub silentio by the Supreme Court's decision last month in *Comcast v. Behrend*, ___ S. Ct. ___, 2013 WL 1222646 (Mar. 27, 2013). That case reversed a grant of class certification in an antitrust case in which both the plaintiffs and the defendants had agreed that class certification depended on the existence of a classwide theory as to *both* liability and damages. In holding that the plaintiffs had failed to present a classwide measure of damages, the Supreme Court did not suggest, and in fact had no occasion to suggest, that a classwide theory of damages was a new threshold prerequisite for certification under Rule 23(b)(3) generally.

By reading *Comcast* as imposing this new requirement, the district court here not only effectively scuttled the wage-and-hour claims in this case but also adopted an erroneous reading of *Comcast* and a sweeping rule that, if accepted,

would fundamentally alter the contours of class action litigation under Rule 23(b)(3).

Plaintiffs now petition this Court under Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5 to hear an appeal from the district court's order denying class certification. Because of the significant implications of the decision below, along with the need to provide district courts throughout the Circuit prompt guidance about the scope and meaning of the recent *Comcast* decision, this Court should grant the petition.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question). This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(e), incorporating by reference Federal Rule of Civil Procedure 23(f). The district court's order denying class certification was entered March 29, 2013, and this appeal is timely filed within fourteen days. *See* Dkt. 114 (attached as Appendix 1); Fed. R. Civ. P. 23(f).

ISSUE PRESENTED

Does the need for an individualized calculation of damages in a wage-and-hour case categorically foreclose a showing of predominance under Rule 23(b)(3)?

RELIEF SOUGHT

Plaintiffs seek permission under Rule 23(f) to appeal the district court's denial of certification; the relief Plaintiffs ultimately seek from this Court is reversal of the district court's order that denied class certification.

STATEMENT OF FACTS

Plaintiffs are employees at Applebee's restaurants owned and operated by Defendant T.L. Cannon Corp. and its various corporate subsidiaries and affiliates. As a matter of policy and practice, Defendant T.L. Cannon Corp. failed to pay to Plaintiffs wages or reimbursements to which New York State and federal wage-and-hour law entitled them. Plaintiffs brought this action in the U.S. District Court for Northern District of New York as a collective action under the Fair Labor Standards Act (FLSA) and as a putative class action under Rule 23 for violations of the New York Labor Law (NYLL), against T.L. Cannon Corp. and several of its corporate affiliates, subsidiaries, officers and managers.

Of Plaintiffs' various claims, two are relevant to this petition. The first is a state-law "spread-of-hours" claim. During the time period implicated by this lawsuit, NYLL required that when an hourly employee's work time spanned more than ten hours from the first minute to the last minute of the work day (including breaks and off-duty time), the employee was entitled to an additional hour of pay. *See Roach v. T.L. Cannon Corp.*, 889 F. Supp. 2d 364, 366-67 & n.3 (N.D.N.Y.

2012) (citing N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 and *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 242 n.4 (2d Cir. 2011)).

At all times relevant to the complaint, Defendants' policy for determining spread-of-hours pay was consistent for all hourly employees, regardless of the location where they were employed. Before March 2005, Defendants' policy was not to provide any spread-of-hours pay to any hourly employee. *See* Dkt. 91, Ex. F (attached as Appendix 5) at 78. In March 2005, Defendants instituted a company-wide policy of providing spread-of-hours compensation only with respect to hourly employees paid at the minimum wage. See Dkt. 91, Ex. F (App. 5) at 60, 62-63; Ex. C (attached as Appendix 3); Ex. D (attached as Appendix 4). In determining which employees would be compensated for a spread of ten hours, Defendants relied solely on the handwritten reporting of location managers. *See* Dkt. 91, Ex. F (App. 5) at 60-62, 74. Defendants' payroll department made no effort to confirm managers' reporting or to ensure that every time any employee worked a ten-hour spread he or she was properly compensated under state law. *See id.* at 73-74. The predictable result of Defendants' approach was that employees at Defendants' locations throughout New York State were not properly compensated for working ten-hour spreads. *See* Dkt. 91, Ex. K (containing statements from dozens of employees). Beginning in 2010, Defendants converted to an automated system but continued to provide spread-of-hours pay only to employees who were paid

minimum wage. *See* Dkt. 91, Ex. F (App. 5) at 63-64, 67. This practice continued until January 2011, when Defendants began compensating all hourly employees, including those who made more than minimum wage, for working a ten-hour spread. *See id.* at 61.

The second claim relevant to this petition is a claim that Defendants violated NYLL by failing to provide required breaks and pay for all time worked (hereinafter "rest-break claims"). These violations stemmed from a common practice of managers altering employee time records to reflect that employees took breaks when in fact they did not do so. For instance, according to one of Defendants' former managers, Defendants trained their restaurant managers to deduct breaks from the time records of hourly employees even when the employees did not actually take a break. *See* Dkt. 91, Ex. I (attached as Appendix 6) at 48, 87-88, 102, 284.

In May 2010, Plaintiffs filed a complaint (subsequently amended August 2012) asserting claims under NYLL and FLSA. In March 2011, the district court conditionally certified plaintiffs' claims only with respect to employees who worked at one particular restaurant location; broader certification, the court ruled, would depend on what additional facts were adduced in discovery. *See* Dkt. 36, *adopted by* Dkt. 37. In August 2012, the district court granted Defendants partial summary judgment narrowing the scope of the claims; as relevant to the spread-of-

hours claim, the court held that only Defendants' minimum wage employees (and therefore only a subset of the putative plaintiff class) were covered under the NYLL spread-of-hours provision. *Roach*, 889 F. Supp. 2d at 369.

On March 5, 2013, the magistrate judge issued a report, recommendation, and order, which (as relevant here) recommended that certification of the class under Rule 23 be granted with respect to the NYLL spread-of-hours claim and denied with respect to the NYLL rest-break claim. *See* Dkt. 109 (attached as Appendix 2).[1] Analyzing predominance under Rule 23(b)(3) regarding the spread-of-hours claim, the magistrate, applying this Court's decisions in *Moore v. PaineWebber, Inc.*, 306 F.3d 1247 (2d Cir. 2002), and *Cordes & Co. Financial Services., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91 (2d Cir. 2007), found that the issue presented — "whether defendants exercised a practice that resulted in minimum-wage employees not receiving the extra hour pay when they worked a ten-hour spread" — was subject to generalized proof and would predominate over those issues subject to individualized proof. Specifically,

> the generalized proof should demonstrate whether defendants applied a practice that resulted in minimum wage employees earning less money than deserved. The individualized proof will relate to the number of occasions defendants failed to pay an employee what he

[1] The magistrate also granted certification of a collective action with respect to the FLSA claims and recommended that class certification be denied regarding the remaining NYLL claims.

> earned, which ultimately is a question bearing on damages, not liability.

Dkt. 109 (App. 2) at 43.

Regarding the rest-break claim, the magistrate found that "[t]here is sufficient evidence . . . to give rise to the suggestion that it was common practice, at the relevant times, for managers to change time records after an employee's shift to reflect that he took a break, even if he did not actually take it." *Id.* at 35-36. The magistrate concluded that the rest-break claims satisfied the Rule 23 requirements of numerosity, commonality, and typicality, *see id.* at 23, 35-37, but recommended denying certification because of concerns about adequacy of representation. Specifically, the magistrate noted that three of the four named plaintiffs had at some time acted in a managerial capacity for Defendants and two of them had admitted to shaving time off employee records, so the magistrate posited that these plaintiffs had a conflict of interest because of the potential that they could be individually liable for the class claims under federal and state law. *Id.* at 38-40. In their objections to this aspect of the magistrate's recommendation, Plaintiffs pointed out that to the extent some of the named plaintiffs had exercised managerial responsibilities, these responsibilities were not significant enough to give rise to potential liability because the named plaintiffs could not hire, fire, control conditions of employment, or determine rates or methods of payment, and therefore did not meet the statutory definition of an "employer" under state or

federal law. *See* Dkt. 110 at 2-6. In the alternative, Plaintiffs contended, even if a conflict of interest existed, the court could certify a subclass represented only by the named plaintiff who never exercised managerial responsibilities. *See id.* at 6-8.

Ruling on both sides' objections to the magistrate's recommendations, the district court on March 29, 2013, denied certification on all class claims, including the spread-of-hours claim as well as the rest-break claim. *See* Dkt. 114 (App. 1).[2] Regarding the spread-of-hours claim, the district court did not take issue with the magistrate's analysis of the evidence or identification of the issue that would be susceptible to generalized proof. However, the court ruled that the Supreme Court's recent decision in *Comcast Corp. v. Behrend* foreclosed certification under Rule 23(b)(3) of any class for which damages would need to be calculated on an individual basis. *Id.* at 6. For this reason, the court denied class certification on the spread-of-hours claim. *See id.* at 5-7. Regarding the rest-break claim, the district court found it unnecessary to address the parties' objections because, "[a]s with the 10-hour spread claim, Plaintiffs . . . offered no model of damages susceptible of measurement across the entire putative break period class." *Id.* at 9-10. Therefore, the court held, *Comcast* foreclosed certification. *Id.* at 10.

[2] Defendants also appealed to the district court from the magistrate's FLSA collective-action certification; the district court has indicated it will address that issue separately, and proceedings are ongoing on that issue.

Plaintiffs now seek review of the denial of certification on the spread-of-hours and rest-break claims.

REASONS FOR GRANTING THE PETITION

By permission of the court of appeals, parties may take an interlocutory appeal of a decision granting or denying class-action certification. Fed. R. Civ. P. 23(f). This Court has recognized that such an appeal should be allowed in at least two circumstances: (1) where "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," and (2) where "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001).

Although these criteria will be "rarely met," *id.* at 140, this case is the rare one in which not just one but both criteria apply, due to the fundamental importance of the issue and the "questionable" decision of the district court. Additionally, in light of the recency of the Supreme Court's *Comcast* decision on which the district court relied, and the potential (as demonstrated by the opinion below) for that decision to be read so broadly as to eliminate all Rule 23(b)(3) class actions where individualized damages calculations are required, district courts are in need of this Court's immediate guidance on the issue.

I. THE DISTRICT COURT'S ORDER WILL EFFECTIVELY TERMINATE LITIGATION OF THE STATE LAW CLAIMS BASED ON AN ERRONEOUS READING OF RULE 23.

A. The State Law Claims Will Not Be Heard Absent Class Treatment.

The denial of certification will effectively terminate the NYLL litigation because Plaintiffs' individual claims are too modest to be litigated independently. Depending on how many ten-hour spreads a given member of the putative class worked and how many break periods were wrongfully deducted, an individual's damages could be significant, but some individuals may have damages as little as one hour's pay at minimum wage. Most plaintiffs in the latter position will have neither the means nor the will to pursue litigation in federal court — particularly in light of the risk of losing and being assessed costs under Federal Rule of Civil Procedure 54(d) that could be greater than their potential for recovery.

B. The District Court's Ruling That The Need For Individualized Damages Calculations Defeats Predominance Is A Substantial Departure From This Court's Jurisprudence And Would Reshape Class Action Litigation.

The decision below applied a rule of law that is not only "questionable," *Sumitomo Copper Litig.*, 262 F.3d at 139, but also novel, sweeping, and erroneous. In *Comcast*, the Supreme Court reversed the certification of a class of antitrust plaintiffs where the proffered proof in support of plaintiffs' classwide measure of damages did not measure the damages flowing specifically from the theory of

liability that the district court had found appropriate for class treatment. *See* 2013 WL 1222646, at *5-*7. The Court found this mismatch problematic in the context of plaintiffs' antitrust case because, as the district court had held and *as the parties had not contested*, "to meet the predominance requirement [plaintiffs] had to show (1) that the existence of individual injury resulting from the alleged antitrust violation . . . was capable of proof at trial through evidence that [was] common to the class . . . and (2) *that the damages resulting from that injury were measurable on a class-wide basis through use of a common methodology*." *Id.* at *3 (citation and internal quotation marks omitted, and emphasis added); *accord id.* at *5 (citing ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57, 62 (2d ed. 2010), for the proposition that "any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation'").

Unlike in the unusual circumstances of *Comcast*, the need for individualized showings of damages is not a problem in the run-of-the-mill class action, such as a wage-and-hour case. On the contrary, as this Court has held, a class can satisfy Rule 23(b)(3) predominance based on common questions pertaining to liability notwithstanding the need for individualized damages calculations. *See, e.g.*, *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) ("If Plaintiffs succeed in [their legal showing] under New York law, then each of

the class plaintiffs will likely prevail on his or her section 196-d claims, although class plaintiffs' individualized damages will vary. We conclude from the record before us that the District Court's finding that common questions predominate over any individualized damages issues is fully supported."); *Seijas v. Republic of Arg.*, 606 F.3d 53, 57-58 (2d Cir. 2010) ("[Defendant] . . . argues that the damages to which each class member is entitled is an individual, not a common, question. However, it is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification."); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) ("[A]lthough a defense may arise and may affect different class members differently, [that circumstance] does not compel a finding that individual issues predominate over common ones. So long as a sufficient constellation of common issues binds class members together, variations in the sources and application of a defense will not automatically foreclose class certification." (citations and internal quotation marks omitted)).

Federal courts of appeals around the country are in agreement with this Court's well-established rule that the need for an individualized measurement of damages does not necessarily defeat predominance. *See, e.g.*, *Arreola v. Godinez*, 546 F.3d 788, 801 (7th Cir. 2008); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564-66 (6th Cir. 2007); *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004),

abrogated in part on other grounds, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 n.18 (3d Cir. 2008); *Tardiff v. Knox County*, 365 F.3d 1, 6 (1st Cir. 2004); *Bertulli v. Indep. Ass'n of Continental Pilots*, 242 F.3d 290, 298 (5th Cir. 2001).

The district court's inference that the Supreme Court overruled these decisions sub silentio and adopted a new threshold requirement for all Rule 23(b)(3) classes is untenable. First, the Supreme Court is unlikely to have promulgated such a sweeping rule by implication. The *Comcast* majority itself gave no indication that its holding applies beyond the antitrust context or beyond the context in which the parties have agreed that class certification was appropriate only if both liability and damages "were measurable on a class-wide basis through the use of a common methodology." 2013 WL 1222646, at *3 (citation and internal quotation marks omitted). Indeed, the dissenting opinion remarked on the narrowness of the holding, noting "[t]he oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents," and contrasting those circumstances with "the mine run of cases" in which "it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *Id.* at 9 (Ginsburg & Breyer, JJ., dissenting). The majority did not disavow or contradict that

characterization of the law, which was one of the dissent's chief arguments in support of dismissing certiorari rather than resolving the case.

Second, the district court's categorical rule is in tension with the text of Rule 23(b)(3), which lists four non-exclusive factors relevant to predominance — none of which is whether there is a classwide measure of damages. *See* Fed. R. Civ. P. 23(b)(3) ("The matters pertinent to [the questions of predominance and the superiority of a class action mechanism] include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."). The district court's decision would not only add to the list a new factor that is not in the text, but it would simultaneously elevate that new, unenumerated factor into a dispositive requirement for all Rule 23(b)(3) classes. Respecting the structure of subsection (b)(3), this Court has never understood the predominance inquiry as an all-or-nothing proposition based on a single factor. Rather, this Court has recognized that "[c]lass-wide issues predominate if resolution of *some* of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject

only to individualized proof." *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (emphasis added); *see also* 7AA Wright, Miller & Kane, Fed. Prac. & Pro. § 1778 (3d ed. 2008) ("The common questions need not be dispositive of the entire action."). The district court erred in concluding that *Comcast* changed the nature of that inquiry in one offhand stroke.

Finally, the district court's rule would produce strange consequences, as the facts of this case illustrate. Unlike a complicated area of law such as antitrust, in which courts rely on competing experts to elucidate technical economic models of injury and loss, *see Comcast*, 2013 WL 1222646, at *3 (describing expert-designed "regression model comparing actual cable prices . . . with hypothetical prices that would have prevailed but for [Comcast's] allegedly anticompetitive activities"), the measure of damages in a wage-and-hour case is straightforward. Particularly regarding the spread-of-hours claim, damages here could be calculated using a statutory formula (one additional hour of pay per each ten-hour spread worked) based on employees' work hours, which could be derived from Defendants' own payroll records. Therefore, unlike in *Comcast*, there is no need for expert opinion or statistical analysis based on elaborate and technical hypotheticals. To hold that "predominance" is not satisfied in a wage-and-hour case because damages must be measured on an individual basis shows the problematic nature of the district court's categorical rule: no matter how simple the individual issues, the fact that

damages would have to be calculated on an individual basis, although using a consistent methodology, would bar certification of a Rule 23(b)(3) class. The Rule 23(b)(3) requirement that common issues "predominate" over individual issues would give way to a requirement that no individual issues exist at all.

The district court's denial of certification spells the end of Plaintiffs' NYLL spread-of-hours claim, and it does so by applying a newly-minted, "questionable" legal rule. *Sumitomo Copper Litig.*, 262 F.3d at 139. Review is therefore appropriate.

II. THE QUESTION WHETHER *COMCAST* REQUIRES A CLASSWIDE MEASURE OF DAMAGES AS A PREREQUISITE TO CERTIFICATION UNDER RULE 23(b)(3) IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

In considering the second reason to hear a Rule 23(f) petition — "a legal question about which there is a compelling need for immediate resolution" — this Court has elaborated that "a novel legal question will not compel immediate review unless it is of fundamental importance to the development of the law of class actions and it is likely to escape effective review after entry of final judgment." *Id.* at 140. Both of these criteria are satisfied here.

First, the question presented is a paradigmatic example of one "of fundamental importance to the development of the law of class actions," because adoption of the district court's rule would transform plaintiffs' burden at class certification from showing generally the predominance of classwide issues over

individual issues to showing specifically that one particular aspect of plaintiffs' case — damages — is capable of classwide measurement. Cognizant of the profound change such a rule would produce in class action practice (by making class actions far harder to certify), class action defendants around the country have already begun urging district courts to adopt the reading of *Comcast* that the district court applied here. *See, e.g.*, Appellee Cintas Corp.'s FRAP 28(j) Letter Regarding Comcast Corp. v. Behrend, *Davis v. Cintas*, No. 10-1662 (6th Cir. filed Mar. 28, 2013); Supp. Auth. Letter of Def. LG USA, *In re LG Front Load Washing Machine Class Action Litig.*, Civ. No. 08 CV 51 (D.N.J. filed Apr. 5, 2013).

Another metric by which the "fundamental importance" of the question presented can be measured is its potential to affect existing law. If the district court's holding is correct, numerous decisions of this Court and its sister circuits (cited in Part I.B, above) are no longer good law. This possibility demonstrates the importance of the question and the need for this Court's review.

This case presents an even more "compelling" need for interlocutory review than the Rule 23(f) petitions granted in *Hevesi v. Citigroup Inc.*, 366 F.3d 70 (2d Cir. 2004), and *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 134-35 (2d Cir. 2001), *overruled on other grounds*, *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 42 (2d Cir. 2006) — which are this Court's only opinions explaining decisions to grant Rule 23(f) petitions. *Hevesi* concerned a

novel application of a particular legal theory (fraud-on-the-market) in the context of a particular type of action (securities fraud). 366 F.3d at 77. *Visa Check* concerned the standard for evaluating expert opinions at the class certification stage and questions of predominance and manageability in a particular type of antitrust case (tying cases). 280 F.3d at 132 n.3. Here, the question — whether Rule 23(b)(3) includes a threshold requirement for predominance that applies in *all* (b)(3) class actions — impacts a significantly broader set of cases than either *Hevesi* or *Visa Check*. A rule barring class certification whenever damages must be individually calculated would, if sustained, surely have at least as "significant effect on the law of class actions," *Hevesi*, 366 F.3d at 77, as the application of one theory to one type of action.

Second, the question presented is likely to escape review unless this petition is granted. Here, as in many cases where the injury to each individual class member is relatively small, litigation may become infeasible without class certification because the cost of litigating so far exceeds the potential recovery. *Cf.* Fed. R. Civ. P. 23, advisory committee notes to 1998 amendment (suggesting that an appeal may be appropriate where "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation").

CONCLUSION

For the foregoing reasons, this Court should grant the petition to appeal under Rule 23(f).

Dated: April 12, 2013

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