13-3070

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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)

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

A putative class of restaurant workers sued their employer, defendant T.L. Cannon Corp., for wage-and-hour violations. Plaintiffs provided ample evidence supporting their claims that Cannon had a practice of altering employee time records to deduct wages for rest breaks that the employees never took and a practice (and at times a formal policy) of denying other wages required under New York law. In spite of this evidence, the district court held that the fact that each class member's damages would need to be calculated individually was a categorical barrier to a finding that common issues predominate, and therefore to class certification, under Rule 23(b)(3).

The district court erred. This Court and federal courts around the country have long held that common issues can predominate over individual issues, and thus a Rule 23(b)(3) class can be certified, where the common issues pertain to liability but damages must be calculated individually. The district court's denial of class certification here rests on the view that this well-established principle was upended sub silentio by the Supreme Court's decision earlier this year in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). But *Comcast* — an antitrust case in which the plaintiffs had *conceded* that class certification depended on the existence of a classwide theory as to *both* liability and damages — 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).

Unsurprisingly, three other courts of appeals have rejected (and a fourth has, in dicta, disagreed with) the district court's view that *Comcast* requires plaintiffs to present a classwide measure of damages to obtain class certification. No court of appeals has held otherwise. Adopting the district court's reading of *Comcast* would thus create a circuit split. It would also fundamentally alter the contours of class action litigation by replacing the multi-factor inquiry prescribed by the text of Rule 23(b)(3) with a singular focus on the measurement of damages. For these reasons, the denial of class certification should be reversed.

Additionally, because the evidence below overwhelmingly demonstrates that common questions in this case — including whether the defendants had a practice of denying statutorily-required pay and whether the defendants had a practice of altering time records to dock pay for breaks employees never took — predominate over individualized questions, this Court should, in the interest of judicial economy, order certification on remand.

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 plaintiffs' timely petition for leave to appeal was filed within fourteen days on April 12, 2013. Spec. App'x ("SA") 1; Fed. R. Civ. Pro. 23(f). This court granted the petition on August 15, 2013. Joint App'x ("JA") 1985.

ISSUES PRESENTED

1. Did the district court err in denying class certification on plaintiffs' wage-and-hour claims on the ground that the need for an individualized calculation of damages automatically defeats class certification?

2. Should the plaintiff class be certified as to its claims that (a) defendants had a policy and/or practice of failing to pay wages required under New York Labor Law's spread-of-hours provision and (b) defendants had a practice of altering employee records to reflect rest breaks the employees had not taken and as a consequence failed to pay employees for all time worked?

STATEMENT OF THE CASE

The plaintiffs, four former employees at various Applebee's restaurants throughout the State of New York, sued defendants, who owned and operated the restaurants, for various violations of state and federal wage-and-hour laws. JA 1398 (amended complaint). As relevant here, plaintiffs sought to litigate their state-

law claims as a class action under Federal Rule of Civil Procedure 23. (Plaintiffs also sought to litigate their federal Fair Labor Standards Act claim as a collective action, but that claim is not at issue in this appeal.) The magistrate judge recommended certification of one of plaintiffs' state law claims (the spread-of-hours claim) as a class action. JA 1962. The district court, however, denied class certification as to all four of plaintiffs' state-law claims (the spread-of-hours and rest-break claims at issue in this appeal, along with additional claims concerning the payment of laundry fees and uniform fees). SA 4-11. Regarding the spread-of-hours and rest-break claims, the court held that the need to calculate damages on an individualized basis precluded a finding that questions common to all members of the class predominate over individual questions, as required by Rule 23(b)(3). SA 5-10.

Plaintiffs petitioned this Court under Rule 23(f) for leave to appeal the denial of certification as to plaintiffs' spread-of-hours and rest-break claims under state law. This Court granted leave to appeal.

STATEMENT OF FACTS

A. The Parties

Plaintiffs Matthew Roach, Garrett Titchen, Melissa Longo, and Christina Apple were employees at Applebee's restaurants in New York State owned and operated by defendant T.L. Cannon Corp. and its various corporate subsidiaries

and affiliates (hereinafter collectively "Cannon"). Longo worked as an hourly employee at the Applebee's restaurant on Front Street in Binghamton, from April 2004 to January 2009. JA 725-26. Roach worked as an hourly employee at the same location from May 2005 to March 2010. JA 349, 353-54, 421-22. Titchen worked as an hourly employee at the same location from May 2005 to mid-2009 (with a three-month break in 2006). JA 641-43, 646.

Apple worked at the Applebee's restaurant in Clay, beginning in 2005 as a salaried assistant manager. JA 566, 570, 579. In 2007 or 2008 (at Apple's request), she became an hourly, non-managerial employee at the North Syracuse location, JA 571-72. In 2008, she became a salaried, assistant manager at the Auburn location. JA 573-74. From 2009-10, Apple again worked at the Clay restaurant, still as an assistant manager; during 2010, she filled in occasionally as a manager at the DeWitt location. JA 574-76.

Titchen, Longo, and Apple were, during portions of their employment with defendants, "key employees" (also called "key hourlies"), JA 572, 650-51, 726, which is the term Cannon uses to denote an hourly employee who exercises some supervisory responsibility, JA 651. A key employee's responsibility is not co-extensive with that of a manager. For instance, general managers approve rates of pay. JA 730. Managers, not key employees, are responsible for setting schedules. JA 1097. Roach was never a key employee. JA 354.

In May 2010, plaintiffs brought this action in the U.S. District Court for the Northern District of New York against Cannon and several of its officers and managers; the case was filed 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). JA 37 (complaint); *see also* JA 1398 (amended complaint filed August 15, 2012). Two of plaintiffs' claims are relevant to this appeal: a state-law spread-of-hours claim and a state-law claim that Cannon failed to pay its employees for all hours worked because it manipulated their time records to reflect rest breaks the employees did not take (the "rest-break claim").

B. The Spread-of-Hours Claim

During the time period implicated by this lawsuit, NYLL provided that an hourly employee was entitled to an additional hour of pay when his or her 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). *See Roach v. T.L. Cannon Corp.*, 889 F. Supp. 2d 364, 366-67 & n.3 (N.D.N.Y. 2012) (citing 12 N.Y. Codes, Rules & Regs. § 137-1.7 (2010) and *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 242 n.4 (2d Cir. 2011)), *available at* JA 1465-66. Plaintiffs allege that Cannon that did not provide this extra hour of pay.

Before March 2005, Cannon's policy was not to provide any spread-of-hours pay to any hourly employee. *See* JA 1088 (testimony of defendants' Rule 30(b)(6)

deponent Elizabeth Quindoza). In March 2005, Cannon instituted a company-wide policy of providing spread-of-hours compensation only with respect to hourly employees paid at the minimum wage. *See* JA 1080-83, 1085 (Quindoza); *see also* JA 1053-54 (defendants' internal memoranda). Subsequently, as plaintiff Apple testified at deposition, at some point during her time working as a manager between 2005 and 2007, Cannon instructed restaurant managers to stop reporting ten-hour spreads; managers were not instructed to resume such reporting until 2010. JA 578-81. Cannon's Rule 30(b)(6) deponent characterized Cannon's policies and practices as generally applicable, making no distinction among restaurant locations throughout the state. *See, e.g.*, JA 1080-88 (Quindoza).

The result of these policies and practices was that no employees received spread-of-hours pay before March 2005, and even after Cannon began providing some spread-of-hours pay, workers making more than minimum wage continued to be denied spread-of-hours pay, and at times minimum-wage employees were likewise denied proper compensation under state law for working ten-hour spreads. *See* JA 1136-1372 (plaintiffs' declarations from employees at defendants' restaurants throughout New York State, 73 of whom attested that they did not receive spread-of-hours pay); *accord* JA 1564-65 (defendants' catalogue of plaintiffs' declarations reflecting same number of employees with this claim); *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).

Beginning in 2010, defendants converted to an automated system but continued to deny spread-of-hours pay to employees who were paid more than minimum wage. *See* JA 1083-85 (Quindoza). This practice continued until January 2011, when defendants began providing spread-of-hours-pay to all hourly employees, including those who made more than minimum wage. *See* JA 1080-81 (Quindoza).

C. The Rest-Break Claim

The second claim at issue in this appeal is that defendants violated NYLL by failing to pay employees for all time worked because of a common practice among Cannon's managers and supervisors of altering employee time records to indicate that employees took rest breaks that the employees did not in fact take. According to two of defendants' former managers who worked at several different restaurant locations, defendants trained their restaurant 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 manager's 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).

Key employees likewise were trained to manipulate time records to reflect breaks not taken. *See, e.g.*, JA 696-97, 785-87, 799. Supervisors (either key hourlies or managers) would also sign time records purportedly verifying breaks employees did not actually take, JA 738-39, and supervisors would force workers to sign records indicating that they had received breaks they had not in fact taken, JA 591-92, 792-93. Managers received bonuses based on their ability to keep employee hours low by manipulating time records, and 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; *see also* JA 1136-1372 (plaintiffs' declarations from employees at defendants' restaurants throughout New York State, 51 of whom attested that employees had their pay records altered to reflect breaks that they did not take); *accord* JA 1564-65 (defendants' catalogue of plaintiffs' declarations reflecting same number of employees with this claim).

As a result of this practice, employees were docked pay for breaks that they did not take. *See, e.g.*, JA 378, 521-25, 583, 599, 882-84 (testimony of workers who experienced this practice); *see also* JA 561, 585-86, 807-08 (testimony of

workers who were aware that other workers had the same experience). In discovery, plaintiffs Longo and Roach reviewed their break logs as produced by defendants and attested that a substantial portion of the entries were incorrect and contained either no signature or a forged signature. JA 1394-97 (Roach and Longo Decls.); *see also* JA 736 (Longo: "Breaks were taken out if I didn't take a break."); JA 776 (Longo: "in general [time-card alteration] happened to all of us [employees]"); JA 521-25 (Roach reviewing discrepancies between time records and pay stubs and explaining the implication of those discrepancies: "It means, if I didn't get a break, as I indicated on my time slip, I was being docked for one anyway.").

D. Proceedings Below

In March 2011, the district court certified plaintiffs' FLSA collective action with respect to employees who worked at one particular restaurant; the court ruled that broader collective-action certification and class certification would depend on what additional facts were adduced in discovery. *See* JA 99 (magistrate judge's report, recommendation, and order), *adopted by district court*, JA 135-36. In August 2012, the district court granted defendants partial summary judgment; as relevant to the spread-of-hours claim, the court, noting a split of authority on this point, 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 367-69, *available at* JA 1466-69.

On March 5, 2013, the magistrate judge issued a report, recommendation, and order, which (as relevant here) recommended that class certification be granted with respect to the NYLL spread-of-hours claim and denied with respect to the NYLL rest-break claim. *See* JA 1950-60.[1] Analyzing predominance under Rule 23(b)(3) regarding the spread-of-hours claim, the magistrate judge, 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 [of] pay when they worked a ten-hour spread" — is subject to generalized proof and would predominate over 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 earned, which ultimately is a question bearing on damages, not liability.

JA 1960.

[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 (the laundry and uniform claims). JA 1931-35, 1943-49.

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." JA 1952-53. The magistrate concluded that the rest-break claim satisfied the Rule 23 requirements of numerosity, commonality, and typicality, JA 1940, 1952-54, but recommended denying certification because of concerns about adequacy of representation. Specifically, the magistrate noted that three of the four named plaintiffs (Longo, Apple, and Titchen) had at some time, in a supervisory capacity, shaved 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. JA 1955-57. 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 supervisory 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* JA 1965-69. Plaintiffs also argued that, even if a conflict of interest existed, the court could

certify a rest-break class represented only by plaintiff Roach, who never exercised supervisory responsibilities. *See* JA 1969-71.

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. SA 4-11.[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 common issues. However, the court ruled that the Supreme Court's recent decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), foreclosed certification under Rule 23(b)(3) of any class for which damages would need to be calculated on an individual basis. SA 6. For this reason alone, the court denied certification of a Rule 23(b)(3) class on the spread-of-hours claim. SA 5-7. Regarding the rest-break claim, the district court once again found it unnecessary to address the parties' objections, *see* SA 8, because, "[a]s with the 10-hour spread claim, Plaintiffs have offered no model of damages susceptible of measurement across the entire putative break period class." SA 9-10. Therefore, the court held, *Comcast* by itself foreclosed certification of a Rule 23(b)(3) class. SA 10.

[2] Defendants also appealed the magistrate's conditional certification of a FLSA collective action; in a later order, the district court affirmed but narrowed the certification. JA 1972-84. That decision is not on appeal.

Plaintiffs sought leave to appeal under Rule 23(f), and this Court granted leave on August 15, 2013. JA 1985.

SUMMARY OF ARGUMENT

This Court and its sister circuits have long held that the need to calculate damages on an individualized basis does not automatically defeat a showing that common issues predominate over individual issues under Rule 23(b)(3). Contrary to the view of the district court, the Supreme Court's *Comcast* decision did not alter that basic tenet of class-action jurisprudence. The question of whether individualized damages are a per se bar to predominance was not even before the Court in *Comcast*, in which both parties had agreed that the plaintiffs' antitrust case depended on a showing that the damages resulting from the defendants' anticompetitive practices were measurable on a classwide basis. In the *Comcast* majority's own view, its holding that the theory of damages proffered in support of class certification must match the class's theory of liability did not break new ground, but rather reflected a "straightforward application of class-certification principles." *Comcast*, 133 S. Ct. at 1433. Thus, *Comcast* did not hold, as the district court believed, that a finding of predominance under Rule 23(b)(3) always requires a showing that damages can be calculated on a classwide basis regardless of the plaintiffs' theories of liability and damages. The Sixth, Seventh, and Ninth

Circuit Courts of Appeals have already rejected the reading of *Comcast* adopted by the district court below, and the Tenth Circuit has done so in dicta.

Turning a classwide measure of damages into the sine qua non for predominance would also contravene the language of Rule 23(b)(3): that rule lists four factors pertinent to the predominance inquiry, none of which is the availability of a classwide measure of damages. The district court's rule would have far-reaching effects on wage-and-hour class actions, where damages are almost always individualized because each employee in the class has worked a different number of hours. This unremarkable characteristic of wage-and-hour cases has not previously been a barrier to class treatment, and *Comcast* does not call into question the courts' historic recognition that wage-and-hour classes may be certified. Because the district court's denial of class certification rested on a legally erroneous interpretation of *Comcast*, the denial of certification should, at a minimum, be reversed.

Additionally, the evidence in the record is more than sufficient to justify class certification. Plaintiffs have submitted abundant evidence showing the prevalence of the illegal practices for which they seek relief, including declarations and deposition testimony from employees, supervisors, and managers at various of Cannon's restaurants throughout the state demonstrating that Cannon trained its managers and supervisors to alter time records and had a policy and practice of

denying spread-of-hours pay. The plaintiffs have thus raised several common questions — including, chiefly, whether the defendants had a policy and/or practice of denying spread-of-hours pay and whether the defendants had a practice of altering time records to dock pay for breaks their employees never took — that predominate over the individual question of the specific amount of damages each class member should receive. The other prerequisites for class certification are not in serious dispute. Once the district court's erroneous view of *Comcast* is dispensed with, the record shows that certification is warranted. In the interest of judicial economy, this Court should so hold and order certification on remand.

ARGUMENT

This Court "review[s] both a district court's ultimate decision on class certification and its rulings as to individual Rule 23 requirements for abuse of discretion," but "[t]o the extent a district court's ruling on an individual Rule 23 requirement involves an issue of law, [appellate] review is de novo." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 237 (2d Cir. 2012) (citations omitted).

Here, because the question whether a classwide measure of damages is required to satisfy Rule 23(b)(3) is a question of law, de novo review applies. Additionally (to the extent the abuse of discretion standard applies), where, as here, the Court is "reviewing a denial of class certification, we accord a district court noticeably less deference than when we review a grant of class certification." *Id.*

I. THE DISTRICT COURT'S RULING THAT THE NEED FOR INDIVIDUALIZED DAMAGES CALCULATIONS DEFEATS PREDOMINANCE MISREADS *COMCAST* AND CONFLICTS WITH THIS COURT'S JURISPRUDENCE AND THE DECISIONS OF THREE OTHER COURTS OF APPEALS.

A. This Court And Its Sister Circuits Agree That Predominance Does Not Require A Classwide Measure Of Damages.

To certify a class action seeking damages under Rule 23, plaintiffs must demonstrate, among other things, that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. Pro. 23(b)(3). Predominance, in turn, is evaluated by reference to four factors: "(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." *Id.*

This Court has never held, as the district court did below, that the need for individualized calculations of damages defeats predominance. On the contrary, this Court's cases demonstrate 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, e.g., Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) ("If Plaintiffs succeed in

showing that the expediters, silver polishers, coffee makers, and/or managers were not eligible to receive tips 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 Argentina*, 606 F.3d 53, 57-58 (2d Cir. 2010) ("[Defendant] also 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."); *cf. 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 agree with this Court's well-established rule that the need for an individualized measurement of damages does not categorically 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. Independent Ass'n of Continental Pilots*, 242 F.3d 290, 298 (5th Cir. 2001).

B. *Comcast* Did Not Impose A New Rule That The Need To Measure Damages Individually Defeats Predominance.

The district court rested its departure from this Court's view, and from the longstanding consensus of the circuits, on the Supreme Court's decision in *Comcast*. The lesson of that case, however, is not that a classwide measure of damages is a prerequisite for predominance, but that the theory of damages must measure the harm flowing from the theory of liability. In *Comcast*, a class of cable subscribers sued a service provider for antitrust violations. *Comcast*, 133 S. Ct. at 1430. The plaintiffs advanced four separate theories of "antitrust impact," i.e., four theories of liability under the Sherman Act, and offered expert testimony that measured the damages to the consumers from the four practices the plaintiffs identified. *Id.* at 1430-31. The district court found that only one of the four theories (but not the other three) was capable of classwide proof. *Id.* Even though the plaintiffs' expert did not isolate the damages caused by the one theory of antitrust impact that the court determined to be capable of classwide proof, the district court certified the class and the Third Circuit affirmed. *Id.* at 1431.

The Supreme Court reversed, explaining that, "at the class-certification stage (as at trial), 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.'" *Id.* at 1433 (quoting ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010)). Because the class was certified as to only one of four theories of liability, the class would be entitled only to damages stemming from that theory. *Id.* Plaintiffs had never presented proof pertaining to that theory alone, so class certification was inappropriate. *Id.* at 1434-35.

Here, no one disputes that the plaintiffs' theories of damages (that they are owed spread-of-hours wages and wages for work time erroneously recorded as rest breaks) are directly tied to their theories of liability (that the defendants unlawfully denied them these wages). *Comcast* therefore poses no impediment to class certification.

Although *Comcast* criticized the plaintiffs in that case for having failed to "establish[] that damages are capable of measurement on a classwide basis," *id.* at 1433, this isolated statement did not establish a new requirement that predominance under Rule 23(b)(3) requires a classwide measure of damages. In fact, the question of whether a classwide measure of damages is required was not before the Supreme Court: the district court had already held and *the parties had*

not contested that the plaintiffs in that case had to show "that the damages resulting from that injury were measurable on a class-wide basis through use of a common methodology." *Id.* at 1430 (citation and internal quotation marks omitted). Moreover, the Supreme Court gave no indication that its reference to a "classwide basis" would apply beyond a case in which the parties have agreed that both liability and damages must be "measureable on a class-wide basis through the use of a common methodology." *Id.* 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 1437 (Ginsburg & Breyer, JJ., dissenting). The majority did not disavow or contradict that characterization of the law. On the contrary, the Court characterized its holding as "turn[ing] on the straightforward application of class-certification principles." *Id.* at 1433 (majority opinion).

Unsurprisingly, all three courts of appeals to have considered the question have rejected the view that *Comcast* imposes a new rule that predominance cannot be shown in the absence of a classwide measure of damages. The most thorough

appellate analysis of *Comcast* to date is the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), which held that class certification was appropriate in a case seeking damages for mold and other problems caused by defective washing machines. *See id.* at 797-98, 802. The Seventh Circuit read *Comcast* as holding that "a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges." *Id.* at 799 (emphasis in original). The court of appeals went on to explain why that problem implicated predominance:

> Because the class in *Comcast* was (in the view of the majority) seeking damages beyond those flowing from the theory of antitrust injury alleged by the plaintiffs, the possibility loomed that "questions affecting only individual members" of the class would predominate over questions "common to class members," rather than, as Rule 23(b)(3) requires, the reverse.

Id. at 800.

The Seventh Circuit pointedly declined to read *Comcast* as the district court did in this case: "It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages." *Id.* at 801. The court noted that, in appropriate cases, damages in a class action can be determined in individual hearings, in settlement negotiations, or through the creation of subclasses; accordingly, "the fact that damages are not identical across all class members should not preclude class certification." *Id.*

Like the *Butler* decision, *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013), read *Comcast* as "instruct[ing] that the 'model purporting to serve as evidence of damages . . . must measure only those damages attributable to that theory.'" *Id.* at 860 (quoting *Comcast*, 133 S. Ct. at 1433) (omission in *Whirlpool*). *Whirlpool* was also a class action concerning washing machines alleged to have a design defect causing them to grow mold. *Id.* at 844. The Sixth Circuit affirmed class certification because liability questions common to the class — whether the alleged design defects caused the mold, and whether the manufacturer adequately warned consumers about the problem — predominated over individual issues. *Id.* at 859. Because *Comcast* "'turn[ed] on the straightforward application of class certification principles,'" *id.* at 860 (quoting *Comcast*, 133 S. Ct. at 1433), it did not alter 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 861 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg & Breyer, JJ., dissenting)) (internal quotation marks omitted).

In addition to the fact that *Comcast* concerned congruence between theories of liability and damages (as opposed to the necessity of a classwide measure of damages), *Whirlpool* identified an additional reason that *Comcast* could not have precluded the certification of a class where damages must be calculated

individually: Rule 23 permits the certification of classes "with respect to particular issues." Fed. R. Civ. Pro. 23(c)(4); *see Whirlpool*, 722 F.3d at 860; *accord Butler*, 727 F.3d at 800 (flagging this same device as a means to handle an individualized damages inquiry). Because the district court in *Whirlpool* had bifurcated liability and damages under that rule, *Comcast*'s discussion of damages could not foreclose predominance as to the liability class. *Whirlpool*, 722 F.3d at 860. The same result would obtain here if the district court had certified a liability-only class. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("[W]e hold that a court may employ subsection (c)(4) to certify a class as to liability[.]").

In the only appellate wage-and-hour decision to consider the effect of *Comcast*, the Ninth Circuit reversed the denial of certification for a class of workers claiming violations of state wage-and-hour law, including rounding down the hours that employees worked and failing to pay employees nondiscretionary bonuses. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512-13 (9th Cir. 2013). Citing the Supreme Court's observation in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that "individualized monetary claims belong in Rule 23(b)(3)," *id.* at 2558, the Ninth Circuit reaffirmed that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514. *Comcast* did not change that result, the court explained; rather, like the Sixth and Seventh Circuits, the Ninth Circuit concluded that *Comcast* stands for the

principle that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Id.*

In dicta, the Tenth Circuit has agreed, after *Comcast*, that "there are ways to preserve the class action model in the face of individualized damages." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (citing *Comcast*, 133 S. Ct. at 1437 & n.* (Ginsburg & Breyer, JJ., dissenting)). That court also cited with approval this Court's statement that "the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification"; instead, that fact is "a factor that we must consider in deciding whether issues susceptible to generalized proof outweigh individual issues." *Id.* (quoting *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), *abrogated in part on other grounds*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)) (internal quotation marks omitted).

Thus, the district court's reading of *Comcast* has so far been unanimously rejected by the federal appellate courts to consider the question. No court of appeals has embraced the district court's view that the need to calculate damages individually precludes certification.[3]

[3] *Halvorson v. Auto-Owners Insurance Co.*, 718 F.3d 773 (8th Cir. 2013), relied on *Comcast* to reverse class certification in an insurance breach-of-contract case because of a failure to show predominance, but the individuated nature of the

(footnote continues on the next page)

C. The District Court's Rule Is Inconsistent With The Text Of Rule 23 And Would Eviscerate Wage-And-Hour Class Actions.

Beyond *Comcast* itself and the decisions of several courts of appeals, there are additional reasons to reject the district court's view that *Comcast* overruled this Court's (and many other courts') predominance jurisprudence sub silentio and held that the need to calculate damages individually is a per se bar to a finding of predominance. First, such a categorical rule would be 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. Pro. 23(b)(3) ("The matters pertinent to [the questions of predominance and the superiority of the 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 both add to the list a new factor that is not in the text and simultaneously elevate that factor to a dispositive requirement for all Rule 23(b)(3) classes. Respecting the

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claims in that case went far beyond damages: plaintiffs' standing and defendants' liability also required individualized inquiries. *See id.* at 779-80.

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 et al., Fed. Prac. & Pro. § 1778 (3d ed. 2005) ("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 an offhand stroke.

Second, 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*, 133 S. Ct. at 1431 (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, and class actions have long been certified notwithstanding differences in the amounts due to individual workers. 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 largely from defendants' own payroll records. Most of the rest-break inaccuracies in defendants' time records concern breaks erroneously inserted into the *middle* of employees' work time, so most of the records should reflect the right overall spreads of hours from the *start* to the *end* of employees' work time. The NYLL violations here with respect to the spread-of-hours provision arise not from the absence of such records, but from defendants' failure either to take note of, or to pay extra wages for, instances in which employees worked ten-hour spreads.

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. Such a rule would have a particularly sweeping effect as to wage-and-hour cases like this one, because, as the Ninth Circuit pointed out, "damages determinations are individual in nearly all wage-and-hour class actions." *Leyva*, 716 F.3d at 513. 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.

In sum, this Court's case law makes clear that the need for individualized damages calculations does not categorically preclude a showing of predominance. The Supreme Court's decision in *Comcast* does not undermine this principle, as all the courts of appeals that have addressed the issue agree. The district erroneously held otherwise and denied class certification for that reason alone. Because the denial of certification was based on an error of law, that decision should be reversed.

II. IN THE INTEREST OF JUDICIAL ECONOMY, BECAUSE THE RECORD IS SUFFICIENT TO SHOW THE PROPRIETY OF CERTIFICATION, THIS COURT SHOULD ORDER THAT THE SPREAD-OF-HOURS AND REST-BREAK CLASSES BE CERTIFIED.

The district court did not take issue with any of the magistrate judge's findings in support of his recommendation that the spread-of-hours claim be certified as a class action, and the record here is sufficiently well-developed regarding both that claim and the rest-break claim that this Court should 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).

A. Numerosity, Commonality, Typicality And Adequacy Of Representation Under Rule 23(a) Are Satisfied.

As a prerequisite to certification, plaintiffs must show (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. Pro. 23(a). Each is satisfied with regard to the spread-of-hours and rest-break claims.

First, numerosity is presumed for a class of at least 40 members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiffs' complaint covers 53 Applebee's restaurants in New York owned and operated by Cannon, JA 1399 (amended complaint), and as the magistrate judge observed, "[g]iven the number of locations and employees at each restaurant it appears that there may be as many as 5,300 putative class members." JA 126. Defendants themselves have argued that certification will encompass "thousands" of employees. JA 96. And more than 70 employees submitted statements in support of plaintiffs' claims regarding either spread-of-hours pay, rest-break manipulation, or both. *See* JA 1136-1372 (plaintiffs' declarations from employees at defendants' restaurants throughout New York State, 74 of whom attested that they did not receive spread-of-hours pay and/or that employees had their pay records altered to reflect breaks that they did not take); *accord* JA 1564-65 (defendants' catalogue of plaintiffs' declarations reflecting same number of employees with these claims). No court could permissibly find that numerosity is not met.

Second, commonality requires at least one "common contention . . . of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551. Following *Dukes*, this Court and others have held that evidence of common policies and practices that defendants apply to the detriment of plaintiffs in wage-and-hour cases establish commonality under Rule 23(a)(2). *See Shahriar*, 659 F.3d at 252 ("[T]he District Court properly found there to be questions of law or fact common to the class, Rule 23(a)(2), since the Plaintiffs' NYLL class claims all derive from the same compensation policies and tipping practices of [defendants]."); *see also, e.g.*, *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 615 (S.D.N.Y. 2012) (common issues included "whether Defendant had a policy of not paying Marketing Representatives and Specialists overtime premium pay"); *Espinoza v. 953 Assocs. LLC*, 280 F.R.D. 113, 127 (S.D.N.Y. 2011) (commonality met based on "Defendants' practice and policy regarding 'family meal' breaks, cashing out of servers, and altering clock-in and clock-out times"); *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 354, 356 (E.D.N.Y. 2011) (commonality met based on "defendant's practice, at least in some circumstances, of failing to pay prevailing wages" and plaintiff's "significant proof that defendant

routinely failed to account for labor performed on public works projects and pay prevailing wages for covered work").

For the spread-of-hours claim, plaintiffs' common contention, supported by evidence submitted to the district court, is that until March 2005 Cannon had a policy of not paying any employee the spread-of-hours wages required by NYLL. Additionally, for at least three years between 2005 and 2010 (the exact dates are not clear from the record), Cannon did not have its managers report ten-hour spreads at all. *See* Statement of Facts, Section B. For the rest-break claim, plaintiffs' common contention, also supported by ample evidence submitted to the district court, is that Cannon had a practice of deducting breaks from the time records of hourly employees when the employees did not actually take a break; Cannon's former managers and supervisory employees testified that defendants explicitly trained them to do this. *See* Statement of Facts, Section C. The questions of whether these policies and practices existed indisputably establish commonality. The magistrate judge so concluded and the district court did not disagree.

Third, typicality is met largely for the same reasons as commonality: plaintiffs' injuries all flowed from the same conduct on the part of defendants. *See Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *see generally Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). The magistrate judge had

no difficulty concluding that numerosity, commonality, and typicality were satisfied with respect to the spread-of-hours and rest-break claims, and the district court did not find otherwise. *See* JA 1940, 1950-54. On these facts, it would be an abuse of discretion not to find typicality.

Finally, regarding adequacy of representation, "the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). Here, there is no question that the representative plaintiffs are interested in pursuing the class claims vigorously, as their claims will stand or fall together with those of the class. The magistrate judge concluded that adequacy of representation was satisfied with respect to the spread-of-hours claim and the district court did not find otherwise. *See* JA 1955.

Regarding the rest-break claim, the magistrate judge concluded that adequacy of representation foundered because three of the named plaintiffs (Apple, Longo, and Titchen) had at some points during their employment had supervisory responsibilities that included shaving time off workers' time records; therefore, the magistrate judge reasoned, they could have interests antagonistic to those of the class because they could be liable for those actions. *See* JA 1955-57. This concern is unfounded, because, as a matter of law, none of the three qualify as "employers"

under NYLL.[4] But this Court need not even reach that question, because the adequacy of plaintiff Roach, who never exercised supervisory responsibility, *see* JA 354, was not questioned either by the magistrate judge or the district court. A class may be represented by a single named plaintiff. *See, e.g., Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) (explaining that the death of the single putative class representative would not moot the case "if *one* of the proposed intervenors can be substituted as a named plaintiff" (emphasis added)); *accord Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 961 (9th Cir. 2009); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 467 (S.D.N.Y. 2005); 7A Wright & Miller et al., Fed. Prac. & Pro. § 1765 (3d ed. 2005). Therefore, it would be an

[4] To be liable for these actions, Apple, Longo, and Titchen would have to qualify as "employers" under NYLL, an inquiry that depends on the "economic reality" of the relationship, including whether the alleged employer had the power to hire and fire, supervised and controlled work schedules or conditions of employment, determined the rate and method of payment, and maintained employment records. *See, e.g., Lauria v. Heffernan*, 607 F. Supp. 2d 403, 409 (E.D.N.Y. 2009) (applying economic reality test to NYLL definition of "employer"); *Chu Chung v. New Silver Palace Rests., Inc.*, 272 F. Supp. 2d 314, 318 n.6 (S.D.N.Y. 2003) (same); *Ovadia v. Office of Indus. Bd. of Appeals*, 918 N.Y.S.2d 56, 57 (N.Y. App. Div. 2011) (same), *rev'd on other grounds*, 19 N.Y.3d 138 (N.Y. 2012); *see generally Herman v. RSR Security Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (setting forth economic reality test). As the record reflects, Apple, Longo, and Titchen lacked any power to hire or fire, control schedules or conditions of employment, or determine the rate and method of payment. *See* Statement of Facts, Section A. They thus could not be held liable as "employers" and so there is no divergence of interest between these putative class representatives and the rest of the class.

abuse of discretion not to hold at least plaintiff Roach to be an adequate class representative for the rest-break claim.

B. Predominance And Superiority Under Rule 23(b)(3) Are Satisfied.

The factors Rule 23(b)(3) urges courts to consider in determining predominance and superiority all favor certification. The class members have no interest in individually controlling the prosecution or defense of separate actions, *see* Fed. R. Civ. Pro. 23(b)(3)(A), particularly since some class members' damages might be as small as a few hours' pay at minimum wage. Counsel are not aware of any pending individual cases concerning the controversy that class members have separately commenced. *See* Fed. R. Civ. Pro. 23(b)(3)(B). It is administratively easier to consolidate the claims of the state-wide class in one judicial district rather than risk competing and potentially contradictory findings from the four different federal district courts throughout New York. *See* Fed. R. Civ. Pro. 23(b)(3)(C). Finally, the class action will not be difficult to manage, *see* Fed. R. Civ. Pro. 23(b)(3)(D), since there are just a few key factual propositions, common to all class members, that are necessary to establish liability, and a portion of the damages (for the spread-of-hours claim) are likely provable from defendants' own payroll records.

Moreover, the efficiency of class proceedings — permitting the resolution via a single proceeding of wage-and-hour claims by Applebee's employees at 53

restaurants throughout New York — underscores the superiority of the class action device as a method for adjudication here. *See, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418, 436 (S.D.N.Y. 2009) ("A class action will also save enormous litigation costs for all parties and allow them to efficiently prosecute their claims and defenses."). That some employees' claims may be so small (only a few hours' pay at minimum wage, potentially) that individual actions are not viable also shows the superiority of a class action here. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))).

Finally, predominance, the Supreme Court has recently reiterated, "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (citations, internal quotation marks, and source's alternation marks omitted, and emphasis in original); *see also In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) ("The predominance requirement is satisfied 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." (citations and internal quotation marks omitted)). Nor, as discussed at length in Part I, is a classwide measure of damages the sine qua non of predominance.

Predominance is satisfied here because at the heart of this litigation are two common questions: (1) Did the defendants have a policy and/or practice resulting in failing to pay spread-of-hours wages required by NYLL? (2) Did the defendants have a practice of altering employees' time records to dock pay for breaks the employees did not in fact take? If the answers to these questions are yes, then liability is established (on the spread-of-hours claim for question one; on the rest-break claim for question two). *Cf.* JA 1960 (magistrate judge considered predominance as to just one claim, spread-of-hours, and found it satisfied).

The spread-of-hours claim also implicates the common legal question, which will determine Cannon's liability for a subset of the class, of whether New York's spread-of-hours law covers employees making more than minimum wage. The district court answered this question in the negative but noted a split of authority on the issue. *See Roach*, 889 F. Supp. 2d at 367-69, *available at* JA 1466-69. Regardless of how the question is answered, it is still a common question. And even if the district court's answer is correct (a question that cannot yet be tested on

appeal), common questions about defendants' policies would still exist regarding the spread-of-hours claim of *minimum-wage* employees for at least two periods of time. First, Cannon's 30(b)(6) representative admitted that during the period prior to March 2005 — a period that includes non-time-barred claims, *see* N.Y. Labor Law § 198(3) (six-year statute of limitations); JA 37 (case filed May 2010) — defendants did not pay any spread-of-hours wages. JA 1088. Second, even after this policy changed, there was a several-year period during which defendants had a practice of not having restaurant managers report ten-hour spreads, and hence not paying spread-of-hours wages, even for minimum-wage employees. *See* JA 578-81 (plaintiff Apple testifying that, during her time working as a manager between 2005 and 2007, Cannon instructed restaurant managers to stop reporting ten-hour spreads entirely, and that managers were not instructed to resume such reporting until 2010).

Assuming liability is established, "the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses." *Butler*, 727 F.3d at 801. Determination of damages regarding the spread-of-hours claim would be particularly simple because they 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 (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). Thus the common questions regarding defendants' practices predominate over the individualized questions of damages, some of which might be easily proved.

Because the requirements of Rule 23(b)(3) are satisfied based on the current record — indeed, neither the magistrate judge nor the district judge suggested otherwise, except for the court's erroneous interpretation of *Comcast* — it would be an abuse of discretion not to certify the spread-of-hours and rest-break classes. Therefore this Court should, for the sake of judicial efficiency, order these two classes certified on remand.

CONCLUSION

For the foregoing reasons, 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.

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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 9,143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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