No. 10-1884-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALIM SHAHRIAR, et al.,
Plaintiffs-Appellees,

v.

SMITH & WOLLENSKY RESTAURANT GROUP, INC.
d/b/a PARK AVENUE RESTAURANT, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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On behalf of the Department of Labor ("Department"), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellees, who assert federal and state law wage claims on behalf of themselves and other employees. There is nothing in the Fair Labor Standards Act ("FLSA" or "Act") or its "opt-in" process for collective actions that conflicts with the certification of the employees' state law wage claims as a class action under Federal Rule of Civil Procedure 23's "opt-out" process or prevents the exercise of supplemental jurisdiction over their state law wage claims.

INTEREST AND AUTHORITY

Federal Rule of Appellate Procedure 29(a) authorizes the Secretary to file this brief as *amicus curiae*.

The Department has a substantial interest in the proper interpretation of the FLSA because the Secretary administers and enforces the Act. See 29 U.S.C. 204, 211(a), 216(c), 217. Specifically, the Department is concerned that the arguments advanced by Defendants-Appellants ("Park Avenue") misinterpret section 16(b) of the FLSA, 29 U.S.C. 216(b), and wrongly invoke the Act's requirement that employees affirmatively opt in to FLSA collective actions as a bar against state wage law class actions in federal courts. Indeed, nothing in the FLSA's text or history precludes a district court from exercising supplemental jurisdiction over state wage law class claims and from certifying those claims as a Rule 23 class action. As the Seventh Circuit did in Ervin v. OS Rest. Servs., Inc., 632 F.3d 971 (7th Cir. 2011), this Court should reject any attempt to use the FLSA to bar certification of a class action of state law wage claims in federal court where an FLSA collective action is pending.

STATEMENT OF THE ISSUE

Whether an "opt-in" collective action under section 16(b) of the FLSA conflicts with an "opt-out" class action of state law wage claims under Federal Rule of Civil Procedure 23, thus

precluding a federal court, in a lawsuit where there is an FLSA collective action, from exercising supplemental jurisdiction over the state law wage claims pled as a class action and from certifying the state law wage claims as a Rule 23 class action.

STATEMENT OF THE CASE

1. Employees often bring lawsuits in federal courts in which they pursue an FLSA collective action and a class action under state wage laws (known as "dual actions"). The FLSA permits employees to bring a collective action on behalf of themselves and other employees similarly situated, but requires other employees to opt in by giving written consent in order to participate in and be bound by the collective action. 29 U.S.C. 216(b). The employees invoke a district court's supplemental jurisdiction under 28 U.S.C. 1367 and seek to certify the state law wage claims as a class action under Rule 23, which governs class actions in federal courts and provides that all members of the class are bound by any judgment affecting the class unless they opt out. See Fed. R. Civ. P. 23(c)(2)(B).

2. Plaintiffs-Appellees brought a dual action in the District Court for the Southern District of New York on behalf of themselves and their fellow waiters against a Park Avenue restaurant. They allege that Park Avenue violated the minimum wage and overtime provisions of the FLSA and the New York Labor Law ("NYLL"), took illegal deductions from their pay by

misappropriating their tips in violation of the NYLL, and violated the NYLL's "spread of hours" requirement. The employees pled their FLSA claims as a collective action and their NYLL claims as a class action.

The employees moved to conditionally certify their FLSA claims as a collective action and requested that the district court facilitate written notice to the waiters who were eligible to participate. The employees and Park Avenue agreed to send notices to those waiters who were eligible to participate in the FLSA collective action. The notice afforded the waiters the opportunity to opt in to the FLSA collective action; 22 of the approximately 172 eligible waiters gave their written consent and opted in (with the named plaintiffs, the FLSA collective action includes 25 employees).

The employees later moved for class certification of their NYLL claims pursuant to Rule 23. The district court held a hearing on the motion, granted the motion without issuing a written opinion, and certified the employees' NYLL claims as a class action. Pursuant to Rule 23(f), Park Avenue sought permission from this Court to appeal the order certifying the employees' NYLL claims as a class action, which this Court granted.

3. Park Avenue argues that Congress' intent in requiring in section 16(b) that employees affirmatively opt in to FLSA

collective actions is undermined when employees bring a lawsuit alleging both an FLSA collective action and a Rule 23 class action. See Appellants' Brief, 9-11. It asserts that there is an inherent conflict between an opt-in collective action and an opt-out class action, especially given that the number of employees in the opt-out class is likely much larger than the number in the opt-in collective action. See id. at 18-23. Park Avenue further asserts that Congress' intent behind section 16(b)'s opt-in requirement was to prevent employees from using an FLSA collective action as the basis for a district court to exercise supplemental jurisdiction over an opt-out Rule 23 class. See id. at 18-20. Thus, according to Park Avenue, the district court "undermine[d] the Congressional intent of the FLSA by a procedural fiction." Id. at 20. Finally, Park Avenue claims that dual actions are "impractical," "unfair," and "offensive to the structure of the FLSA" on the ground that those employees who do not opt in to the FLSA collective action and do not opt out of the Rule 23 class action "could very well have their FLSA cause of action extinguished" because their FLSA claims will nonetheless be adjudicated by the dual action. Id. at 21-22.

SUMMARY OF ARGUMENT

Private actions by employees under the FLSA and state wage laws that are brought as part of the same federal lawsuit are an

essential complement to the Secretary's enforcement of the FLSA. Such dual actions are envisioned by Congress and are permissible under the FLSA. The plain text of 28 U.S.C. 1367, providing for federal courts' exercise of supplemental jurisdiction over state law claims, indicates that Congress intended state law claims to go forward with federal law claims when the claims are sufficiently related, unless a specified exception applies. Moreover, although section 16(b)'s opt-in process is different from Rule 23's opt-out process, that difference does not lead to the result that they are in conflict or incompatible. There is no basis in the text of section 16(b) for the proposition that Rule 23 state wage law class actions are incompatible with the FLSA's opt-in collective action process. In fact, in enacting the FLSA, Congress did not attempt to fully regulate the payment of employees' wages to the exclusion of state law remedies; rather, the FLSA makes clear that states may enact wage laws (such as the NYLL) that are more protective than the FLSA. See 29 U.S.C. 218(a).

Additionally, nothing in the legislative history of section 16(b)'s opt-in provision indicates that Congress intended to prevent a court from exercising supplemental jurisdiction over, or to otherwise bar or limit, state wage law class actions. Indeed, Congress enacted section 16(b)'s opt-in process in response to a wave of particular FLSA lawsuits over 60 years

ago, and not to affect or prohibit class certification of state law wage claims under Rule 23.

Thus, contrary to Park Avenue's arguments, the FLSA does not bar supplemental jurisdiction over, or certification of, a class of state law wage claims; federal courts should conduct their 28 U.S.C. 1367 supplemental jurisdiction and Rule 23 class certification analyses without recourse to section 16(b) as a basis for the state law class action not to proceed.[1]

ARGUMENT

DUAL ACTIONS ARE PERMISSIBLE BECAUSE NOTHING IN THE TEXT OR HISTORY OF SECTION 16(b) PREVENTS A DISTRICT COURT FROM EXERCISING SUPPLEMENTAL JURISDICTION OVER STATE LAW WAGE CLAIMS AND CERTIFYING THEM AS A RULE 23 CLASS ACTION

A. Congressional Presumption in Favor of Dual Actions

As a threshold matter, 28 U.S.C. 1367 reflects a strong presumption by Congress in favor of having related federal and state law claims proceed together in one federal lawsuit. Specifically, a federal court "shall have supplemental jurisdiction" over all state law claims that are "so related" to the federal claims over which the court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution," unless an enumerated exception applies. 28

[1] Park Avenue makes numerous other arguments against supplemental jurisdiction and class certification; however, this brief addresses only those arguments that implicate the FLSA.

U.S.C. 1367(a). By its terms, 28 U.S.C. 1367 extends the sweep of supplemental jurisdiction to the limits of Article III of the Constitution. See id.; see also Jones v. Ford Motor Credit Co., 358 F.3d 205, 212-13 (2d Cir. 2004) (28 U.S.C. 1367 explicitly extends federal courts' jurisdiction to Article III's limits). Park Avenue ignores this congressional presumption, which undermines its argument that FLSA collective actions and Rule 23 class actions in the same lawsuit are inherently in conflict.

B. Nothing in the Text of Section 16(b) Precludes Concurrent State Law Wage Claims from Proceeding in the Same Federal Lawsuit

1. The starting point for analyzing whether section 16(b) was intended to preclude a state wage law class action in the same lawsuit must be its text. See Morenz v. Wilson-Coker, 415 F.3d 230, 234 (2d Cir. 2005) ("This court has held it to be a fundamental principle of statutory construction that the starting point must be the language of the statute itself.") (internal quotation marks omitted). As the Seventh Circuit stated in Ervin in addressing whether section 16(b) bars dual actions, the analysis must flow through the text. See 632 F.3d at 977 ("In our view, the [district] court jumped too quickly to congressional intent. Before taking that step, we must examine the text of the FLSA itself.").[2]

[2] Park Avenue does not base its arguments as to the intent of section 16(b) on its text.

Section 16(b) provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. 216(b) (emphasis added). By its terms, section 16(b) applies only to three specific FLSA provisions: minimum wage, overtime, and anti-retaliation. See id. Further, section 16(b) authorizes employees to bring claims on behalf of themselves and others similarly situated only for violations of those three FLSA provisions specifically identified. See id. Likewise, section 16(b)'s opt-in requirement applies only to "any such action" – in other words, only to actions brought for violations of those FLSA provisions specifically identified. Id. There is nothing in the text of section 16(b) regarding state law wage claims – whether they may be brought in federal court, whether federal courts may exercise supplemental jurisdiction over them,

or whether federal courts may certify them as class actions. See id.

Numerous courts acknowledge that the plain meaning of section 16(b) does not preclude dual actions. For example, in Ervin, the Seventh Circuit examined section 16(b) and concluded: "Nothing we find suggests that the FLSA is not amenable to state-law claims for related relief in the same federal proceeding. . . . That provision providing that employees may bring actions against their employers makes no mention of state wage and labor laws." 632 F.3d at 977. The Seventh Circuit further stated: "Nothing in the text of the FLSA or the procedures established by the statute suggests either that the FLSA was intended generally to oust other ordinary procedures used in federal court or that class actions in particular could not be combined with an FLSA proceeding." Id. at 974. In Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 162 (S.D.N.Y. 2008), the court stated:

> [B]y its own terms, the opt-in requirement of Section 216(b) applies only to wage claims brought under the substantive provisions of the FLSA. Congress has only spoken with regard to FLSA wage claims, not wage claims generally, and has expressed no policy preference with respect to whether to certify a class for state law wage claims.

See also Klein v. Ryan Beck Holdings, Inc., No. 06 Civ. 3460, 2007 WL 2059828, at *5-6 (S.D.N.Y. July 20, 2007) (section 16(b)'s opt-in requirement "applies only to actions brought

pursuant to the FLSA – not to employment law actions generally"; "[t]he FLSA guarantees merely that all collective actions brought *pursuant to it* be affirmatively opted into [but] does not guarantee that employers will never face traditional class actions pursuant to state employment law") (emphasis in original); Lehman v. Legg Mason, Inc., 532 F. Supp.2d 726, 731 (M.D. Pa. 2007) ("This court is persuaded that nothing in the plain text of the FLSA reflects Congressional intent to limit the substantive remedies available to an employee under state law, nor to limit the procedural mechanism by which such a remedy may be pursued."); McLaughlin v. Liberty Mut. Ins. Co., 224 F.R.D. 304, 308 (D. Mass. 2004) (by enacting the opt-in requirement, Congress sought to limit the scope of collective actions under federal law, not to restrict state remedies; "[n]othing in the statute limits available remedies under state law").

2. Indeed, the FLSA does not purport to preclude state regulation of employees' wages. The FLSA's "savings clause" makes clear that states may enact wage laws that are more protective than the Act:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall

> justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter.

29 U.S.C. 218(a). This Court held that section 18(a)'s savings clause demonstrates Congress' intent to allow state wage laws to coexist with the FLSA by explicitly permitting, for example, states to mandate greater overtime benefits than the FLSA. See Overnite Trans. Co. v. Tianti, 926 F.2d 220, 221-22 (2d Cir. 1991) (rejecting argument that FLSA preempts state wage laws); see also Ervin, 632 F.3d at 977 (section 18(a) preserves state and local laws); Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000) (section 18(a) demonstrates that the FLSA is not the exclusive remedy for wage payment claims and that Congress did not intend to occupy the entire field). The FLSA's express embrace in section 18(a) of more protective state wage law remedies undercuts the assertion that a state wage law class action is incompatible with an FLSA collective action.

3. Finally, section 16(b) must be interpreted consistent with the expressed policy for enacting the FLSA – elimination of substandard working conditions. See 29 U.S.C. 202. Interpreting section 16(b) to bar employees' access to federal courts to seek class-wide remedies for alleged substandard working conditions would be inconsistent with that expressed policy.

C. The Legislative History of Section 16(b) Provides No Support for Precluding FLSA and State Law Wage Claims from Proceeding in the Same Federal Lawsuit

1. The legislative history of section 16(b)'s opt-in provision does not support Park Avenue's argument. Section 16(b) originally permitted an employee to bring a collective action on behalf of similarly situated employees, or to "designate an agent or representative" to bring a representative action on behalf of similarly situated employees. Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938). It was silent on whether employees who were not named plaintiffs were required to opt in to a collective or representative action. See id.

The opt-in provision was added in 1947 by the Portal-to-Portal Act ("Portal Act"). The impetus for the Portal Act was the Supreme Court's decision in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-93 (1946), that time spent by employees performing certain activities was compensable time under the FLSA. Concerned by what it perceived as a wave of employee lawsuits following Mt. Clemens that threatened the financial well-being of U.S. industry, Congress enacted the Portal Act to overrule its compensable time holding. See Portal Act, § 1, 61 Stat. 84, 84-85 (1947). The Portal Act also eliminated representative actions (actions by non-employees as agents of employees); collective actions by employees on behalf of others

similarly situated remained permissible, although they became subject to an express opt-in requirement. See id., § 5, 61 Stat. at 87. Specifically, the Portal Act provided that an employee shall not be a party to a collective action "unless he gives his consent in writing to become such a party and such consent is filed [with the court]." Id., § 5(a), 61 Stat. at 87. Significantly, the Portal Act made clear that the opt-in requirement "shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938." Id., § 5(b), 61 Stat. at 87. Moreover, the reports issued by Congress upon the Portal Act's enactment contain no suggestion of any intent to prevent class certification of, or the exercise of supplemental jurisdiction over, state wage law class claims. See Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. 80-71 (1947); Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. Rep. No. 80-48 (1947); Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326 (1947).

Further, Congress' enactment of the opt-in provision for FLSA collective actions cannot be construed as a choice against, or a relegation of, Rule 23's opt-out process given that, at the time, Rule 23 did not contain an opt-out provision. Indeed, "[a]ddition of the opt-in rule brought FLSA section 216(b) into conformity with the Rule 23 opt-in requirement in effect at the

time, and made explicit what courts at the time had already [inferred] from the statute." Andrew C. Brunsden, Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts, 29 Berkeley J. Emp. & Lab. L. 269, 280 (2008). The modern opt-out version of Rule 23 was not enacted until 1966 – almost 20 years after the Portal Act. See Marc Linder, Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947, 39 Buff. L. Rev. 53, 174-75 (1991). Significantly, the Advisory Committee Notes accompanying the 1966 amendments to Rule 23 state that "[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23 advisory committee notes (1966). The fact that the Rule 23 amendments specifically considered the FLSA's opt-in process and made no effort to reconcile it with Rule 23's opt-out process further confirms that FLSA collective actions and Rule 23 class actions are compatible.[3] As one district court concluded:

> [T]he court finds no support in the legislative history of Section 16(b) for defendant's view that, while expressly allowing state overtime regulation to coexist with the federal scheme, Congress intended . . . to undermine those

[3] Similarly, the Class Action Fairness Act of 2005 ("CAFA") does not exclude state wage law class actions from its grant of jurisdiction to the federal courts (although CAFA does exclude certain other state law class actions). See 119 Stat. 4, 9-12 (2005). Congress would have carved out state wage law class actions from CAFA's grant of federal jurisdiction if they were incompatible with FLSA collective actions.

> coexisting state rights by denying employees access to the tools of the modern class action of today.

Gardner v. Western Beef Properties, Inc., No. 07-CV-2345, 2008 WL 2446681, at *4 (E.D.N.Y. June 17, 2008); see Ervin, 632 F.3d at 977-78 (dual actions are consistent with regime Congress established in the FLSA); McCormick v. Festiva Dev. Group, LLC, No. 09-365-P-S, 2010 WL 582218, at *8 (D. Me. Feb. 11, 2010) (dual action "does not undermine Congress' purpose in limiting *FLSA collective actions* to opt-in participants only") (emphasis in original).

2. Park Avenue either mischaracterizes section 16(b)'s legislative history or uses that history in a way that does not support its argument that section 16(b) conflicts with Rule 23. First, it asserts that section 16(b) expresses Congress' clear intent in regard to dual actions by requiring FLSA collective actions "to be in the form of an opt-in class, . . . rather than a traditional opt-out class as established in Rule 23 of the Federal Rules of Civil Procedure." Appellants' Brief, 10 (emphasis added). However, as discussed *supra*, there was no Rule 23 opt-out class when Congress enacted the opt-in requirement in 1947.

Second, Park Avenue asserts: "In passing legislation containing Section 216(b), Congress explained that if FLSA actions were opt-out rather than opt-in, 'the courts of the

country would be burdened with excessive and needless litigation.'" Appellants' Brief, 10 (quoting Portal Act, § 1(a)(7), 61 Stat. at 84). However, Section 1 of the Portal Act does not mention either the opt-out or opt-in process (see Portal Act, § 1, 61 Stat. at 84-85), and the reference to "excessive and needless litigation" reflected Congress' concern that, if the holding in Mt. Clemens regarding compensable time was not overruled, employers would have been faced with more FLSA lawsuits, thereby threatening their financial well-being. See Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. Rep. No. 80-48, at 12 (more than 1,900 lawsuits seeking more than $5.78 billion were filed in a seven-month period following Mt. Clemens); Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. 80-71, at 4 (same).

Third, Park Avenue asserts that "Congress created the FLSA 'opt-in' procedure 'for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions.'" Appellants' Brief, 18-19 (quoting Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 173 (1989)). In Hoffman-La Roche, however, the Supreme Court held that courts may facilitate notice to potential plaintiffs in FLSA collective actions; state law claims were not at issue. See 493 U.S. at 170-74. In

discussing the addition of the opt-in provision to the FLSA, the Supreme Court made clear that the opt-in requirement applies only to "private FLSA plaintiffs"; it said nothing regarding state law wage claims. Id. at 173.

Fourth, Park Avenue asserts that "the opt-in requirement was added 'to prevent large group actions, with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit,'" and that "Congress amended the FLSA in 1947 to prohibit exactly what the District Court has allowed here, 'a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members.'" Appellants' Brief, 19-20 (quoting Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1248 (11th Cir. 2003)). In Cameron-Grant, the court held that a denial of a motion for conditional certification of an FLSA collective action after the named plaintiffs had settled and dismissed their cases may not be reviewed on appeal in light of section 16(b)'s opt-in requirement and the fact that the named plaintiffs' claims were moot when the denial occurred. See 347 F.3d at 1247-48. The court concluded that once the named plaintiffs' own claims were dismissed, they could not seek to continue with a representative action under the FLSA as agents for employees who still had claims, because the Portal Act's revisions to section 16(b)

prohibit representative actions (as opposed to collective actions). See id. at 1247-49; see also Portal Act, § 5, 61 Stat. at 87.[4] Cameron-Grant did not involve state wage laws and thus provides no support for the argument that section 16(b)'s intent was to prohibit Rule 23 state wage law class actions.

D. Relevant Caselaw Rejects the Argument that Section 16(b) and Rule 23 Are Incompatible

Other appellate courts have held that there is no incompatibility between a section 16(b) opt-in collective action and a Rule 23 opt-out state wage law class action.

1. In Ervin, the Seventh Circuit held "that there is no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also includes a collective action brought under the FLSA." 632 F.3d at 973-74. As noted *supra*, the Seventh Circuit concluded that section 16(b) does not provide or even suggest that state law wage claims cannot proceed together with an FLSA collective action; it further recognized that section 18(a) expressly preserves state wage

[4] As Congress made clear at the time, section 5 of the Portal Act repealed the authority in the FLSA permitting an employee to designate an agent or representative to bring an action on behalf of all employees similarly situated; collective actions by employees on behalf of themselves and other employees remained permissible. See Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326, at 13. Park Avenue seems to confuse the Portal Act's ban on representative actions with its limit – through the opt-in requirement – on collective actions. In any event, the Portal Act evidences no intent to prohibit or affect state wage law class actions.

laws. See id. at 977. Regarding the intent behind the opt-in requirement, the Seventh Circuit concluded: "There is ample evidence that a combined action is consistent with the regime Congress has established in the FLSA." Id. The court rejected the argument – similar to one advanced by Park Avenue (see Appellants' Brief, 18-20) – that the congressional intent behind the opt-in requirement and "the idea that disinterested parties were not supposed to take advantage of the FLSA" are undermined when employees' state law wage claims reach federal court under the court's supplemental jurisdiction. Ervin, 632 F.3d at 978. The court concluded that "there is nothing in the FLSA that forecloses these possibilities" given that any employee who is only in the Rule 23 class (the employee did not opt in to the FLSA collective action and did not opt out of the Rule 23 class action) "is not part of the FLSA litigating group," "will not be entitled to a single FLSA remedy," and "will receive only the relief that is prescribed under the law governing her part of the case." Id.[5] "In [dual] actions, the question whether a

[5] Park Avenue asserts that potential class members who do not opt in to the FLSA collective action and do not opt out of the Rule 23 class could have their FLSA claim "extinguished" and could "los[e] their rights by doing nothing." Appellants' Brief, 21-23. This assertion is not correct. An employee who does not opt in to the FLSA collective action retains the right to bring an FLSA action even if the employee is a member of the Rule 23 class because the employee participates in and is bound by the FLSA collective action only by giving written consent. See 29 U.S.C. 216(b). The fact that a dual action, if there is a final

class should be certified under Rule 23(b)(3) will turn – as it always does – on the application of the criteria set forth in the rule; there is no insurmountable tension between the FLSA and Rule 23(b)(3)." Id. at 974.[6]

2. The Seventh Circuit in Ervin also rejected the argument that the difference between section 16(b)'s opt-in provision and Rule 23's opt-out process prevents supplemental jurisdiction of state wage law class claims. See 632 F.3d at 979-81. In so holding, the Seventh Circuit joined the D.C. and Ninth Circuits. See id. at 979 (citing Lindsay v. Gov't Employees Ins. Co., 448 F.3d 416 (D.C. Cir. 2006); Wang v. Chinese Daily News, Inc., 623 F.3d 743 (9th Cir. 2010)). The Seventh Circuit determined that 28 U.S.C. 1367(a), which provides that a federal court shall have supplemental jurisdiction over all state law claims that

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judgment, may have some preclusive effect in favor of or against an employee is unremarkable; it makes a dual action no different than any other lawsuit and is not a reason to deny class certification of state law wage claims. A state wage law class action brought separately could also have that preclusive effect and has no greater preclusive effect merely because it is combined in the same lawsuit as an FLSA collective action. See Espenscheid v. DirectSat USA, LLC, 708 F. Supp.2d 781, 792 (W.D. Wis. 2010) (rejecting argument that the possibility of *res judicata* prevents a Rule 23 class action from proceeding in the same lawsuit with an FLSA action; "principles of res judicata apply to any class action, whether it is a pure Rule 23 state law class action or one containing a simultaneous FLSA claim"); Guzman v. VLM, Inc., No. 07-CV-1126, 2008 WL 597186, at *10 n.11 (E.D.N.Y. Mar. 2, 2008) (same).

[6] The Seventh Circuit further rejected the argument that an FLSA collective action and a state wage law class action in the same lawsuit would cause confusion among potential class members. See Ervin, 632 F.3d at 978.

are so related to the federal claims, is "satisfied in cases like this one, where state-law labor claims are closely related to an FLSA collective action." Id. The D.C. Circuit similarly concluded that the FLSA and state law claims in the dual action before it were sufficiently related and that supplemental jurisdiction over the state law claims is mandatory under 28 U.S.C. 1367 unless one of its exceptions apply. See Lindsay, 448 F.3d at 421-24; see also Wang, 623 F.3d at 761 (affirming exercise of supplemental jurisdiction over state law class action claims that were closely related to FLSA collective action).

The Seventh Circuit further determined that the exception at 28 U.S.C. 1367(a), which states that a court shall not have supplemental jurisdiction if a federal statute expressly so provides, does not apply because the FLSA does not place any limits on supplemental jurisdiction. See Ervin, 632 F.3d at 979 ("[T]he opt-in procedures in the FLSA do not operate to limit – expressly or impliedly – a district court's supplemental jurisdiction to only those state-law claims that also involve opt-in procedures."). Similarly, the D.C. Circuit determined that section 16(b) does not prohibit the exercise of supplemental jurisdiction over state law claims of opt-out class members. See Lindsay, 448 F.3d at 421-22. The D.C. Circuit rejected the argument that a "conflict" between section 16(b)'s

opt-in provision and Rule 23's opt-out provision precluded the exercise of supplemental jurisdiction and stated that "we doubt that a mere *procedural* difference can curtail section 1367's *jurisdictional* sweep." Id. at 424 (emphases in original); see Wang, 623 F.3d at 761-62 (rejecting argument that an opt-in FLSA collective action prevents supplemental jurisdiction over a related state law class action).[7]

The Seventh and D.C. Circuits also addressed the exceptions to supplemental jurisdiction in 28 U.S.C. 1367(c), which provides that a court "may decline" supplemental jurisdiction over a state law claim if: "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Regarding the second exception – that state law claims substantially predominate over the FLSA claims – the Seventh Circuit rejected the argument (made by Park Avenue here, see Appellants' Brief, 23) that, because the Rule 23 class action has more members than the FLSA collective action, the state law claims predominate. "A simple

[7] The exceptions to supplemental jurisdiction in 28 U.S.C. 1367(b) apply only in actions based solely on diversity jurisdiction, which is not the case in FLSA actions.

disparity in numbers should not lead a court to the conclusion that a state claim 'substantially predominates' over the FLSA action, as section 1367(c) uses that phrase." Ervin, 632 F.3d at 980. "As long as the claims are similar between the state plaintiffs and the federal action, it makes no real difference whether the numbers vary." Id.[8] Similarly, the D.C. Circuit held: "Predomination under section 1367(c)(2) relates to the type of claim and here the state law claims essentially replicate the FLSA claims – they plainly do not predominate." Lindsay, 448 F.3d at 425. Moreover, according to the D.C. Circuit, this argument misreads 28 U.S.C. 1367(c)(2), which plainly directs the court to compare the state claim to the federal claim and not the number of state claimants to the number of federal claimants. See id. at 425. The Ninth Circuit agreed in Wang that predominance under 28 U.S.C. 1367(c)(2) refers to the type of claim, and it affirmed the exercise of supplemental jurisdiction over state law class claims in a dual action even though the number of claimants and the amount of potential damages were higher in the state law class action than in the FLSA collective action. See 623 F.3d at 761-62. And a district court in this Circuit held that "predominance" under 28

[8] In Ervin, the FLSA collective action had approximately 30 members, and the Rule 23 classes had between 180 and 250 members. See 632 F.3d at 981. The numbers here are similar (25 in the FLSA collective action, and approximately 275 in the Rule 23 class).

U.S.C. 1367(c)(2) relates to the type of claim and not the number of claimants, noting that:

> Defendants' argument that the New York Labor Law claims would predominate over the federal claims boils down to the unremarkable notion that the Rule 23 class will be larger than the FLSA representative action because the state claims are subject to a longer statute of limitations and because an opt-out class is virtually certain to have many more members than an FLSA action that requires individuals affirmatively to opt-in.

Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 374-375 (S.D.N.Y. 2007).[9]

Regarding the fourth exception – that supplemental jurisdiction may be declined in exceptional circumstances when there are compelling reasons – the Seventh and D.C. Circuits made clear that the difference between section 16(b)'s opt-in provision and Rule 23's opt-out provision is not a compelling reason to decline jurisdiction. See Ervin, 632 F.3d at 980 ("[T]he 'conflict' between the opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction under section 1367(c)(4)."); Lindsay, 448 F.3d at 425 (difference between section 16(b)'s opt-in

[9] It is possible to argue in a dual action, consistent with 28 U.S.C. 1367(c)(2), that supplemental jurisdiction should be declined because the state law claims substantially predominate. Such an argument, however, must be based on the nature of the state law claims as opposed to any perceived conflict between the FLSA's opt-in process and Rule 23's opt-out process or the difference in size between the FLSA collective action and the Rule 23 class action. That is not the thrust of Park Avenue's argument here. See Appellants' Brief, 19-20.

procedure and Rule 23's opt-out procedure cannot be an "exceptional circumstance" or "other compelling reason" that satisfies 28 U.S.C. 1367(c)(4)).[10]

3. Park Avenue relies on the Third Circuit's decision in De Asencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003). See Appellants' Brief, 18-23. However, De Asencio and its specific circumstances are not applicable here. De Asencio did not base its holding on any "conflict" between section 16(b)'s opt-in process and Rule 23's opt-out procedure, but instead held that the district court should not have exercised supplemental jurisdiction over the state law wage claims because the exception to supplemental jurisdiction at 28 U.S.C. 1367(c)(2) applied — the state law claims would predominate over the FLSA claims for reasons specific to the facts of the case before it. See 342 F.3d at 309-12.[11]

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[10] Park Avenue also argues that supplemental jurisdiction should be declined pursuant to the first exception in 28 U.S.C. 1367(c) – that the state claim raises a novel or complex issue. See Appellants' Brief, 13-14. This argument could serve as a basis on which a district court may decline supplemental jurisdiction (see 28 U.S.C. 1367(c)(1)); however, the Secretary takes no position on this argument because it does not implicate section 16(b) or the FLSA. The third exception – that the district court has dismissed the federal claims – is not relevant in dual actions.

[11] De Asencio did describe the difference between opt-in and opt-out classes as "crucial," and stated that Congress showed in section 16(b) an "express preference for opt-in actions for the federal cause of action." 342 F.3d at 310-11. This was not the basis for the court's holding, however, and in any event, there is no basis for concluding that Congress' "preference" was for

First, the Third Circuit noted that the state law claim at issue was not based on a statute that paralleled the FLSA but was instead based on a statute that provides a remedy when employers breach a contract to pay earned wages. See id. at 309-10. Pennsylvania courts had never addressed whether the employees' theory of liability was permissible and, therefore, the state law claim, according to the court, presented novel legal issues and would require more proof and testimony as compared to the "more straightforward" FLSA claim. Id. Second, although the Third Circuit acknowledged that the "predominance" inquiry under 28 U.S.C. 1367(c)(2) goes to the types of claims involved, it was concerned that the disparity in numbers between the FLSA opt-in class and the Rule 23 opt-out class would substantially transform the case "by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog." Id. at 311.[12] Indeed, the

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anything other than FLSA actions. Moreover, De Asencio recognized that the interest in exercising supplemental jurisdiction over the state law claims before it is "strong," the federal and state claims "share a common nucleus of operative fact and they arise from the same case or controversy," and the exercise of supplemental jurisdiction "would permit the District Court to efficiently manage the overall litigation." Id. at 310.

[12] In De Asencio, 447 persons opted in to the FLSA collective action, and the proposed Rule 23 state law class consisted of approximately 4,100 persons. See 342 F.3d at 305. The sizes of the classes here are a fraction of those in De Asencio: 25 in the FLSA collective action and approximately 275 in the Rule 23 class action.

Seventh Circuit in Ervin distinguished De Asencio on both these grounds. See 632 F.3d at 981 (agreeing with Lindsay and Wang that De Asencio "represents only a fact-specific application of well-established rules, not a rigid rule about the use of supplemental jurisdiction in cases combining an FLSA count with a state-law class action").

4. The district courts in the Second Circuit have overwhelmingly permitted dual actions, rejecting "incompatibility" and other arguments. For example, a court described the incompatibility argument as "an imaginary legal doctrine." Westerfield v. Washington Mut. Bank, No. 06-CV-2817, 2007 WL 2162989, at *2 (E.D.N.Y. July 26, 2007) (there is no legal doctrine that would permit dismissal of state law claims on the ground that they are incompatible with federal claims). And another court in the same district stated that "there is no reason that [the] FLSA's collective action procedure is incompatible with maintaining a state law class action over the same conduct." Guzman, 2008 WL 597186, at *10. The Guzman court noted that "it is routine for courts in the Second Circuit to certify state labor law classes in FLSA actions." Id. at *8-10. Similarly, another district court stated that it "knows of no rule of law that provides it must dismiss state class allegations based on 'incompatibility' with parallel federal claims." Perkins v. Southern New England Tel. Co., No. 3:07-cv-

967, 2009 WL 350604, at *3 (D. Conn. Feb. 12, 2009) (FLSA collective action and Rule 23 class action may coexist); see Cohen v. Gerson-Lehrman Group, Inc., 686 F. Supp.2d 317, 323-24 (S.D.N.Y. 2010) (rejecting argument that opt-out class action mechanism for NYLL claims is in "irreconcilable conflict" with FLSA's opt-in mechanism); Patel v. Baluchi's Indian Restaurant, No. 08 Civ. 9985, 2009 WL 2358620, at *9 (S.D.N.Y. July 30, 2009) (incompatibility argument is, "under the relevant case law, substantively defective"); Damassia, 250 F.R.D. at 161-64 ("'[C]ourts in the Second Circuit routinely certify class action[s] in FLSA matters so that New York State and federal wage and hour claims are considered together.'") (quoting Duchene v. Michael L. Cetta, Inc., 244 F.R.D. 202, 204 (S.D.N.Y. 2007)); Gardner, 2008 WL 2446681, at *2-4 ("Despite the alleged incompatibility of the FLSA collective action and a Rule 23 opt-out class, the Court notes that federal courts in New York have regularly allowed the two to coexist."); Iglesias-Mendoza, 239 F.R.D. at 367-75 (exercising supplemental jurisdiction over state law class claims and certifying both an FLSA collective action and a Rule 23 state law class action).

CONCLUSION

For the foregoing reasons, this Court should reject the argument that section 16(b)'s opt-in provision for FLSA collective actions prevents the exercise of supplemental jurisdiction over, or class certification of, state law wage claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), I certify that the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees:

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because it contains 6,994 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Date: March 25, 2011

/s/ Dean A. Romhilt
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees was served this 25th day of March, 2011, via the Court's ECF system and by pre-paid overnight delivery (for delivery on the 28th day of March, 2011) on each of the following:

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