NO. _____

In The

United States Court Of Appeals

For The Fourth Circuit

SCOTT REHBERG, WILLARD ALLEN RILEY, and MARIO RONCHETTI, On Behalf of Themselves and Others Similarly Situated,

Plaintiffs-Respondents,

v.

FLOWERS BAKING COMPANY OF JAMESTOWN, LLC, and FLOWERS FOODS, INC.,

Defendants-Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION, CASE NO. 3:12-cv-00596-MOC-DSC

PETITION OF FLOWERS BAKING COMPANY OF JAMESTOWN, LLC AND FLOWERS FOODS, INC. FOR PERMISSION TO APPEAL ORDER GRANTING CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(f)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISLCOURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No._____ Caption: *Rehberg, et al. v. Flowers Baking Company of Jamestown, et al.* (WDNC 3:12-cv-00596-MOC-DSC)

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1

Flowers Baking Company of Jamestown, LLC, who is a Petitioner, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
____Yes __X__ No

2. Does party/amicus have any parent corporations? __X__Yes _____No
If yes, identify all parent corporations, including grandparent and great-grandparent corporations: Flowers Foods, Inc. and Flowers Bakeries, LLC

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? __X__Yes _____No

If yes, identify all such owners: Flowers Foods, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? _____Yes __X__No

If, yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
____Yes __X__No
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? _____Yes __X__No
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Benjamin R. Holland Date: April 7, 2015

Counsel for:
Flowers Baking Company of Jamestown, LLC and Flowers Foods, Inc.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Counsel for:
Flowers Baking Company of Jamestown, LLC and Flowers Foods, Inc.

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Flowers Baking Co. of Jamestown, LLC and Flowers Foods, Inc. respectfully file this petition pursuant to Fed. R. Civ. P. 23(f) and seek permission to appeal the attached Order (Exhibit A), dated March 24, 2015, certifying Plaintiffs' North Carolina Wage and Hour Act ("NCWHA") claims. Appellate review is appropriate because the District Court applied an incorrect "liberal" standard when construing Rule 23 and did not conduct an independent rigorous analysis of the record evidence to ensure all Rule 23 requirements have been satisfied. In doing so, the District Court relied on scant record evidence, summarily dismissing and failing to rigorously analyze the legal significance of the extensive record evidence establishing significant differences in actual practice, which is the relevant inquiry. Moreover, the District Court failed to conduct any independent factual analysis, let alone a rigorous one, into whether Rule 23(b)(3) predominance is satisfied and improperly certified a Rule (b)(2) class despite necessarily individualized damages.

Even taking into account the District Court's considerable discretion, its Order granting class certification contains substantial weaknesses, is manifestly erroneous, and constitutes an abuse of discretion. Moreover, prompt appeal is appropriate given the nature and status of the underlying litigation, may facilitate the development of Rule 23 precedent in this circuit, and would resolve fundamental, unsettled issues of law. Flowers respectfully requests that this Court grant their petition accordingly.

I. STATEMENT OF JURISDICTION

Under Fed. R. Civ. P. 23(f), this Court has discretionary jurisdiction to review an order certifying a class action. This Petition is timely filed within 14 days of the District Court's March 24, 2015 Order granting class certification.

II. STATEMENT OF FACTS

Plaintiffs (Scott Rehberg and Mario Ronchetti)[1] claim they were misclassified as independent contractors and assert claims for unlawful deductions under the NCWHA, N.C. Gen. Stat. §§ 95-25.1, *et seq*. (Ct. Doc. No. 1, pp. 1-3, 16-18).[2] Plaintiffs pursue these claims on behalf of themselves and all Jamestown distributors in North Carolina. (*Id.* pp. 5-6).[3] There are approximately 215 distributors in this putative class, 46 of whom, including Rehberg, are former distributors who signed a release of claims. (Ct. Doc. No. 117-18, pp. 2-3). Jamestown distributors sign an independent distributor agreement that contains numerous indicia of independent contractor status. (Ct. Doc. No. 117-17, pp. 2-3). Agreements entered into after 2002 contain a statute-of-limitations and limitations-of-damages provision. (*Id*. pp. 4-5).

Despite entering into similar agreements, the extensive record evidence—

[1] Willard Allen Riley, the third named Plaintiff, is not in the North Carolina class.
[2] Plaintiffs also assert claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). (Ct. Doc. No. 1, p. 5).
[3] Plaintiffs requested, and the District Court applied, a three-year statute of limitations to the NCWHA claims. (Ct. Doc. No. 1, p. 5). However, a two-year statute of limitations applies. N.C. Gen. Stat. § 95-25.22(f).

which is based mainly on Plaintiffs' and putative class members' own testimony[4] — establishes that distributors can and do operate very differently *in practice* and that any "common policies," to the extent they exist, affect distributors very differently. These differences are legally significant because the focus of the applicable economic realities test is *actual practice*.[5] (Ex. A, p. 9, 11-13). For example, the evidence establishes that some distributors build significant equity in their distributorships. Rehberg is a prime example: he built close to $90,000 in equity in his distributorship, advertised it for sale on routesforsale.com, and sold it to an outside buyer for $140,000. (Ct. Doc. No. 113-33, pp. 4-6; Ex. 1, p. 30; Ct. Doc. No. 113-34, pp. 2-9). Another putative class member, Glavey, expects to pocket over $200,000 when he sells his distributorship. (Ct. Doc. No. 113-16, pp. 48-59). Some distributors operate separate businesses, including Ronchetti who has an oil-change business in addition to his distributorship that he advertises on LinkedIn and hopes to grow into a full-time business. (Ct. Doc. No. 113-42, pp. 7-

[4] The parties have conducted extensive class discovery, including deposing 21 Plaintiffs and FLSA opt-ins, 17 national accounts representatives, and 2 other corporate designees. (Ct. Doc. No. 117, p. 3, n. 6).

[5] These factors include: (1) the degree of control exercised; (2) opportunities for profit or loss; (3) investment in equipment or employment of helpers; (4) the degree of skill required; (5) permanence of the relationship; and (6) the degree to which the services are an integral part of the putative employer's business. *Schultz v. Capital Intern. Sec., Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006). No single factor is determinative. A totality of circumstances approach is employed. *Id.* at 305.

11, Ct. Doc. No. 113-44, pp. 5-6). Others, like Rehberg, claim they "do not have time." (Ct. Doc. No. 113-34, pp. 59-62).

While Flowers does provide certain basic tools, like the handheld, dollies and label guns (Ct. Doc. No. 107-3, pp. 17-18), distributors are responsible for the majority of their equipment and expenses. Ronchetti, for example, regularly deducts between $33,000 and $45,000 in business expenses on his tax returns for truck expenses, amortization of his territory, a home office, and others. (Ct. Doc. No. 113-43, pg. 29-45). Glavey deducts between $62,000-$69,000 a year in business expenses. (Ct. Doc. No. 113-18, pp. 51, 53). Rehberg hired more than five helpers to assist him with his distributorship. (Ct. Doc. No. 113-33, pp. 9-15). Glavey also hired several helpers at once, including on a full-time basis, admitting he did not need any prior approval from Flowers. (Ct. Doc. No. 113-14, pp. 3-9; Ct. Doc. No. 113-16, pp. 60-65; Ct. Doc. No. 113-17, pp. 1-3, Ct. Doc No. 113-18, pp. 46-48). Other distributors do not use helpers at all. (Ct. Doc. No. 111-2, pp. 28-32).

Further, Jamestown distributors service different types of accounts. Some distributors, like Glavey, service mostly non-national accounts, where they are typically the primary contact and have more discretion. (Ct. Doc. No. 113-15, pp. 17-18; Ct. Doc. No. 113-17, pp. 21-23, 30-36). In fact, approximately 70% of Glavey's business is from a non-national account customer who looks to him for

almost everything and with whom Flowers has little interaction. (Ct. Doc. No. 113-17, pp. 30-35). Ronchetti, likewise, admits he can recommend new products to his cash accounts, is the primary contact, has changed pricing, and has solicited new cash accounts on this own. (Ct. Doc. No. 113-41, pp. 5-8, 25; 113-42, pp. 14-16; Ct. Doc. No. 113-43, pp. 5-6, 14-15; Ct. Doc. No. 113-39, p. 14). Conversely, over 90% of Rehberg's business is to national accounts, and he claims he does not have these same opportunities in those accounts. (Ct. Doc. No. 113-34, pp. 69-73).[6]

Even distributors with mostly national accounts are different, however, because there are nine different types of national accounts, each of which presents different opportunities for profit and discretion. For example, in Family Dollar and Variety Wholesale accounts, distributors can determine what products to sell off an authorized products list. (Ct. Doc. No. 113-60, pp. 6-7, 21-22). In Target stores, distributors have the opportunity to get additional displays from local store management to increase their sales. (Ct. Doc. No. 113-56, pp. 37-40). In BJs, distributors can work with local store management to get additional authorized items added to the shelf space allocation. (Ct. Doc. No. 113-59, pp. 12-13). In food-service accounts, by contrast, these opportunities do not exist. (Ct. Doc. No. 113-60, p. 36). The opportunities actually exercised within the same type of account even differ by distributor. Keistler, for example, admits he asks for

[6] *See* Ct. Doc. No. 111-5, Att. 2, comparing national vs. non-national account business for certain putative class members.

displays in Target "any time he has an opportunity" and has worked with Food Lion to get more shelf space and the shelf space allocation changed. (Ct. Doc. No. 113-27, pp. 39-45; Ct. Doc. No. 113-28, pp. 6-20). Rehberg claims that these opportunities are not available in these accounts. (Ct. Doc. No. 113-34, pp. 69-73). These differences—of which there is substantial record evidence—are far from exhaustive.

On October 31, 2014, Plaintiffs moved for class certification of their NCWHA claims for unlawful deductions under Rule 23(b)(2) and Rule 23(b)(3). (Ct. Doc. No. 106, pp. 1-2; Ct. Doc. No. 107). Plaintiffs' Motion was largely based on conclusory, unsupported assertions about "common policies," which they claim satisfy the inapplicable "right to control" test. Plaintiffs completely ignored the extensive record evidence, in large part based on their own sworn testimony, establishing that significant differences exist in the application of these "common policies" in actual practice, which is the relevant inquiry under the applicable economic realities test. (Ct. Doc. No. 107). In fact, except for a few limited cites to Rehberg's deposition, Plaintiffs failed to cite any of their own testimony. (*Id.*). On December 3, 2014, Flowers responded, challenging Plaintiffs' failure to affirmatively support their Motion with actual evidentiary proof and otherwise challenging the propriety of certification given the extensive divergent record and inherently individualized analyses required. (Ct. Doc. No. 117). In support,

Flowers attached and discussed three detailed summary-of-evidence charts (attached hereto as Exhibit B, C, and D),[7] which stand in stark contrast to the paucity of evidence that Plaintiffs offered and which highlight the extensive testimony Plaintiffs failed to even discuss—let alone distinguish—in their Motion.

After oral argument on February 11, 2015, the District Court issued its Order granting certification (Ex. A). On April 7, 2015, Defendants timely filed this Rule 23(f) petition seeking review of this Order for the reasons discussed below.

III. QUESTIONS PRESENTED

1. Should this Court grant Flowers permission to appeal the Order certifying Plaintiffs' NCWHA claims when the District Court: (a) applied an incorrect "liberal" standard for class certification, (b) failed to rigorously analyze the evidentiary record to determine if the Rule 23 requirements are met, (c) improperly assumed that predominance was met if commonality was, blending the two requirements, (d) found predominance to be satisfied when the record establishes that individualized evidence required by the economic realities test predominates over common proof; and (e) misapplied the Rule 23(b)(2) standard?

[7] These charts include the: (1) "Summary of Evidence Chart by Plaintiffs' Contention," comparing each of Plaintiffs' contentions and supporting "evidence" with the extensive evidence to the contrary (Ct. Doc. No. 117-3); (2) "Plaintiffs' Differences Chart," summarizing Plaintiffs' divergent testimony by economic realities test topic (Ct. Doc. No. 111-2); and; (3) "National Accounts Differences Chart" (Ct. Doc. No. 111-3), summarizing the national accounts representatives' testimony regarding differences in opportunities in these accounts.

2. Should this Court grant Flowers permission to appeal the Order certifying Plaintiffs' NCWHA claims when doing so may help facilitate the development of Rule 23 case law analyzing independent contractor misclassification claims under the economic-realities test for certification and when other factors support appeal?

IV. RELIEF REQUESTED

This Court should grant review of the Order certifying Plaintiffs' NCWHA claims under Rule 23 and, after briefing on the merits, reverse it or vacate it and remand for further proceedings below.

V. REVIEW UNDER 23(f)

Rule 23(f) empowers this Court to "permit an appeal from an order granting or denying class certification." Circuit courts enjoy "unfettered discretion" to grant or deny permission to appeal based on "any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23, adv. comm. note. In 2001, this Court adopted a five-factor test to assist in guiding that exercise of discretion, including:

> (1) whether the certification ruling is likely dispositive of the litigation; (2) whether the district court's certification decision contains a substantial weakness; (3) whether the appeal will permit the resolution of an unsettled legal question of general importance; (4) the nature and status of the litigation before the district court (such as the presence of outstanding dispositive motions and the status of discovery); and (5) the likelihood that future events will make appellate review more or less appropriate.

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 144-46 (4th Cir. 2001). This Court "consider[s] these factors on a holistic basis," but grants a petition, notwithstanding

the other factors, "[w]here a district court's certification decision is manifestly erroneous and virtually certain to be reversed on appeal." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (quoting *Lienhart*, 255 F.3d at 145).

This Court reviews the District Court's decision to certify a class under an abuse-of-discretion standard. *Id.* at 357. Although a district court has wide discretion in deciding whether to certify a class, "that discretion must be exercised within the framework of Rule 23." *Lienhart*, 255 F.3d at 146 (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996)). "A district court abuses its discretion when it materially misapplies the requirements of Rule 23" (*Adair*, 764 F.3d at 357), "makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

VI. REASONS FOR GRANTING INTERLOCUTORY APPEAL

The District Court abused its discretion by certifying Plaintiffs' Rule 23 class, and discretionary review is warranted, because: (A) the Order contains substantial weaknesses and, as such, is manifestly erroneous; and (B) the timing of the appeal is appropriate in light of the nature and status of litigation and the appeal will permit resolution of an unsettled legal question of general importance.

A. The District Court's Order is manifestly erroneous.

1. *The District Court applied an improper "liberal" Rule 23 standard.*

First, the District Court's order is manifestly erroneous and contains substantial weaknesses because it applies a "liberal rather than restrictive construction" of Rule 23, citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) in support. (Ex. A, p. 6). This standard, however, has been flatly rejected by the Supreme Court, which held that a class action is "an exception to the usual rule," and, as such, district courts must conduct a "rigorous analysis" into whether Rule 23's requirements are met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550- 51 (2011). Further, the Fourth Circuit has rejected this "liberal construction," noting that "[t]o the extent the vision of liberality and flexibility set forth by the court in *Gunnells* conflicts with the Supreme Court's admonitions that we should pay 'careful attention' to Rule 23 by giving it a 'rigorous analysis,' we are, of course, are bound to follow the Supreme Court." *Thorn*, 445 F.3d at 318 n.8. The standard applied here constitutes an improper lens through which the District Court viewed the facts, resulting in manifest error.

2. *The District Court failed to rigorously analyze all the record evidence.*

On its face, the Order fails to conduct the requisite independent rigorous analysis to determine if Rule 23's requirements are met. *Adair*, 764 F.3d at 358 (quoting *Dukes*, 131 S. Ct. at 2551) ("the district court has an *independent obligation* to perform a 'rigorous analysis' to ensure that all of the prerequisites

have been satisfied.")(emphasis added). In the Fourth Circuit, failure to conduct this rigorous analysis constitutes an abuse of discretion sufficient to warrant Circuit Court review. *Adair,* 764 F. 3d at 358. *Accord Ealy v. Pinkerton Gov't Svcs., Inc.*, 514 Fed. App'x. 299, 306 (4th Cir. 2013) (unpublished).

Specifically, in the Order, the District Court concludes that common evidence exists to determine independent contractor status on a classwide basis because (in pertinent part): (1) "Defendants exercise uniform control over distributors" by requiring compliance with the "good industry practices" provision in the distributor agreement, (2) Defendants exercise "significant control over profit-generating activities of Plaintiffs" through the national accounts practices, and (3) distributors "are expected to make the same level of investment." (Ex. A, pp. 13-14). In support, however, the District Court relies on extremely limited evidence, which, like Plaintiffs' underlying Motion, largely ignores the putative class members' own extensive and divergent testimony.[8] Further, the District Court failed to distinguish or rigorously analyze significant testimony that contradicts the "common evidence" cited. For example, the District Court cites Defendants' "control over" the national accounts as the common evidence of opportunities for profit or loss, but ignores that putative class members also service cash accounts

[8] The Order cites a few conclusory assertions in Rehberg's conditional certification declaration— several of which were later contradicted by sworn deposition testimony—the distributor agreement, limited passages from three 30(b)(6) depositions, two management declarations, and conditional-certification briefing.

and non-national charge accounts, which for some comprise the majority of their business, and where they admit they have more discretion.

Moreover, while the District Court acknowledges that the applicable economic realities test focuses on "how . . . policies actually affect individual workers" (Ex. A, p. 9), it summarily dismisses, and fails to rigorously analyze, the distributors' substantial testimony confirming that significant differences exist in actual practice. The Court acknowledges Flowers' evidence about differences in management "control," selling distribution rights, operating other businesses, hiring helpers, and building equity, among others, but summarily dismisses this evidence, without rigorously analyzing how it affects class certification, characterizing it as mere examples of distributors "carryi[ng] out the essential functions of [the] job slightly differently," analogous to "variations in personal style and circumstance." (*Id.*, p. 15). By doing so, the District Court disregards the legal significance of these factual differences, each of which is relevant to the applicable economic realities test, ultimately concluding that Defendants' uniform classification of distributors as independent contractors, "substantially similar job duties"[9] and the distributor agreement is sufficient to satisfy commonality. (*Id.*).

[9] Reliance on common "job duties" is also misplaced because the focus of the inquiry here is the economic-realities test factors, not "job duties." *See* fn. 5, *supra*.

3. *The District Court affords improper weight to common classification.*

The District Court's heavy reliance on "common classification" to support certification, which is referenced throughout the Order, is also misplaced. *See, e.g.*, Ex. A, p. 19 ("fact that all putative class members had various minor differences in their job situations does not change the root cause of their claim—the policy of classifying distributors as independent contractors."). This is because reliance on common classification alone results in misapplying the Rule 23 requirements. First, as the Supreme Court has held when discussing commonality, "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate *common answers*." *Dukes*, 131 S. Ct. at 2551 (emphasis added). This common contention must be capable of classwide resolution "in a single stroke." *See id.* Common classification as independent contractor, however, does nothing to prove "in a single stroke" that all 215 putative plaintiffs are misclassified and entitled to damages, especially on this factual record. This is because common classification is not per se unlawful. Rather, to determine whether plaintiffs are misclassified, the court must apply the fact-based economic-realities test factors that focus on *actual practice*, which the record here establishes vary significantly and *will not* yield a common answer for the class in a single stroke. For this reason, when examination of actual practice is required in misclassification cases,

courts routinely deny certification. *E.g., Saleem v. Corporate Transp. Group*, 12 Civ. 8450, 2013 U.S. Dist. LEXIS 163934, at *27 (S.D.N.Y. Nov. 15, 2013) (common classification "will not yield a common answer. Instead, answering that question . . . will require a fact-specific . . . examination of the degree of control that CTG exercised in fact."); *Edwards v. Publishers Circulation Fulfillment, Inc.*, 268 F.R.D. 181, 184 (S.D.N.Y. 2010) (commonality not established when there is no classwide evidence of control *actually* exerted over the class members, notwithstanding existence of standard forms and agreements). The Fourth Circuit, albeit in a different context, has held that when individualized inquiries into each plaintiffs' circumstances are required, certification is inappropriate. *Stott v. Haworth*, 916 F.2d 134, 139 (4th Cir. 1990) ("judicial investigation into individual claims of each plaintiff" precludes certification).

Moreover, relying on common classification alone, to the near exclusion of other relevant factors, skews the Rule 23(b)(3) predominance inquiry. *In re Wells Fargo Home Mortg.*, 571 F.3d 953 (9th Cir. 2009). For example, in *Wells Fargo*, the Ninth Circuit, on 23(f) appeal, reversed a grant of class certification that was largely based on a uniform policy classifying employees as exempt. *See id.* at 956. The district court, like the Court here, noted that "it is manifestly disingenuous for a company to treat a class of employees as a homogenous group for the purposes of internal policies and compensation, and then assert that the same group is too

diverse for class treatment in overtime litigation." *Id.* at 956. But the Ninth Circuit reversed, finding that while a uniform classification policy *is one factor*, it is an abuse of discretion to rely on it "to the near exclusion of other factors relevant to predominance." *Id.* at 959. This is because a uniform exemption policy, like uniform classification, "does nothing to facilitate common proof on the otherwise individualized [exemption] issues." *Id.* Instead, the factfinder must still determine how each class member *is actually* spending his/her time and then determine whether those individualized issues would predominate, or here, determine the actual practice of each Plaintiff and class member. *Id.* Because the court failed to do so, reversal of the underlying class certification decision was appropriate. *See id*. at 959. The same reasoning applies equally here.

4. *The District Court failed to rigorously analyze predominance.*

Perhaps most importantly, the District Court's Order is manifestly erroneous because the Court did not conduct an independent rigorous analysis to determine whether Rule 23(b)(3)'s predominance requirement is met. In fact, the Order contains virtually no analysis on predominance (other than citing the legal standard), but rather merely cross-references the commonality evidence, noting that, "as explained above, . . . common evidence exists as to the propriety of Defendants' uniform classification of all distributors." (Ex. A, pp. 22-23). Not only does the rigorous analysis requirement apply under (b)(3), *Comcast Corp. v.*

Behrend, 133 S. Ct. 1426 (2013), but merely identifying common practices or evidence is not sufficient to satisfy predominance. *Adair*, 764 F.3d at 366 ("the mere fact that the defendants engaged in uniform conduct is not, by itself, sufficient to satisfy Rule 23(b)(3)'s more demanding predominance requirement."). Rather, the court must analyze "why those common practices [are] sufficient to ensure that the class members' common issues would predominate over individual ones." *Id.*

Here, the District Court identified common evidence but failed to *independently analyze* whether it would predominate over the individualized inquiries required under the economic realities test given the record evidence. As *Adair* establishes, this is an abuse of discretion. *See id. Accord Ealy*, 514 Fed. App'x at 306. Moreover, the Supreme Court has proscribed the blending approach employed by the District Court here because "whether common questions predominate over individual questions is a *separate inquiry*, distinct from the requirements found in Rule 23(a)." *Ealy*, 514 Fed. App'x at 305 (citing *Dukes*, 131 S. Ct. at 2556).

Even if the District Court had appropriately analyzed predominance, however, it nonetheless fails. In contrast to the paucity of Plaintiffs' actual record evidence, the extensive evidentiary record here is replete with significant, material dissimilarities in actual practice between the class members on the majority of the

economic realities test factors. Because the economic realities test necessarily requires an analysis of these varying practices and how each affects each plaintiff, which the record establishes differs, individualized issues will inevitably predominate over any "common evidence." In misclassification cases, numerous courts have reached this same conclusion when the underlying claims require an examination of actual practice. *E.g.*, *Sherman v. Am. Eagle Express*, No. 09-575, 2012 U.S. Dist. LEXIS 30728, at *38 (E.D. Pa. March 8, 2012) (need for individualized inquiry into actual practice rendered claims "unsuitable for class-wide treatment," noting that in *In re FedEx Ground Packaging Sys., Inc.*, 273 F.R.D. 424 (N.D. Ind. 2008), the court declined certification of any class where the court would have to make a "driver-by-driver examination."); *Narayan v. EGL, Inc.*, 285 F.R.D. 473, 480 (N.D. Cal. 2012) (predominance not satisfied because while plaintiffs interacted "on the same terms with defendants," they were situated "very differently," requiring individualized inquiries to adjudicate their claims); *Costello v. BeavEx, Inc.*, 303 F.R.D. 295, 308 (N.D. Ill. 2014) (predominance not satisfied given individualized inquiries in independent contractor analysis).

Similarly, the District Court's failure to independently analyze Flowers' contractual and other defenses (e.g., statute of limitations, release, and other defenses) under (b)(3) also constitutes an abuse of discretion. *Adair*, 764 F.3d at 370 (failure to consider what proof the "plaintiff-focused elements of the

[defense]" may require was abuse of discretion). Instead of analyzing whether: (1) common proof exists to allow resolution of these defenses on a classwide basis; and (2) individualized issues would predominate over any such common proof, the District Court summarily dismissed these defenses, noting they can be "applied to all potential class members uniformly according to the version of the Distributor Agreement they signed." (Ex. A, p. 20). This analysis is erroneous because adjudicating these defenses necessarily requires extensive individualized inquiries for each class member. For example, analyzing the statute of limitations defense alone would require the factfinder to determine, *for each class member that signed the applicable agreement,* when they first believed or reasonably should have believed they were misclassified as independent contractors. This type of individualized inquiry, which "focuses on the contents of the plaintiff's mind," defeats predominance. *Thorn*, 445 F.3d at 320-21 (individualized statute-of-limitations defense defeated predominance); *Paulino v. Dollar Gen. Corp.*, No. 3:12-CV-75, 2014 U.S. Dist. LEXIS 64233, at *18 (N.D.W.Va. May 9, 2014) (no predominance given individualized inquiries).

5. *The District Court misapplied the Rule 23(b)(2) standard.*

Finally, the District Court failed to apply Rule 23(b)(2) appropriately or rigorously analyze Rule 23(b)(2) certification. As *Dukes* establishes, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled

to an individualized award of monetary damages." 131 S. Ct. at 2557. Determining damages in this case cannot be conducted by merely applying a one-size-fits-all mechanical formula. Rather, if plaintiffs are found to be misclassified, whether they are entitled to damages and the amount will necessarily depend on several individualized factors, including: (1) what version of the contract they signed; (2) if the post-2002 version, when they gained knowledge of their claims; (3) whether they signed a release; (4) whether they signed a specific authorization and, if so, for what amount and for what time period; and (4) the extent and type of deductions, all of which may vary by distributor. In light of these individualized damage calculations and without procedural protections afforded (b)(3) claims, Rule (b)(2) certification here would violate Defendants' due process rights and is improper as a matter of law.

B. The appeal will permit resolution of an unsettled legal question and the status of litigation is ripe for appeal.

Finally, appeal is warranted here because it will permit resolution of an unsettled legal question of general importance. Class action lawsuits challenging independent contractor status are on the rise. Following *Dukes*, the Fourth Circuit has yet to address the type of evidence sufficient to establish class certification under the necessarily fact-based economic realities test. Yet the potential exposure to defendants if classes are certified is enormous, creating incentives to settle even non-meritorious cases, particularly given the uncertain legal standard. Resolving

this unsettled legal question is thus of significant importance and would resolve an unsettled question of law. Moreover, the nature and status of litigation makes this case particularly ripe for appeal. Discovery has concluded and there are no pending dispositive motions. Conversely, if the Order stands, the parties will likely spend significant time and expense proceeding to trial on a class basis, all of which would be for naught if the District Court ultimately decertifies given the individualized evidence and inquiries here.[10]

VII. CONCLUSION

For the reasons discussed above, appellate review of the Order is wholly appropriate and satisfies the criteria for Rule 23(f) review. Flowers respectfully requests that this Court grant its Petition for review accordingly.

Dated this 7th day of April, 2015.

Respectfully submitted,
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[10] The Order contemplates this result already. (Ex. A, pp. 25-26).

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, the foregoing was filed with the Clerk of Court using the CM/ECF system and copies were served via email and first class mail, addressed to the following counsel of record for Plaintiffs:

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