

10-1884-cv  
Salim Shahriar et al. v. Smith & Wollensky

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

August Term 2010

Docket No. 10-1884-cv

Argued: June 6, 2011

Decided: September 26, 2011

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Salim Shahriar, Muhammad Islam, and Mary Harvey, on behalf of themselves and all others similarly situated, and Suhel Ahmed, Andrew Mellor, Maria Zayaruzny, Masud Ahad, Anthony Justin DeSouza, Nazaruiddin Zaidan, Christopher Lee Robbins, Sebastian G. Joulain, Michael Mueller, Gous Uddin, Ron Elton Megason, Bobbi Kim, Nicholas Lee Mullins, Erasmo Dinninno, Matthew Alexander Wulf, Ishah Faith-Jannsen, Mahbub Malik, Raymond Taylor, Phylliss Lynn Spiece, Lawrence Larocca, Rbiai Ouazene, Pat Thuniljinda,

*Plaintiffs-Appellees,*

v.

Smith & Wollensky Restaurant Group, Incorporated, DBA Park Avenue Restaurant, Fourth Walls Restaurant LLC, DBA Park Avenue Restaurant,

*Defendants-Appellants.\**

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Before: NEWMAN, MINER, and LYNCH, Circuit Judges.

Defendants-appellants appeal from a January 29, 2011 Order of the United States District Court for the Southern District of New York (Cedarbaum, J.) granting plaintiffs-appellees’ motion for class certification, pursuant to Federal Rule of Civil Procedure 23, of their state law claims, in an action brought by former employees of defendant restaurant alleging (1) claims of failure to pay minimum wage and overtime in violation of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*, (“FLSA”); (2) claims of failure to pay minimum wage and overtime in violation of the New York State Minimum Wage Act, New York Labor Law §§ 650, 663; (3) illegal pay deductions and deductions from gratuities in violation of New York Labor Law §§ 193, 196-d, 198-b; and (4) violation of the New York Labor Law’s “spread of hours” requirement, New York Labor Law § 650, *et seq.*, N.Y. Comp. Code R. & Regs. tit. 12, § 137-1.7, the District Court having exercised supplemental jurisdiction over plaintiffs-appellees’ New York State Labor Law claims and found the requirements for class certification under Rule 23(a), (b)(3) satisfied.

AFFIRMED.

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\* The Clerk of the Court is directed to amend the official caption as set forth above.

1 GREGORY B. REILLY III, A. MICHAEL WEBER, Littler  
2 Mendelson, P.C., New York, New York, *for*  
3 *Defendants-Appellants*.

4 DANIEL MAIMON KIRSCHENBAUM, Denise A.  
5 Schulman, Charles Joseph, Joseph, Herzfeld, Hester  
6 & Kirschenbaum LLP, New York, New York, *for*  
7 *Plaintiffs-Appellees*.

8 Richard J. Burch, Bruckner Burch PLLC, Houston,  
9 Texas, *for Plaintiffs-Appellees*.

10 DEAN A. ROMHILT (Jennifer S. Brand, Associate  
11 Solicitor and Paul L. Frieden, Counsel for Appellate  
12 Litigation, *on the brief*; M. Patricia Smith, Solicitor of  
13 Labor, of counsel), Washington, D.C., *for the United*  
14 *States Secretary of Labor as Amicus Curiae in Support of*  
15 *Plaintiffs-Appellees*.

16 Justin M. Swartz (Rachel Bien and Mariko Hirose, on  
17 the brief), Outten & Golden LLP, New York, New  
18 York, *for Rebecca M. Hamburg, National Employment*  
19 *Lanyers Association, et al., San Francisco, California, as*  
20 *Amicus Curiae in Support of Plaintiffs-Appellees*.

21 MINER, Circuit Judge:

22 Defendants-appellants, Smith & Wollensky Restaurant Group, Inc. (d/b/a Park Avenue  
23 Restaurant), and Fourth Walls Restaurant LLC (d/b/a Park Avenue Restaurant) (collectively, “Park  
24 Avenue”) appeal from a January 29, 2010, Order of the United States District Court for the  
25 Southern District of New York (Cedarbaum, J.) granting a motion for class certification made,  
26 pursuant to Federal Rule of Civil Procedure 23, by plaintiffs-appellees, Salim Shahriar, Muhammad  
27 Islam, and Mary Harvey (collectively, the “Plaintiffs”). Plaintiffs worked for Park Avenue as waiters  
28 at the Park Avenue Restaurant in Manhattan. On behalf of themselves and all others similarly  
29 situated, they filed a Complaint on January 4, 2008, and an Amended Complaint on July 28, 2008,  
30 alleging that Park Avenue violated the minimum wage and overtime provisions of the Fair Labor  
31 Standards Act (“FLSA”), Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201–19  
32 (2006), by requiring waiters to share tips with tip-ineligible employees. Plaintiffs allege that Park  
33 Avenue also violated various provisions of the New York Labor Law by requiring servers to share  
34 tips with tip-ineligible employees and by failing to pay waiters for an extra hour’s work when their

1 workdays lasted more than ten hours. Plaintiffs' federal claims for relief were brought as a collective  
2 action pursuant to Section 16(b) of the FLSA, 29 U.S.C. § 216(b), and a putative class action was  
3 brought with regard to Plaintiffs' New York State Labor Law claims.

4 On November 11, 2009, Plaintiffs moved to have their state law claims certified as a class  
5 action pursuant to Federal Rule of Civil Procedure 23 ("Rule 23"). The District Court heard oral  
6 argument and orally granted Plaintiffs' motion on January 28, 2010. In granting the motion, the  
7 court exercised supplemental jurisdiction over the Plaintiffs' New York State Labor Law claims and  
8 found that the requirements for class certification under Rule 23(a), (b)(3) had been met.

9 On February 11, 2010, Park Avenue filed in this Court, pursuant to Federal Rule of Civil  
10 Procedure 23(f), a petition for leave to appeal from the District Court's written January 29, 2010,  
11 interlocutory Order granting Plaintiffs' motion for class certification of their state law claims. Over  
12 plaintiffs' opposition, we granted the petition for leave to appeal on May 14, 2010. [A 259–60] For  
13 the reasons that follow, we affirm the Order of the District Court certifying the class action.

## 14 BACKGROUND

### 15 I. Park Avenue's Alleged Practices

16 Defendant-appellant Smith & Wollensky Restaurant Group, Inc. ("Smith & Wollensky"), is a  
17 Delaware corporation with its headquarters in New York City. Smith & Wollensky owned and  
18 managed Park Avenue Restaurant in midtown Manhattan. Defendant Fourth Walls Restaurants  
19 LLC (d/b/a Park Avenue Restaurant) is a limited liability corporation with its headquarters in New  
20 York and owns and manages Park Avenue Restaurant. Each plaintiff was employed by Park Avenue  
21 at the Park Avenue Restaurant as a "front waiter/captain" within three years of the filing of the  
22 Complaint.

23 Plaintiffs have alleged that Park Avenue's practices concerning tips violate federal and state  
24 law. Park Avenue compensates servers pursuant to state and federal tip credits that permit

1 restaurant employers to pay tipped employees<sup>1</sup> a lower minimum wage as long as the employees earn  
2 a certain amount in tips. See 29 U.S.C. § 203(m) (2006); N.Y. Comp. Codes R. & Regs. tit. 12, §  
3 137-1.5 (2010) (“Tip allowance for food service worker”).<sup>2</sup> The FLSA permits employers to take a  
4 tip credit up to 50% of the minimum wage except that the credit “may not exceed the value of the  
5 tips actually received by the employee.” 29 U.S.C. § 203(m). Under New York Labor Law, as of  
6 January 1, 2011, however, employers are entitled to a tip credit of only \$2.25. N.Y. Comp. Codes R.  
7 & Regs. tit. 12, § 146-1.3 (effective Jan. 1, 2011) (“Tip credits”).

8 Under the FLSA an employer may not avail itself of the tip credit if it requires tipped  
9 employees to share their tips with employees who do not “customarily and regularly receive tips.”  
10 29 U.S.C. § 203(m) (stating that the tip credit “shall not apply with respect to any tipped employee  
11 unless such employee has been informed by the employer of the provisions of this subsection, and  
12 all tips received by such employee have been retained by the employee, except that this subsection  
13 shall not be construed to prohibit the pooling of tips among employees who customarily and  
14 regularly receive tips”). Thus, an employer loses its entitlement to the tip credit where it requires  
15 tipped employees to share tips with (1) employees who do not provide direct customer service or (2)  
16 managers. E.g., Myers v. Copper Cellar Corp., 192 F.3d 546, 550–51 (6th Cir. 1999) (noting its  
17 precedent that a host or hostess qualifies as a “tipped employee[]” because his or her work entails  
18 “sufficient customer interaction and table attendance duties” but concluding that a “salad maker”  
19 was not a tipped employee because a salad maker: had no “direct intercourse with diners, worked  
20 entirely outside the view of restaurant patrons, and solely performed duties traditionally classified as

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<sup>1</sup> A “tipped employee” is one “engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips.” 29 U.S.C. § 203(t) (2006).

<sup>2</sup> For most of the period relevant to the underlying action, the New York regulation regarding tip credits was N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.5. On December 14, 2010, this regulation was replaced by N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.3 (effective Jan. 1, 2011) (“Tip credits”). Under, § 146-1.3(b) “[a] food service worker shall receive a wage of at least \$5.00 per hour, and credit for tips shall not exceed \$2.25 per hour, provided that the total of tips received plus the wages equals or exceeds \$7.25 per hour.”

1 food preparation or kitchen support work”); Chung v. New Silver Palace Rest., 246 F. Supp. 2d 220,  
2 229 (S.D.N.Y. 2002) (finding that it violates the FLSA for an employer to use a tip credit while  
3 requiring tipped employees to share tips with managers).

4 New York law similarly prohibits employers from requiring tipped employees to share tips  
5 with non-service employees or managers. N.Y. Labor Law § 196-d (“§ 196-d”) (McKinney 2009)  
6 (“Gratuities”) provides:

7 No employer or his agent or an officer or agent of any corporation, or any other  
8 person shall demand or accept, directly or indirectly, any part of the gratuities,  
9 received by an employee, or retain any part of a gratuity or of any charge purported  
10 to be a gratuity for an employee. . . . Nothing in this subdivision shall be construed  
11 as affecting . . . the sharing of tips by a waiter with a busboy or similar employee.

12 By its plain terms, § 196-d bars employers from requiring tipped employees to share tips  
13 with employees who do not perform direct customer service — i.e., employees who are not  
14 “busboy[s] or similar employee[s]” and employees who are managers or “agent[s]” of the employer.  
15 See Chan v. Triple 8 Palace, Inc. (“Chan II”), No. 03 Civ. 6048, 2006 U.S. Dist. LEXIS 15780, at  
16 \*57 (S.D.N.Y. Mar. 31, 2006) (noting that plaintiffs may establish a violation of § 196-d by showing  
17 that they were required to share tips with individuals who were either “employers, owners, or  
18 managers” or simply “not waiters, busboys, or ‘similar employees’”); see also Ayres v. 127  
19 Restaurant Corp., 12 F. Supp. 2d 305, 307 n.1 (S.D.N.Y. 1998) (“While tip-pooling is not per se  
20 illegal, N.Y. Labor Law § 196-d prohibits any ‘employer or his agent’ from ‘demand[ing] or  
21 accept[ing], directly or indirectly, any part of the gratuities, received by an employee, or retain[ing]  
22 any part of a gratuity or of any charge purported to be a gratuity for an employee.’ An employer  
23 ‘includes any person acting directly or indirectly in the interest of an employer in relation to an  
24 employee.’ 29 U.S.C. § 203(d).” (internal citation omitted; alternations in original)); Tandoor Rest.,  
25 Inc. v. Comm’r of Labor, No. PR-82-85 (Industrial Bd. of App. Dec. 23, 1987) (finding that  
26 defendant restaurant violated § 196-d by requiring service employees to share tips with managers and  
27 with clerical and kitchen staff who did not engage in “any meaningful aspect of direct service to  
28 customers”).

1 Thus, 29 U.S.C. § 203(m) and § 196-d bar the same types of tipping practices, and actions  
2 that violate the tip pooling provision of 29 U.S.C. § 203(m) may also violate § 196-d. Plaintiffs  
3 contend that Park Avenue's tipping practices violate both 29 U.S.C. § 203(m) and § 196-d.  
4 According to the Plaintiffs, Park Avenue required servers to share their tips with "expeditors,"  
5 "dishwashers," "silver polishers," and "coffee makers." Plaintiffs allege that none of these  
6 employees had any direct contact with customers. These employees worked in the kitchen, which  
7 was on a floor of the restaurant to which customers did not have access. According to the Plaintiffs,  
8 at the Park Avenue Restaurant, expeditors work in the kitchen relaying food orders to the cooks and  
9 making sure that food runners take the correct orders out of the kitchen; dishwashers wash dishes  
10 and various other service items; coffee makers prepare coffee; and silver polishers polish silverware  
11 and glassware.

12 Beginning in or around May 2007, Park Avenue also required servers to share tips with a  
13 person who Plaintiffs contend was a "manager" whose primary duties included supervising  
14 employees, interviewing job applicants, disciplining employees, running daily pre-shift meetings for  
15 servers, and scheduling employees. Plaintiffs claim that, because of the nature of a restaurant-wide  
16 tip sharing policy, the inclusion of a single tip-ineligible employee in that pool is a violation with  
17 respect to all waiters because every waiter would have shared tips with that ineligible employee.  
18 Plaintiffs contend that their claims brought under the FLSA and § 196-d depend on whether, given  
19 their job duties, expeditors, dishwashers, silver polishers, coffee makers, and managers lawfully could  
20 be included in Park Avenue's tip pool and tip sharing scheme. Because all servers were required to  
21 share their tips with the same people, Plaintiffs contend that once factual findings are made in the  
22 District Court as to the duties of the positions in question, Park Avenue will either be liable or not  
23 liable to all servers under the FLSA and section 196-d of the New York Labor Law.<sup>3</sup>

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<sup>3</sup> Although it does not affect the resolution of the issues in this case, the New York State Hospitality Industry Wage Order, which took effect on January 1, 2011, made various changes to practices in the food services industry. One such change is that employers may now require food service workers to participate in mandatory tip sharing or tip pooling. N.Y. Comp. Codes R. & Regs., tit. 12, §§ 146-2.15(b), 146-2.16(b) (Jan. 1, 2011).

1 Plaintiffs also contend that Park Avenue violated New York’s “spread of hours” provision.  
2 That provision required employers to pay servers an extra hour’s pay at the regular minimum wage  
3 for each day they work more than ten hours. N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 (2010)  
4 (“On each day in which the spread of hours exceeds 10, an employee shall receive one hour’s pay at  
5 the basic minimum hourly wage rate before allowances, in addition to the minimum wages otherwise  
6 required in this Part.”).<sup>4</sup>

7 II. Prior Proceedings

8 On January 4, 2008, Plaintiffs filed a Complaint in the District Court. On July 28, 2008,  
9 Plaintiffs filed an Amended Complaint alleging (1) claims of failure to pay minimum wage and  
10 overtime in violation of the FLSA (Claims One and Two); (2) claims of failure to pay minimum  
11 wage and overtime in violation of the New York State Minimum Wage Act, New York Labor Law  
12 §§ 650, 663 (McKinney 2002) (Claims Three and Four); (3) illegal pay deductions and deductions  
13 from gratuities in violation of New York Labor Law §§ 193, 196-d, 198-b (McKinney 2009) (Claim  
14 Five); and (4) violation of the New York Labor Law’s “spread of hours” requirement, N.Y. Comp.  
15 Code R. & Regs. tit. 12, § 137-1.7 (2010) (Claim Six).<sup>5</sup>

16 Following joinder of issue, plaintiffs filed a November 11, 2009 motion seeking an order  
17 from the District Court certifying the class of plaintiffs, as to their state law claims, pursuant to Rule  
18 23. In support of their motion for class certification, Plaintiffs submitted declarations, deposition  
19 testimony, and documentary evidence that related to the entire period of time covered by the

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<sup>4</sup> As of December 29, 2010, former N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 was replaced by N.Y. Comp. Codes R. & Regs. tit. 12, § 146-1.6, which also requires employers to pay employees an extra hour’s pay at the minimum wage when their workday lasts longer than 10 hours. Plaintiffs cite to N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 because it was effective for the entire class period.

<sup>5</sup> After the original Complaint was filed, four additional plaintiffs filed consent-to-sue forms, thereby asserting FLSA claims. By consent of the parties and with the District Court’s approval, the Plaintiffs sent notice in 2008 of the FLSA claims to the waiters who worked for Park Avenue, providing an opportunity for them to join the lawsuit within the FLSA statute of limitations. As a result, 18 additional persons filed consent to sue forms, bringing the total number of plaintiffs to 25, all now named in the caption.

1 underlying action. The Plaintiffs submitted the evidence to demonstrate that (1) all purported class  
2 members were subject to the same tipping practices; (2) the expeditors, dishwashers, silver polishers,  
3 and coffee makers with whom servers were required to share tips provided no direct customer  
4 service; (3) servers were required to share tips with a manager; and (4) Park Avenue did not provide  
5 spread of hours pay to servers.

6 At a hearing in the District Court on January 28, 2010, the court certified the class and  
7 explained its reasoning from the bench. As an initial matter, the court retained supplemental  
8 jurisdiction over the Plaintiffs' state law claims, noting its concern with the prospect of Plaintiffs  
9 having to refile their state claims in state court given the statute of limitations period. Specifically,  
10 the court stated that it would not dismiss the state law claims "unless I know that [the Plaintiffs] can  
11 do the same thing in state court that they can do here." Moreover, in allowing the state law class  
12 claims to coexist with the federal claims, the court also stated that "there is an interesting policy  
13 question involved" but that it was "too late in this case" and "too close to trial" to decline  
14 supplemental jurisdiction.

15 Second, the court turned to class certification under Rule 23. The court noted that sufficient  
16 numerosity existed in this case, as a class of 275 "is numerous enough." Fed. R. Civ. P. 23(a)(1).  
17 Next, the court accepted Plaintiffs' argument that there were "no individual issues that predominate  
18 over the class issues" and that "[t]he class issues are one and the same," thereby finding that "there  
19 are questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), (b)(3), and that the  
20 "claims or defenses of the representative parties are typical of the claims or defenses of the class,"  
21 Fed. R. Civ. P. 23(a)(3).

22 Park Avenue filed a petition for leave to appeal pursuant to Rule 23(f) on February 11, 2010,  
23 seeking permission to appeal the District Court's order granting Plaintiffs' motion for class  
24 certification.<sup>6</sup> A Panel of this Court granted that petition on May 14, 2010.<sup>7</sup>

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<sup>6</sup> By motion filed in the District Court on February 11, 2010, Park Avenue sought a stay of proceedings in the District Court pending the outcome of this appeal. That unopposed motion was granted by the court on March 15, 2010. Shahriar, et al. v. Smith & Wollensky, et al., No. 08-cv-

1 On appeal, Park Avenue challenges the District Court’s decision granting class certification.  
2 Park Avenue contends that the court: (1) abused its discretion in exercising supplemental jurisdiction  
3 over the Plaintiffs’ New York State Labor Law claims; (2) erred in its determination that the  
4 Plaintiffs’ evidence sufficed to meet the standards for class certification under Rule 23; and (3) failed  
5 to make a ruling with respect to each requirement for Rule 23 class certification.

6 **ANALYSIS**

7 I. Supplemental Jurisdiction Over Plaintiffs’ State Law Class Claims

8 Before turning to the question of whether Rule 23 class certification was proper, we first  
9 must examine whether the District Court properly exercised supplemental jurisdiction over  
10 Plaintiffs’ parallel state law class claims. We review a district court’s exercise of supplemental  
11 jurisdiction for abuse of discretion. See Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt.  
12 Dist., 31 F.3d 89, 103 (2d Cir. 1994) (A “district court may, in its discretion, exercise supplemental  
13 jurisdiction.”).

14 The FLSA was designed to protect workers and ensure that they are not subjected to  
15 working conditions “detrimental to the maintenance of the minimum standard of living necessary  
16 for health, efficiency, and general well-being.” 29 U.S.C. § 202(a) (2006). New York similarly  
17 enacted minimum wage standards to remedy the practice of persons working “at wages insufficient  
18 to provide adequate maintenance for themselves and their families,” N.Y. Lab. Law § 650  
19 (McKinney 2002), and it created standards regarding tipping in order to ensure that service  
20 employees receive all monies given as gratuities to them. See Samiento v. World Yacht Inc., 10  
21 N.Y.3d 70, 79 n.4 (2008). Victims of wage and hour violations therefore often have parallel claims

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0057 (MGC), Document 63 (S.D.N.Y. March 17, 2010) (Memo Endorsed, Defendants’ Notice of Motion for a Stay Pending Appeal).

<sup>7</sup> Federal Rule of Civil Procedure Rule 23(f) provides us with the authority to permit interlocutory review of a district court’s class certification order. Fed. R. Civ. P. 23(f). Permission was granted by a previous panel of this Court, and we therefore have appellate jurisdiction to proceed with this appeal.

1 under both the FLSA and the New York Labor Law (“NYLL”).

2 Under the FLSA, a plaintiff may bring a “collective action” for his or her FLSA claims.  
3 Collective actions under the FLSA are actions that allow employees to sue on behalf of themselves  
4 and other employees who are “similarly situated.” 29 U.S.C. § 216(b) (2006). The FLSA requires,  
5 however, that an employee affirmatively consent to join a “collective action” in order to assert a  
6 claim. Id. (“An action to recover the liability prescribed in either of the preceding sentences may be  
7 maintained against any employer (including a public agency) in any Federal or State court of  
8 competent jurisdiction by any one or more employees for and in behalf of himself or themselves and  
9 other employees similarly situated. No employee shall be a party plaintiff to any such action unless  
10 he gives his consent in writing to become such a party and such consent is filed in the court in which  
11 such action is brought.”).

12 Thus, an employee fearful of retaliation or of being “blackballed” in his or her industry may  
13 choose not to assert his or her FLSA rights. Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 163  
14 (S.D.N.Y. 2008) (“Indeed, it may be that in the wage claim context, the opt-out nature of a class  
15 action is a valuable feature lacking in an FLSA collective action, insofar as many employees will be  
16 reluctant to participate in the action due to fears of retaliation.” (internal citations omitted)); Scott v.  
17 Aetna Services, 210 F.R.D. 261, 267 (D. Conn. 2002) (noting “the evidence that potential class  
18 members failed to join the FLSA class action because they feared reprisal”). See generally Sanft v.  
19 Winnebago Indus., Inc., 214 F.R.D. 514, 524 (N.D. Iowa 2003) (compiling cases holding Rule 23’s  
20 numerosity requirement satisfied because, where some class members are still employed by the  
21 defendant, “concern regarding employer retaliation or reprisal renders individual joinder less  
22 practicable”).

23 The NYLL, on the other hand, does not have a provision for collective actions. Instead,  
24 plaintiffs may pursue a traditional “opt-out” class action through class certification for their state law  
25 claims. A class action under the NYLL allows employees to recover lost wages without the risks  
26 attendant to asserting affirmatively an FLSA claim. See, e.g., Damassia, 250 F.R.D. at 152. Because

1 FLSA and NYLL claims usually revolve around the same set of facts, plaintiffs frequently bring both  
2 types of claims together in a single action using the procedural mechanisms available under 29  
3 U.S.C. § 216(b) to pursue the FLSA claims as a collective action and under Rule 23 to pursue the  
4 NYLL claims as a class action under the district court's supplemental jurisdiction. This is what has  
5 occurred in this case. At issue before us is whether the District Court properly exercised  
6 supplemental jurisdiction over Plaintiffs' NYLL claims such that the Plaintiffs may proceed  
7 simultaneously with both their class action and collective action in federal court.

8 Park Avenue contends that it was an abuse of the District Court's discretion to exercise  
9 supplemental jurisdiction, arguing that Congress's intent in requiring that employees affirmatively  
10 opt-in to FLSA collective actions is undermined when employees bring a lawsuit alleging both a  
11 FLSA collective action and a Rule 23 class action (i.e., an opt-out class action) alleging state labor  
12 law claims. Park Avenue asserts that the inherent conflict between the two types of actions stems  
13 from the fact that the number of employees in the opt-out class will likely be much larger than the  
14 number in the opt-in collective action. Park Avenue claims that the dual actions are impractical,  
15 unfair, and "offensive to the structure of the FLSA" because those employees who do not opt-in to  
16 the FLSA collective action "could very well have their FLSA cause of action extinguished" as their  
17 FLSA claims will be adjudicated by the dual (state) action. We disagree.

18 A district court's exercise of supplemental jurisdiction is governed by 28 U.S.C. § 1367  
19 ("section 1367"). Subsection (a) of section 1367 provides:

20 (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise  
21 by Federal statute, in any civil action of which the district courts have original  
22 jurisdiction, the district courts shall have supplemental jurisdiction over all other  
23 claims that are so related to claims in the action within such original jurisdiction that  
24 they form part of the same case or controversy under Article III of the United States  
25 Constitution. . . .

26 28 U.S.C. § 1367(a) (2006). For purposes of section 1367(a), claims "form part of the same case or  
27 controversy" if they "derive from a common nucleus of operative fact." Briarpatch Ltd., L.P. v.  
28 Phoenix Pictures, Inc., 373 F.3d 296, 308 (2d Cir. 2004) (internal quotation marks omitted). Here,  
29 the NYLL and FLSA actions clearly derive from such a common nucleus of operative facts since

1 they arise out of the same compensation policies and practices of Park Avenue. See, e.g., Treglia v.  
2 Town of Manlius, 313 F.3d 713, 723 (2d Cir. 2002) (exercise of supplemental jurisdiction was proper  
3 where plaintiff's state and federal claims arose "out of approximately the same set of events").

4 Where section 1367(a) is satisfied, "the discretion to decline supplemental jurisdiction is available  
5 only if founded upon an enumerated category of subsection 1367(c)." Itar-Tass Russian News  
6 Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998) (emphasis supplied). In addition,  
7 we have stated that

8 where at least one of the subsection 1367(c) factors is applicable, a district court  
9 should not decline to exercise supplemental jurisdiction unless it also determines that  
10 doing so would not promote the values articulated in [United Mine Workers of  
11 America v.] Gibbs, [383 U.S. 715, 726 (1966)]: economy, convenience, fairness, and  
12 comity.

13 Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004).

14 Subsection (c) of § 1367 provides:

15 (c) The district courts may decline to exercise supplemental jurisdiction over a claim under  
16 subsection (a) if —

- 17 (1) the claim raises a novel or complex issue of State law,  
18 (2) the claim substantially predominates over the claim or claims over which the  
19 district court has original jurisdiction,  
20 (3) the district court has dismissed all claims over which it has original jurisdiction, or  
21 (4) in exceptional circumstances, there are other compelling reasons for declining  
22 jurisdiction.

23 28 U.S.C. § 1367(c) (2006).

24 "In providing that a district court 'may' decline to exercise such jurisdiction, [section 1367(c)]  
25 is permissive rather than mandatory." Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir.  
26 2003) (citing Marcus v. AT & T Corp., 138 F.3d 46, 57 (2d Cir. 1998); Nowak v. Ironworkers Local  
27 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir.1996)). "As the Supreme Court stated in discussing §  
28 1367's predecessor judicial doctrine of pendent jurisdiction, however, this is traditionally 'a doctrine  
29 of discretion, not of plaintiff's right.'" Kolari v. New York Presbyterian Hosp., 455 F.3d 118, 122  
30 (2d Cir. 2006) (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)). "Subsection (c)  
31 of § 1367 'confirms the discretionary nature of supplemental jurisdiction by enumerating the

1 circumstances in which district courts can refuse its exercise.” Id. (quoting City of Chicago v. Int’l  
2 Coll. of Surgeons, 522 U.S. 156, 173 (1997)).

3 Having concluded that the NYLL and FLSA claims form part of the same case or  
4 controversy, our analysis proceeds to section 1367(c), where the critical inquiry becomes whether  
5 one or more of the section 1367(c) factors is applicable, in which case the exercise of supplemental  
6 jurisdiction could be an abuse of discretion.

7 First, as to section 1367(c)(1), Plaintiffs’ NYLL claims based on spread-of-hours pay and  
8 purported illegal deductions from tips do not appear to raise a “novel or complex issue of [s]tate  
9 law.” Rather, the spread of hours claim will likely hinge on factual findings of (1) whether class  
10 members had workdays lasting more than ten hours and (2) whether Park Avenue paid class  
11 members an extra hour’s pay at the New York minimum wage when their workdays lasted more  
12 than ten hours. See N.Y. Comp. Codes R. & Regs. tit. 12, § 137-1.7 (2010). Plaintiffs’ claim for  
13 illegal deductions from tips is also straightforward. That claim will turn on whether servers were  
14 required to share or pool tips with (1) agents of their employer (such as the Plaintiffs’ manager)  
15 and/or with (2) employees who were not waiters, busboys, or similar employees (such as expeditors,  
16 silver polishers, dishwashers, and coffee makers who allegedly provided no direct customer service).  
17 See N.Y. Labor Law § 196-d (McKinney 2009); see also N.Y. Comp. Codes R. & Regs. tit. 12, §  
18 146-2.14(e) (2011) (“[Tip-eligible employees must perform, or assist in performing, personal service  
19 to patrons at a level that is a principal and regular part of their duties and is not merely occasional or  
20 incidental.”). Accordingly, we conclude that Plaintiffs’ claims do not raise complicated or novel  
21 issues of state law for purposes of § 1367(c)(1).

22 Section 1367(c)(2) requires that a state law claim “substantially predominate” over a federal  
23 claim before a district court has discretion to refuse supplemental jurisdiction. See Itar-Tass Russian  
24 News Agency, 140 F.3d at 448. In adjudicating the federal claims, the District Court likely will  
25 determine whether the Plaintiffs were tip-eligible under the FLSA. Because the FLSA and the  
26 NYLL use a similar standard for making such a determination, and because each set of claims arise

1 from the same set of operative facts, a determination as to the FLSA claims may decide the  
2 Plaintiffs' NYLL claim as well. See 29 U.S.C. § 203(m) (2006); New York Labor Law § 196-d  
3 (McKinney 2009).

4           Moreover, we agree with our sister circuits that the fact that there are more class members in  
5 the state law class action than those in the FLSA collective action “should not lead a court to the  
6 conclusion that a state claim ‘substantially predominates’ over the FLSA action, as section 1367(c)  
7 uses that phrase.” Ervin v. OS Rest. Servs., Inc., 632 F.3d 971, 980 (7th Cir. 2011). “Predomination  
8 under section 1367 generally goes to the type of claim, not the number of parties involved.” Id.  
9 (quoting De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 311 (3rd Cir. 2003)); see also Ervin, 632  
10 F.3d at 981 (“[T]he disparity between the number of FLSA plaintiffs and the number of state-law  
11 plaintiffs is not enough to affect the supplemental jurisdiction analysis. In the majority of cases, it  
12 would undermine the efficiency rationale of supplemental jurisdiction if two separate forums were  
13 required to adjudicate precisely the same issues because there was a different number of plaintiffs  
14 participating in each claim.”); accord Wang v. Chinese Daily News, Inc., 623 F.3d 743, 761–62 (9th  
15 Cir. 2010) (“Although the number of claimants and amount of potential damages in the [state law]  
16 claim may have been higher . . . ‘[p]redomination under section 1367(c)(2) relates to the type of  
17 claim and here the state law claims essentially replicate the FLSA claims — they plainly do not  
18 predominate.” (emphasis and alteration in original)). Indeed, any addition of plaintiffs in the  
19 certified state law class action does not change the factual determinations and claims made with  
20 regard to Park Avenue’s practices. Accordingly, we conclude that the Plaintiffs’ state law claims do  
21 not substantially predominate over their federal claims, over which the District Court has original  
22 jurisdiction, for purposes of § 1367(c)(2).

23           Third, section 1367(c)(3) is not applicable here because the District Court did not dismiss  
24 any claims over which it had original jurisdiction.

25           Fourth, as to whether there is a “compelling reason” under section 1367(c)(4) for the  
26 District Court to decline supplemental jurisdiction over the NYLL claims, Park Avenue argues that

1 class certification should have been denied “because of [an] inherent conflict” between opt-in  
2 collective actions under FLSA and opt-out class actions under NYLL. We reject this argument for  
3 several reasons. First, nothing in the language of the FLSA prevents the exercise of supplemental  
4 jurisdiction over Plaintiffs’ state law wage claims. Section 216(b) of the FLSA provides that

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

19 29 U.S.C. § 216(b) (2006). This section explicitly authorizes employees, on behalf of themselves and  
20 those similarly situated, to bring, under the FLSA, minimum wage, overtime, and anti-retaliation  
21 claims. Section 216(b) also provides that the FLSA consent requirement “applies only to wage  
22 claims brought under the substantive provisions of the FLSA” and does not apply to “wage claims  
23 generally.” Damassia, 250 F.R.D. at 162. Accordingly, we do not read the plain language of §  
24 216(b) as restraining any remedies available to employees under state law or as affecting a federal  
25 court’s ability to obtain supplemental jurisdiction over state employment actions. See Ervin, 632  
26 F.3d at 979 (“[T]he opt-in procedures in the FLSA do not operate to limit — expressly or impliedly  
27 — a district court’s supplemental jurisdiction to only those state-law claims that also involve opt-in  
28 procedures.”).

29 Second, the FLSA’s “savings clause” makes clear that states may enact wage laws that are  
30 more protective than those that are provided in the act: “No provision of this chapter or of any  
31 order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance  
32 establishing a minimum wage higher than the minimum wage established under this chapter . . . .”

33 29 U.S.C. § 218(a) (2006). We have held that this clause demonstrates Congress’ intent to allow state

1 wage laws to co-exist with the FLSA by permitting explicitly, for example, states to mandate greater  
2 overtime benefits than the FLSA. See Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221–22 (2d Cir.  
3 1991) (rejecting the argument that the FLSA preempts state wage laws); see also Ervin, 632 F.3d at  
4 977 (same); Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1151 (9th Cir. 2000) (stating that  
5 section 18(a) indicates that the FLSA is not the exclusive remedy for wage payment claims). Further,  
6 interpreting the above provisions of the FLSA to bar employees’ access to federal courts to seek  
7 class-wide remedies for alleged substandard working conditions “detrimental to [their] . . . health,  
8 efficiency, and general well-being,” 29 U.S.C. § 202(a) (2006), would be inconsistent with the stated  
9 purpose of the FLSA.

10 Third, the legislative history surrounding the FLSA’s opt-in provision also provides no  
11 support for precluding joint prosecution of FLSA and state law wage claims in the same federal  
12 action. Originally, § 216(b) permitted an employee to bring a collective class action on behalf of  
13 similarly situated employees but did not expressly require unnamed plaintiffs to opt-in to the action.  
14 See Fair Labor Standards Act of 1938, 52 Stat. 1060, 1069 (1938). Then, in 1947 Congress added  
15 the opt-in provision through passage of the Portal-to-Portal Act (the “Portal Act”). See Portal Act,  
16 § 1, 61 Stat. 84, 84–85 (1947). The Portal Act made clear that the opt-in requirement “shall be  
17 applicable only with respect to actions commenced under the [FSLA] of 1938.” Id. § 5(b), 61 Stat. at  
18 87. However, the Portal Act contains no suggestion of any intent to prevent class certification or  
19 any prohibition of the exercise of supplemental jurisdiction over state wage law class claims. See  
20 Regulating the Recovery of Portal-to-Portal Pay, and for Other Purposes, H.R. Rep. No. 80-71  
21 (1947); Exempting Employers from Liability for Portal-to-Portal Wages in Certain Cases, S. Rep.No.  
22 80-48 (1947); Portal-to-Portal Act of 1947, H.R. Conf. Rep. No. 80-326 (1947). We do not view  
23 Congress’s creation of the opt-in provision for FLSA collective actions as a choice against, or a  
24 rejection of, Rule 23’s opt-out process for state law class actions. See Ervin, 632 F.3d at 977  
25 (“There is ample evidence that a combined action is consistent with the regime Congress has  
26 established in the FLSA.”).

1 Finally, our sister circuits in the Seventh, Ninth, and District of Columbia Circuits all have  
2 determined that supplemental jurisdiction is appropriate over state labor law class claims in an action  
3 where the court has federal question jurisdiction over FLSA claims in a collective action. See Ervin,  
4 632 F.3d at 973–74, 978 (looking to the plain language of the FLSA and concluding that (1) “there is  
5 no categorical rule against certifying a Rule 23(b)(3) state-law class action in a proceeding that also  
6 includes a collective action brought under the FLSA”; and (2) “if these actions were to proceed  
7 separately — the FLSA in federal court and the state-law class action in state court — an entirely  
8 different and potentially worse problem of confusion would arise, with uncoordinated notices from  
9 separate courts peppering the employees.”); Wang, 623 F.3d at 761 (concluding that “it was within  
10 the district court’s discretion to exercise supplemental jurisdiction over the [state law class claim  
11 because] . . . [t]he [state] claim does not pose novel questions of state law akin to those present in De  
12 Asencio”); see also Lindsay v. Gov’t Employees Ins. Co., 448 F.3d 416, 424–25 (D.C. Cir. 2006)  
13 (holding that the opt-in collective action provision of FLSA did not expressly prohibit the exercise  
14 of supplemental jurisdiction over the New York Minimum Wage Act claims of opt-out class  
15 members and, therefore, that the district court could exercise supplemental jurisdiction over the  
16 New York Minimum Wage Act claims of class members).

17 Accordingly, we agree with the Seventh Circuit that “while there may in some cases be  
18 exceptional circumstances or compelling reasons for declining jurisdiction, the ‘conflict’ between the  
19 opt-in procedure under the FLSA and the opt-out procedure under Rule 23 is not a proper reason to  
20 decline jurisdiction under section 1367(c)(4).” Ervin, 632 F.3d at 980.

21 The only circuit court decision declining supplemental jurisdiction over state labor law class  
22 claims in an action where the court has federal question jurisdiction over FLSA claims was the Third  
23 Circuit’s decision in De Asencio v. Tyson Foods, Inc., 342 F.3d 301 (2003). In De Asencio,  
24 employees at chicken-processing plants brought a representative action in the district court alleging  
25 that their employer violated minimum wage and overtime provisions of the FLSA as well as the  
26 Pennsylvania Wage Payment and Collection Law (WPCL). See id. at 304. The district court granted

1 class certification to the employees for their state labor law (WPCL) claims. See id. at 305.

2 On appeal, the Third Circuit held that although the district court did not abuse its discretion  
 3 by ruling that FLSA and WPCL actions arose from same controversy and shared a common nucleus  
 4 of operative facts, 28 U.S.C. § 1367(a), the district court should not have exercised supplemental  
 5 jurisdiction over the WPCL claim, which presented novel and complex questions of state law and  
 6 which substantially predominated over the FLSA claim within the meaning of 28 U.S.C. §  
 7 1367(c)(1), (c)(2) (2006). See De Asencio, 342 F.3d at 309 (“Generally, a district court will find  
 8 substantial predomination where a state claim constitutes the real body of a case, to which the  
 9 federal claim is only an appendage — only where permitting litigation of all claims in the district  
 10 court can accurately be described as allowing a federal tail to wag what is in substance a state dog.”  
 11 (internal quotation marks omitted)). Specifically, the Third Circuit explained that

12 certain issues of state law presented in the WPCL action also weigh heavily, tilting  
 13 the balance against the exercise of supplemental jurisdiction. Pennsylvania courts  
 14 have not addressed two novel and complex questions of state law squarely presented  
 15 here: whether a WPCL action may rest on an implied employment contract that  
 16 relies on alleged oral representations by Tyson managers; and whether the WPCL  
 17 pertains to at will, non-collective bargaining employees. The need to resolve these  
 18 issues, which are better left to the Pennsylvania state courts, weighs in favor of  
 19 declining supplemental jurisdiction. 28 U.S.C. § 1367(c)(1).

20 De Asencio, 342 F.3d at 311.

21 We conclude that De Asencio is distinguishable from this case and the other circuit cases  
 22 that have dealt with the dual action question in that De Asencio involved a complex question of  
 23 state law rendering supplemental jurisdiction inappropriate under section 1367(c)(1). Its rationale  
 24 was premised on a case-specific analysis of supplemental jurisdiction rather than on a general  
 25 prohibition of exercising supplemental jurisdiction over state labor law class claims in an FLSA  
 26 action.<sup>8</sup> Accordingly, “De Asencio represents only a fact-specific application of well-established

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<sup>8</sup> The Third Circuit nevertheless recognized that the “interest in joining the [FLSA and WPCL] actions is strong as well.” De Asencio, 342 F.3d at 310. Examining the “crucial” distinction “between opt-in and opt-out classes,” the Third Circuit noted that “aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation.” Id. Ultimately, the Third Circuit recognized the opt-in scheme for FLSA actions as a “policy decision” by Congress and

1 rules, not a rigid rule about the use of supplemental jurisdiction in cases combining an FLSA count  
 2 with a state-law class action.” Ervin, 632 F.3d at 981; see also Wang, 623 F.3d at 761–62  
 3 (distinguishing the facts of De Asencio). Accordingly, we find no abuse of discretion in the District  
 4 Court’s decision to exercise supplemental jurisdiction over the NYLL claims in this case. See Ervin,  
 5 632 F.3d at 980 (“[W]hile there may in some cases be exceptional circumstances or compelling  
 6 reasons for declining jurisdiction, the ‘conflict’ between the opt-in procedure under the FLSA and  
 7 the opt-out procedure under Rule 23 is not a proper reason to decline jurisdiction under section  
 8 1367(c)(4).”).<sup>9</sup>

## 9 II. Rule 23 Class Certification of the State Law Claims

10 A district court’s decision regarding class certification under Rule 23 is reviewed for abuse of  
 11 discretion. See In re IPO Secs. Litig., 471 F.3d 24, 31–32 (2d Cir. 2006) (“Provided that the district  
 12 court has applied the proper legal standards in deciding whether to certify a class, its decision may  
 13 only be overturned if it constitutes an abuse of discretion.” (internal quotation marks omitted)). We  
 14 have stated that “the abuse-of-discretion standard has regularly been applied in reviewing a district  
 15 judge’s conclusions with respect to individual requirements of Rule 23 both by this Court and by  
 16 other Circuits.” Id. at 32 (internal citations omitted) (collecting cases). An appellate court, however,  
 17 is “noticeably less deferential . . . when [the district] court has denied class status than when it has  
 18 certified a class.” Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999)  
 19 (internal quotation marks omitted), overruled on other grounds by In re IPO Secs. Litig., 471 F.3d at  
 20 40.

21 “A district court vested with discretion to decide a certain matter is empowered to make a

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stated that the Court would not “tout the relative merits of either approach” as it proceeded to a straightforward supplemental jurisdiction analysis under section 1367(a), (c). Id.

<sup>9</sup> Moreover, as noted above, even if one of the four statutory bases were applicable, it would still be error to decline supplemental jurisdiction where exercising it would promote the values of economy, convenience, fairness and comity identified in United Mine Workers of America v. Gibbs. As is implicit in our discussion above, requiring plaintiffs to bring a separate action in state court to assert their state law claims would result in duplicative litigation and present an additional risk of confusion on the part of potential class members who would receive notices of both actions.

1 decision — of its choosing — that falls within a range of permissible decisions.” Parker v. Time  
 2 Warner Entm’t Co., L.P., 331 F.3d 13, 18 (2d Cir. 2003) (emphasis in original; internal quotation  
 3 marks omitted). “A district court ‘abuses’ or ‘exceeds’ the discretion accorded to it when (1) its  
 4 decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision —  
 5 though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot  
 6 be located within the range of permissible decisions.” Id. (quoting Zervos v. Verizon N.Y., Inc., 252  
 7 F.3d 163, 168–69 (2d Cir. 2001) (footnotes omitted; omission in original)). In contrast, *de novo*  
 8 review is “review without deference,” id., and is “traditionally associated with appellate assessments  
 9 of a district court’s legal conclusions.” Id.

10 “With these principles in mind, the standard of review applicable to class certification  
 11 decisions can be succinctly summarized as follows: “We review class certification rulings for abuse of  
 12 discretion. We review de novo the district court’s conclusions of law that informed its decision to  
 13 deny class certification.” Id. (quoting Turner v. Beneficial Corp., 242 F.3d 1023, 1025 (11th Cir.  
 14 2001)).

15 Rule 23(a) provides that

16 (a) One or more members of a class may sue or be sued as representative parties on behalf  
 17 of all members only if:

- 18 (1) the class is so numerous that joinder of all members is impracticable;  
 19 (2) there are questions of law or fact common to the class;  
 20 (3) the claims or defenses of the representative parties are typical of the claims or  
 21 defenses of the class; and  
 22 (4) the representative parties will fairly and adequately protect the  
 23 interests of the class.

24 Fed. R. Civ. P. 23(a)(1)–(4). In addition, “[a] class action may be maintained if Rule 23(a) is satisfied  
 25 and if: . . . (3) the court finds that the questions of law or fact common to class members  
 26 predominate over any questions affecting only individual members, and that a class action is superior  
 27 to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
 28 Rule 23(b).

29 As to the role of the district court in making a determination that the foregoing requirements

1 of Rule 23 have been met, we have held that

2 (1) a district judge may certify a class only after making determinations that each of  
3 the Rule 23 requirements has been met; (2) such determinations can be made only if  
4 the judge resolves factual disputes relevant to each Rule 23 requirement and finds  
5 that whatever underlying facts are relevant to a particular Rule 23 requirement have  
6 been established and is persuaded to rule, based on the relevant facts and the  
7 applicable legal standard, that the requirement is met; (3) the obligation to make such  
8 determinations is not lessened by overlap between a Rule 23 requirement and a  
9 merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in  
10 making such determinations, a district judge should not assess any aspect of the  
11 merits unrelated to a Rule 23 requirement; and (5) a district judge has ample  
12 discretion to circumscribe both the extent of discovery concerning Rule 23  
13 requirements and the extent of a hearing to determine whether such requirements are  
14 met in order to assure that a class certification motion does not become a pretext for  
15 a partial trial of the merits.

16 In re IPO Secs. Litig., 471 F.3d at 41; see also id. at 42 (“A district judge is to assess all of the  
17 relevant evidence admitted at the class certification stage and determine whether each Rule 23  
18 requirement has been met, just as the judge would resolve a dispute about any other threshold  
19 prerequisite for continuing a lawsuit.”). In deciding a motion for class certification under Rule 23,  
20 “the district judge must receive enough evidence, by affidavits, documents, or testimony, to be  
21 satisfied that each Rule 23 requirement has been met.” Id. at 41. While we have made clear that the  
22 district court must make these determinations, we have not required that the district court utilize any  
23 particular verbal formula, nor that the district court make express findings on each requirement.  
24 Where the basis of the district court’s ruling is obvious in context, we will not reverse a class  
25 certification simply because the district court has not explicitly recited each finding.

26 Citing to In re IPO Secs. Litig., Park Avenue argues that we should reverse the District  
27 Court’s January 29, 2010, Order certifying the state law claims as a class action because the Plaintiffs  
28 have failed to meet, by a preponderance of the evidence, the evidentiary requirements for Rule 23  
29 class certification. Park Avenue argues that the District Court “neither addressed each requirement  
30 for Rule 23 class certification nor made a separate ruling as to each requirement.” We disagree.  
31 Here, both the record and the transcript of the January 28, 2010, hearing in the District Court  
32 provide us with the ability to determine that the District Court did not abuse its discretion in  
33 certifying the class action as to the state law claims.

1 First, as to the requirement of numerosity, Rule 23(a)(1), the District Court found, and the  
2 parties do not appear to dispute, that the class includes approximately 275 people. Accordingly, we  
3 have little difficulty in agreeing with the court that the numerosity requirement is satisfied. See  
4 Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (stating that numerosity is  
5 presumed where a putative class has forty or more members).

6 Second, we conclude that the District Court properly found there to be questions of law or  
7 fact common to the class, Rule 23(a)(2), since the Plaintiffs' NYLL class claims all derive from the  
8 same compensation policies and tipping practices of Park Avenue. Further, all of the class plaintiffs'  
9 claims arise under the same New York State statutes and regulations.

10 Third, with regard to whether the claims of the representative parties are typical of the claims  
11 of the class, Rule 23(a)(3), the District Court recognized that if certain individuals who are tip-  
12 ineligible employees are found to have been included inappropriately in the tip pool, such a  
13 determination would affect every plaintiff and "would result in everybody else getting something  
14 more." Indeed, the parties do not appear to dispute that Park Avenue's tipping practices affected  
15 every plaintiff during the time period in question. The District Court's observation in this respect is  
16 sufficient to uphold its determination that commonality and typicality are satisfied. **[A 277-78]** See  
17 Marisol A. v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if  
18 plaintiffs' grievances share a common question of law or of fact."); Robidoux v. Celani, 987 F.2d  
19 931, 936 (2d Cir. 1993) ("[T]ypicality requirement is satisfied when each class member's claim arises  
20 from the same course of events and each class member makes similar legal arguments to prove the  
21 defendant's liability."); Spicer v. Pier Sixty LLC, 269 F.R.D. 321, 337 (S.D.N.Y. 2010) (finding  
22 commonality and typicality easily satisfied where all class members were subject to the same policies  
23 regarding their employers' distribution of a service charge). Moreover, Plaintiffs submitted  
24 declarations and deposition testimony regarding the tip pool structure, as well as tip-out sheets that  
25 show that all Class Members were subject to the same tipping policies of Park Avenue. Plaintiffs  
26 also submitted payroll records produced by Defendants that show a common policy and practice of

1 not paying the spread of hours premium. We conclude that the District Court properly found the  
2 elements of commonality and typicality satisfied.

3 As to whether the “representative parties will fairly and adequately protect the interests of  
4 the class,” Rule 23(a)(4), the Plaintiffs provided the District Court with adequate representation that  
5 the class representatives are prepared to prosecute fully the action and have no known conflicts with  
6 any class member. Accordingly, although there was no express finding by the District Court as to  
7 the adequacy of the representative Plaintiffs for the class, there is nothing in the record to suggest  
8 that the class representatives are inadequate. Moreover, if, for some reason it is later determined by  
9 the court that the representative Plaintiffs are inadequate, the court could substitute another class  
10 plaintiff for the representative plaintiff in question or simply allow the remaining representative  
11 Plaintiffs to proceed with the class action. See Central States Southeast and Southwest Areas Health  
12 and Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229, 241 (2d Cir. 2007) (“[W]e  
13 note that only one of the named Plaintiffs is required to establish standing in order to seek relief on  
14 behalf of the entire class.”).

15 Finally, as to Rule 23(b)(3)’s requirement that class-wide issues predominate over individual  
16 issues, Plaintiffs have alleged that all servers were subject to Park Avenue’s uniform tip-sharing or  
17 tip-pooling system. That is, all servers who worked for Park Avenue at a given time allegedly were  
18 required to share their tips with the same tip-ineligible person(s) (e.g., a manager). Park Avenue has  
19 not denied that all servers were subject to its uniform tip practices, and Plaintiffs support the  
20 allegation that all class plaintiffs were subject to the same uniform tip practices with their submission  
21 of tip-distribution sheets with their motion for class certification. If Plaintiffs succeed in showing  
22 that the expeditors, silver polishers, coffee makers, and/or managers were not eligible to receive tips  
23 under New York law, then each of the class plaintiffs will likely prevail on his or her section 196-d  
24 claims, although class plaintiffs’ individualized damages will vary. We conclude from the record  
25 before us that the District Court’s finding that common questions predominate over any  
26 individualized damages issues is fully supported. E.g., In re Visa Check/MasterMoney Antitrust

1 Litig., 280 F.3d 124, 139 (2d Cir. 2001) (“Common issues may predominate when liability can be  
2 determined on a class-wide basis, even when there are some individualized damage issues.”).

3 Accordingly, we conclude that the Plaintiffs provided ample and sufficient evidence as to the  
4 elements of Rule 23(a)(1)–(4) and Rule 23(b)(3) for us to uphold the District Court’s findings and  
5 conclusions with respect to each of the Rule 23 requirements.

6 **CONCLUSION**

7 In accordance with the foregoing, we affirm the Order of the District Court certifying the  
8 New York State law claims.