13-3070

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Matthew **ROACH**, Melissa Longo, Garrett Tichen, Christina Apple,
Plaintiffs - Appellants,

v.

T.L. CANNON CORP., DBA Applebees, T.L. Cannon Management Corp., TLC West, LLC, TLC Central, LLC, TLC Utica, LLC, TLC East, LLC, TLC North, LLC, David A. Stein, individually and as Owner and Chairman of T.L. Cannon Corp. and as Director and Chairman of T.L. Cannon Management Corp., Matthew J. Fairbarn, individually and as Owner and President of T.L. Cannon Corp. and as Director and Chief Executive Officer of T.L. Cannon Management Corp., John A. Perry, individually and as Vice-President and Director of Operations of T.L. Cannon Corp. and as President of T.L. Cannon Management Corp.,
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)

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

INTRODUCTION AND SUMMARY OF ARGUMENT

The answering brief of Defendants T.L. Cannon Corp. et al. ("Cannon") is notable mainly for what it does not say. Cannon does not dispute that this Court's precedent permits certification of a class action where damages must be calculated individually. Cannon does not dispute that the Sixth, Seventh, and Ninth Circuits have taken the same view after *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Cannon makes a passing suggestion that *Comcast* "undercut" the principle that a classwide measure of damages is not a prerequisite to certification, but Cannon does not explain how this is so and does not rebut Plaintiffs' interpretation of *Comcast*; rather, Cannon argues that *Comcast* stands for the unremarkable proposition that proof of damages is *part* of the predominance inquiry.

Having conceded the doctrinal point at issue, Cannon attempts to salvage the decision below by obfuscating the district court's reasoning. But Cannon's contention that the inability to prove damages on a classwide basis was *not* the basis for the denial of certification is flatly wrong. The very language Cannon quotes from the district court's opinion confirms that the absence of a classwide measure of damages was the basis for the decision below. Therefore, the district court erred; at a minimum, its decision must be vacated, and the case remanded.

The only remaining question is whether this Court should also order certification on remand. Cannon does not dispute that Plaintiffs have satisfied

numerosity, commonality, typicality, adequacy of representation, and superiority; Cannon challenges only predominance. But Cannon's argument relies largely on misrepresentations of the record. Cannon repeatedly claims an absence of evidence on various points even though Plaintiffs' opening brief discusses, with specific citations to the record, precisely the evidence that Cannon claims not to see.

When Cannon does engage with the record evidence, it attempts to show that the evidence is disputed. Plaintiffs do not disagree. But the existence of disputed questions on the merits does not make class certification inappropriate. The question at certification is about how those merits disputes will be resolved, and the answer depends on whether the common questions predominate so as to make class treatment a more efficient means of resolving the disputes. Plaintiffs have provided ample evidence raising common questions: chiefly, the factual questions whether Cannon had a policy or practice resulting in failing to pay spread-of-hours wages required by New York Labor Law, and whether Cannon had a practice of altering employees' time records to dock pay for breaks the employees did not in fact take. Because the common answers to these questions are crucial to determining whether Cannon is liable for wage-and-hour violations, predominance is satisfied and certification is appropriate.

The district court's denial of certification should be reversed and the case remanded with instructions to certify the class.

ARGUMENT

I. CANNON DOES NOT MEANINGFULLY DISPUTE THAT A CLASS CAN BE CERTIFIED NOTWITHSTANDING THE NEED TO CALCULATE DAMAGES ON AN INDIVIDUAL BASIS.

There is little dispute between the parties about the applicable law. This Court's cases hold that a class can satisfy Rule 23(b)(3) predominance based on common questions pertaining to liability notwithstanding the need for individualized damages calculations. *See* Appellants' Opening Br. (AOB) 17-18 (citing *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011); *Seijas v. Republic of Argentina*, 606 F.3d 53, 57-58 (2d Cir. 2010); and *In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006)). Cannon does not argue otherwise.

As Plaintiffs have shown, *Comcast* did not abrogate this Court's rule. *See* AOB 19-21. Cannon disputes this proposition briefly, stating that "[w]hatever support that contention ever enjoyed was undercut by . . . *Comcast.*" Br. for Defendants-Appellees (Defs.' Br.) 19. But Cannon neither explains this position nor rebuts Plaintiffs' analysis of the decision; instead, Cannon relies mainly on lengthy quotations from the *Comcast* opinion without explaining how these passages support Cannon's view. Cannon points to a footnote in which the Supreme Court described the need for a classwide measure of damages as the subject of the question presented in the case, *see id.* at 20 (quoting *Comcast*, 133 S.

Ct. 1431 n.4), but Cannon does not acknowledge that the plaintiffs in *Comcast* had *conceded* that a classwide measure of damages was needed in order to certify the class in that case. *See* AOB 20-21 (quoting *Comcast*, 133 S. Ct. at 1430). And Cannon does not refute Plaintiffs' point that the holding of *Comcast* addressed not whether the measure of damages applied to the class as a whole but whether that measure was consistent with the theory of liability on which the class had been certified. *See id.* at 20 (discussing *Comcast*, 133 S. Ct. at 1433-35); *accord Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) (reading *Comcast* the same way), *cert. denied*, 82 U.S.L.W. 3217 (Feb. 24, 2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (same), *cert. denied*, 82 U.S.L.W. 3236 (Feb. 24, 2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) (same). Cannon's takeaway from *Comcast* — that it "requires the district court to consider proof of damages in weighing Rule 23(b)(3) predominance issues," Defs.' Br. 21 — is both unremarkable and undisputed. Plaintiffs do not claim that the district court erred by "considering" proof of damages in the predominance analysis; rather, it erred by holding that a classwide measure of damages is a *prerequisite* to class certification.

Finally, as Plaintiffs have explained, the Sixth, Seventh, and Ninth Circuits have all rejected the district court's view of *Comcast*; no circuit has held otherwise. *See* AOB 21-25 (discussing *Whirlpool*, *Butler*, and *Leyva*). Cannon does not

distinguish or even discuss these cases, except to suggest that the Seventh Circuit's concern that an expansive reading of *Comcast* could undermine the class action device is overstated. *See* Defs.' Br. 21 n.18. Cannon advances no legal argument that would support deviating from or rejecting the holdings of the Sixth, Seventh, and Ninth Circuits.

Meanwhile, since Plaintiffs filed their opening brief, the Fifth Circuit also has rejected the view that *Comcast* requires a classwide measure of damages as a prerequisite to certification. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), considered several appeals from the settlement of a class action regarding the 2010 explosion and oil spill in the Gulf of Mexico. *Id.* at 795. One of the arguments against the settlement was that *Comcast* "precludes certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement." *Id.* at 815. Joining the Sixth, Seventh and Ninth Circuits, the Fifth Circuit squarely rejected that contention: "*Comcast* held that a district court errs by premising its Rule 23(b)(3) decision on a formula for classwide measurement of damages whenever the damages measured by that formula are incompatible with the class action's theory of liability," but "nothing in *Comcast* mandates a formula for classwide measurement of damages in all cases." *Id.* Thus, the court concluded, *Comcast* "has no impact on cases . . . in

which predominance [is] based not on common issues of damages but on the numerous common issues of liability." *Id.*

In sum, Cannon does not raise a substantial argument disputing the Plaintiffs' understanding of *Comcast* — an understanding shared by the Fifth, Sixth, Seventh and Ninth Circuits. And Cannon does not dispute the continued viability of this Court's rule that class certification is permissible even where damages must be calculated individually. Therefore, because the district court ignored this Court's precedent by denying certification based on the absence of a classwide measure of damages, the district court's decision cannot stand.

II. CONTRARY TO CANNON'S CHARACTERIZATION, THE ABSENCE OF A CLASSWIDE MEASURE OF DAMAGES WAS THE BASIS FOR THE DECISION BELOW.

Cannon attempt's to salvage the decision below by arguing that the lack of a classwide measure of damages was *not* the basis for the district court's decision is unpersuasive. A plain reading of the opinion below demonstrates that this is precisely why the court denied certification. In fact, Cannon's own extended quotation from the district court's opinion regarding the spread-of-hours claim demonstrates that the lack of a classwide measure of damages was the sole basis for the district court's decision, as the italicized portions below reflect:

> In the instant case, Plaintiffs *have not offered a damages model susceptible of measurement across the entire class*, arguing instead that this issue is separate from the question of liability. Plaintiffs contend that damages need not be considered for Rule 23 certification

> even if such damages might be highly individualized. See Pl. MOL in Support of Cert., pp. 18, 19, 22, 23; Reply MOL pp. 9-10. This position is in contravention of the holding of *Behrend*.
>
> Furthermore, a demanding and rigorous analysis of the evidentiary proof on this claim *does not yield a finding that damages are capable of measurement on a classwide basis*. Rather, Plaintiffs' proof that some employees, on various occasions, were denied their 10-hour spread payments indicates that *damages in this putative class are in fact highly individualized*. *Because Plaintiffs have offered no model of damages susceptible of measurement across the entire putative 10-hour spread claim class*, "[q]uestions of individual damage calculations will inevitabl[y] overwhelm questions common to the class." *Behrend*, slip op., at 7. Rule 23 certification must be denied for Plaintiffs' failure to satisfy their requirements under Rule 23(b)(3). *See generally Behrend*.

Defs.' Br. 21-22 (quoting SA 6-7) (emphasis added). Nearly every sentence of the district court's discussion makes reference to the individualized nature of damages or the absence of a classwide measure of damages.

Cannon's argument that the district court would have stopped after the first quoted sentence had it viewed *Comcast* as dispositive, *see id.* at 22, is undermined by the remainder of the analysis, which elaborates on the exact same point. And Cannon's argument that the presence of a factual analysis somehow changes the legal rule the district court applied, *see id.*, is a non sequitur. The district court marshaled facts to justify applying the legal rule it thought *Comcast* had announced — that certification requires a classwide measure of damages. The court's reason for denying certification is unmistakable: "Because Plaintiffs have offered no model of damages susceptible of measurement across the entire putative

10-hour spread claim class, '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class,'" and so "Rule 23 certification must be denied." SA 6-7 (quoting *Comcast*, 133 S. Ct. at 1433).

Cannon does not dispute that the district court denied certification of the rest-break claim for the same reason. Again, the district court's opinion is clear. After explaining in detail why "damages are individualized" based on the record, SA 8-9, the court concluded: "As with the 10-hour spread claim, Plaintiffs have offered no model of damages susceptible of measurement across the entire putative break period class. Questions of individual damage calculations will inevitably overwhelm questions common to this class. Consequently, the motion for class certification of this claim fails under Rule 23(b)(3)." SA 9-10 (citing *Comcast*).

In sum, Cannon's defense of the decision below on the basis that "this is not a case in which class certification was denied solely because damages were individualized," Defs.' Br. 22, is undermined by the district court's own words. The district court denied certification based on a misreading of *Comcast* and in defiance of this Court's repeated holdings that predominance does not depend on a classwide measure of damages. Therefore, at a minimum, the district court's opinion must be vacated, and the case remanded.

III. CANNON'S ARGUMENT AGAINST PREDOMINANCE IGNORES RECORD EVIDENCE AND RAISES DISPUTES NOT RELEVANT TO CERTIFICATION.

The only remaining question is whether, in addition to vacating the erroneous decision below, this Court should order that the class be certified on remand as Plaintiffs urge. *See* AOB 29-39. Cannon does not dispute that Plaintiffs have satisfied numerosity, commonality, typicality, and adequacy of representation under Rule 23(a), or that they have shown superiority under Rule 23(b)(3). *See id.* at 30-36. Cannon claims only that Plaintiffs have not shown predominance. In so arguing, Cannon ignores portions of the record and quarrels over whether Plaintiffs will be able to prove their claims at trial, rather than whether the claims are appropriate for class treatment.

A. Plaintiffs Have Satisfied Predominance Regarding The Spread-Of-Hours Claim.

On the spread-of-hours claim, Cannon contends that Plaintiffs have not identified the "common answers" that they expect to drive the resolution of the litigation, Defs.' Br. 25, and therefore that Plaintiffs cannot show that common questions will predominate. This position does not so much respond to Plaintiffs' argument as ignore it, along with the record evidence supporting it. Cannon argues that (1) its policies prior to March 2005 are irrelevant because March 2005 is outside the class definition in the magistrate's certification recommendation that the district court declined to adopt, (2) policies failing to provide spread-of-hours

pay to employees making more than minimum wage are irrelevant because that is a lawful practice, (3) Cannon's January 2011 policy is irrelevant because it is lawful, and (4) Cannon's practice of relying on manager reporting does not raise a common question because it shows disuniformity across Cannon's locations. *See* Defs.' Br. 25-28.

The most glaring flaw in this litany is that it ignores the company-wide practice of not providing spread-of-hours pay at all for a period of several years. As Plaintiffs noted in their opening brief, *see* AOB 7, 38, Plaintiffs submitted evidence showing that Cannon stopped managers' reporting of ten-hour spreads, and hence Cannon did not pay spread-of-hours wages, even for minimum-wage employees, for several years. *See* JA 578-81 (plaintiff Apple testifying that, during her time working as a manager between 2005 and 2007, Cannon no longer instructed restaurant managers to report ten-hour spreads, and that managers were not instructed to resume such reporting until 2010).

Cannon makes one reference to this evidence in its statement of facts, where Cannon contends that plaintiff Apple did *not* testify that Cannon managers stopped reporting ten-hour spreads. Defs.' Br. at 14 n.14. Like Cannon's reading of the district court's opinion, Cannon's creative reinterpretation of Apple's testimony is untenable. Apple's testimony is explicit on several points: First, managers stopped reporting spreads of hours because the form on which to do that was no longer

provided to managers. *See* JA 579 (page 82 of the deposition minuscript) ("The 10-hour spread form wasn't existent for us to do anymore."); *accord id.* (minuscript page 84) (repeating this point). Second, the period of non-reporting began sometime between 2005 and 2007. *See id.* (minuscript page 83) ("Q. Okay. So at some point when you're at Clay as a manager from 2005 until, I think we said, October of 2007 – / A. Mm-hmm. / Q. – you were not filling out a 10-hour spread form the entire time you were a manager there? / A. I don't know how long. I know I did it for a while. / Q. But you know at some point you stopped? / A. At some point, we stopped."). Third, the change was not limited to one restaurant. *See id.* (minuscript page 82) (referring to practices at both Auburn and Clay). Fourth, non-reporting was a corporate policy dictated by "upper management," *id.* at 578 (minuscript page 80); the checklist that stopped including the 10-hour spread form came from "the home office." *Id.* at 579 (minuscript page 85). Finally, reporting resumed in 2010. *See* JA 580 (minuscript pages 88-89).

Additionally, Cannon cannot brush aside its pre-March 2005 policy and its policy applicable to employees making more than minimum wage. This case was filed in May 2010, and the statute of limitations is six years, so a common question exists as to Cannon's liability from May 2004 to March 2005 for its policy of refusing to provide *any* spread-of-hours pay. *See* JA 37 (reflecting filing date of complaint); JA 1088 (testimony of defendants' Rule 30(b)(6) deponent Elizabeth

Quindoza) (noting that the company did not provide any spread-of-hours pay before March 2005); N.Y. Labor Law § 198(3) (statute of limitations). And the question whether employees making above minimum wage were entitled to spread-of-hours pay is a common and unresolved legal question whose answer will determine in one stroke whether Cannon is liable to that group of employees for the period during which Cannon had a policy of denying them spread-of-hours pay. *See* JA 1080-81, 1085 (Quindoza) (explaining that prior to January 2011, Cannon did not provide spread-of-hours pay to workers earning above minimum wage); JA 1466-69 (district court holding that spread-of-hours law did not cover employees making more than minimum wage, but noting split of authority on the issue).

Thus, Plaintiffs have provided specific evidence in support of three policies and/or practices (pre-March 2005 policy, pre-2010 practice, and policy regarding workers earning above minimum wage) the existence or non-existence of which will drive the resolution of the spread-of-hours claim. These common questions easily predominate over the only individualized question regarding the spread-of-hours claim — damages — which can be shown using defendants' own payroll records to find the ten-hour spreads for which defendants failed to pay their employees. *See Leyva*, 716 F.3d at 514 (noting that the availability of defendants' records to help calculate damages buttressed a finding of predominance based on common questions regarding liability); *see also* JA 518-19 (plaintiff Roach

testifying that he worked a number of ten-hour spreads without receiving spread-of-hours pay, and that although he did not have records of each time that occurred, defendants would). Therefore, this Court should order that the spread-of-hours claim be certified on remand.

B. Plaintiffs Have Satisfied Predominance Regarding The Rest-Break Claim.

Cannon's argument on the rest-break claim shifts ground throughout its brief. At times, Cannon mischaracterizes the record as containing no evidence to show "a common policy or practice that violates the law." Defs.' Br. 17; *see also id.* at 4 n.5 ("Appellants do not identify any Company-wide policy that violates the law[.]"); *id.* at 9 ("Appellants failed to identify any Company policy that instructed managers to adjust employees' time to insert a break that was not taken. Nor did they submit evidence of a common practice among managers to do so."). At other points, Cannon attempts to grapple with the evidence it has said does not exist by interpreting that evidence in the light most favorable to Cannon, *see id.* at 9-12, although the question at certification is whether common questions predominate, not in whose favor those common questions will ultimately be resolved. Neither of Cannon's contradictory approaches is persuasive.

Cannon's argument that Plaintiffs rely on mere allegations as opposed to evidence, *see* Defs.' Br. 28 ("Appellants allege, again in conclusory fashion, that there was a common practice of improper time altering"); *id.* at 29 (referring to

Plaintiffs' "make weight assertions" that "merely pay lip service to the requirements of Rule 23(b)(3)"), is easily dispensed with. Plaintiffs have produced ample evidence supporting their claim that Cannon had a practice of instructing its managers to deduct time for rest breaks its workers did not take. *See* AOB 8-10 (detailing this evidence, with record citations). Plaintiffs provided evidence from several managers and supervisors that Cannon had a practice of training its managers and supervisors to remove time from employee time records for breaks they had not taken, *see* AOB 8-9 (citing JA 567, 570, 577, 585, 590, 591-92, 593, 696-97, 785-87, 799, 1105-08, 1113-16, 1121-24, 1127-28, 1133-34), as well as evidence that the practice was implemented and widespread, *see* AOB 9-10 (citing JA 378, 521-25, 561, 583, 585-86, 591-92, 599, 738-39, 779-84, 792-93, 794, 807-08, 882-84). By contrast, Cannon provides no citation for its claim that the "testimony of Appellants themselves, as well as uncontroverted record evidence, reveals" that Plaintiffs are incorrect about the challenged practice. Defs.' Br. 28.

Elsewhere, Cannon, instead of denying that Plaintiffs have provided evidence of a common practice, attempts to minimize that evidence. *See id.* at 9-12. But disputes about the persuasiveness of Plaintiffs' evidence are beside the point. At the class certification stage, the court considers whether the evidence demonstrates predominance, not which party will ultimately prevail in proving its case. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196

(2013) (explaining that at certification, plaintiffs "need not . . . prove that the predominating question will be answered in their favor"); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (explaining that a court may not decline to certify a class based on its view of the merits).

Cannon also mischaracterizes the evidence it discusses. According to Cannon, "[t]he evidence reveals that, at most, only two of Appellees' managers *may* have been improperly trained," and "at best, shows that a few managers, on some occasions, at some locations, disregarded Appellees' lawful policy and inserted breaks into time records when no breaks were allegedly taken." Defs.' Br. 12. Cannon significantly understates the case. Defendants' former managers who worked at *several* different restaurant locations testified at deposition that defendants *trained* their managers to deduct time for rest breaks from the time records of hourly employees even when the employees did not take a break. *See* JA 1105-08, 1113-16, 1121-24, 1127-28, 1133-34 (testimony of Ann Marie Rudd, former assistant manager at Binghamton Front Street location); JA 567, 570, 577, 590, 591-92, 593 (plaintiff Apple discussing managers' training and practices she saw implemented at Auburn, Clay, and North Syracuse locations); *see also* JA 585 (Apple testifying that, from her interactions with managers at the Watertown location, the spread-of-hours and rest-break practices were the same there as in the restaurants where she worked). Plaintiffs also documented that key hourly

employees likewise were trained to manipulate time records to reflect breaks not taken, *see, e.g.*, JA 696-97, 785-87, 799; that supervisors (either key employees or managers) would also sign time records purportedly verifying breaks employees did not actually take, JA 738-39; and that supervisors would force workers to sign records indicating that they had received breaks they had not in fact taken, JA 591-92, 792-93. Key employees were threatened with having their hours cut if they did not manipulate time records. *See* JA 376, 391, 779-84, 809-10. In general, the manipulation of breaks was "common practice." JA 779, 781, 783, 784, 794. Puzzlingly, Cannon responds that "Appellants' own testimony established that any violations were isolated and individualized in nature," Defs.' Br. 13, but that claim is unaccompanied by citation to any part of the record.

Plaintiffs have thus raised the common question, which is crucial to Cannon's liability on the rest-break claim, whether Cannon had a practice of altering employee time records. This Court and district courts within the circuit have repeatedly characterized the existence of an illegal corporate wage policy or practice as a "common question" for the purpose of class certification. *See* AOB 31-32 (citing *Shahriar*, 659 F.3d at 252; *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 615 (S.D.N.Y. 2012); *Espinoza v. 953 Assocs. LLC*, 280 F.R.D. 113, 127 (S.D.N.Y. 2011); and *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 354, 356 (E.D.N.Y. 2011)).

Cannon's repeated statements that manipulating time records was against company policy, *see, e.g.*, Defs.' Br. 11, 12, are beside the point. What Plaintiffs are claiming — and have supported with evidence — is that, whatever Cannon's official *policy*, its *practice* was to train managers and supervisors to alter time records. *See, e.g.*, JA 592-93 (plaintiff Apple differentiating between policy and practice, i.e., between the written company policies and the training she received).

Neither the fact that plaintiffs Roach and Longo analyzed their hours on an individual basis, *see* Defs.' Br. 11-12, 30, nor the fact that Cannon's practice of manipulating employees' time records did not *always* result in improper deductions, *see id.* at 11, detracts from the importance of the common factual question whether Cannon had a practice of altering employee records. The need for individual analyses shows only what Plaintiffs have never disputed: that damages will be measured individually. That fact, standing alone, does not bar certification. *See supra* Part I. Rather, the dispositive point is that the overarching factual question about Cannon's corporate practice predominates over individualized questions of damages, which "can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses." *Butler*, 727 F.3d at 801.

Because the record here is sufficiently well-developed to show predominance regarding both the spread-of-hours and rest-break claims, and because the other elements of Rule 23 are not in dispute, this Court should, in the

interest of judicial economy, order certification of those two claims on remand. *See, e.g.*, *Leyva*, 716 F.3d at 516 (reversing denial of certification and ordering certification on remand); *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 461 (1st Cir. 2009) (same); *Hassine v. Jeffes*, 846 F.2d 169, 171 (3d Cir. 1988) (same).

CONCLUSION

This Court should reverse the denial of class certification and remand with instructions to certify the class as to the spread-of-hours and rest-break claims.

Dated: February 28, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. Civ. Pro. 32(a)(7)(B) because this brief contains 4,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Scott Michelman