

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

**SHANNA THORNTON, JENNIFER  
PRATER, and HEATHER KIDD**

Plaintiffs,

v.

**CRAZY HORSE, INC.; JEANETTE  
H. JOHNSON; SANDS NORTH, INC.,  
d/b/a FANTASIES ON 5th AVENUE;  
KATHLEEN HARTMAN; CAROL J.  
HARTMAN; and MARCO  
GONZALEZ**

Defendants.

Case No. 3:06-cv-00251 TMB

**ORDER**

**O R D E R DENYING WITHOUT  
PREJUDICE PLAINTIFFS' MOTIONS  
FOR FLSA AND RULE 23  
CERTIFICATION**

**I. INTRODUCTION**

This is a wage and hour dispute. Plaintiffs Shanna Thornton, Jennifer Prater, and Heather Kidd (“Plaintiffs”) allege that Defendants Crazy Horse, Inc., et. al (“Defendants”) failed to pay them overtime wages when they worked more than 40 hours a week, and improperly forced them to tip other employees, thus reducing their wages below the minimum mandated by law. In two related motions, Plaintiffs now seek to (1) conditionally certify their federal claims as a collective action under the Fair Labor Standards Act (“FLSA”), and (2) certify their state law claims under the Alaska Wage and Hour Act (“AWHA”) as a class action under Rule 23. Defendants oppose. For the reasons explained below, the Court denies both motions without prejudice.

## II. BACKGROUND

The parties are familiar with the allegations. Plaintiffs assert that they are dancers whose employers (Defendants) forced them to tip DJs, bouncers, and doormen each night they danced, thus reducing their wages below the minimum required by law. Plaintiffs also contend that they worked more than 40 hours per week and were not paid overtime. The statutory basis for Plaintiffs' claims are the Alaska Wage and Hour Act, AS 23.05.140, AS 23.10.060, AS 23.10.065, and AS 23.10.110, the FLSA, 29 U.S.C. § 201 *et. seq.*, and 8 AAC 15.160.

## III. ANALYSIS

Plaintiffs seek to certify two different types of actions. First, they seek to certify their federal claims as a collective action under the FLSA.<sup>1</sup> Second, they seek to certify their state law AWAHA claims as a class action under Rule 23.<sup>2</sup>

Because of their similar sounding names, *class* actions and *collective* actions are often confused with each other.<sup>3</sup> Nevertheless, there are significant differences between the two. The FLSA and Rule 23 utilize opposite mechanisms to gather their members: individuals in a *collective* action under § 216(b) must opt-in to become a member of the collective action, while individuals in a *class* action certified under Rule 23 are generally a member of the class unless they opt-out.<sup>4</sup>

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<sup>1</sup> 29 U.S.C. § 216(b).

<sup>2</sup> FED. R. CIV. P. 23.

<sup>3</sup> *Salazar v. Agriprocessors, Inc.*, 527 F.Supp.2d 873, 877 (N.D.Iowa 2007).

<sup>4</sup> 29 U.S.C. § 216(b).

Here, Plaintiffs seek to pursue their claims under parallel tracks. Plaintiffs ask the Court to utilize the FLSA’s opt-in mechanism for their federal claims, while utilizing Rule 23’s opt-out mechanism for their AWAHA claims. Defendants oppose both certifications. They contend that Plaintiffs have not met the requirements for either certification. They also request that if the case is certified, it proceed solely as an “opt-in” action to minimize the confusion for potential class members, who would otherwise receive two potentially conflicting notices: one notice allowing them to “opt-in,” and another allowing them to “opt-out.”

**A. THE PARALLEL FLSA AND RULE 23 ACTION DOES NOT PRESENT ANY INHERENT JURISDICTIONAL CONFLICT, AND DEFENDANTS HAVE NOT SHOWN THAT SUCH AN ACTION WOULD BE UNWORKABLE IN FACT.**

Defendants first argue that allowing a parallel FLSA and Rule 23 actions would create jurisdictional difficulties. A number of courts have raised similar concerns.<sup>5</sup> Since the court would have original jurisdiction over the FLSA claim, but only supplemental jurisdiction over the state law claims, some courts worry that a parallel action would essentially permit plaintiffs to make an “end run” around the FLSA – a statute that intentionally utilized the opt-in procedure to “[free] employers from the burden of representative actions.”<sup>6</sup> Other courts worry that if a small number of plaintiffs opted into the FLSA portion of the case, and then a much larger number of plaintiffs joined under the state-law class action claims, the court would face a situation in which a “state tail wags what is in essence a federal dog.”<sup>7</sup> In other words, by

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<sup>5</sup> *Leuthold v. Destination America, Inc.*, 223 F.R.D. 462, 469 (N.D.Cal. 2004); *De Ascencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003).

<sup>6</sup> *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

<sup>7</sup> *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574 (N.D. Ill. 2004).

allowing state-law claimants to pursue their action by piggybacking onto a FLSA action, courts might allow them to “back door” in unnamed parties “through the vehicle of a similar statute that lacks such an opt-in requirement.”<sup>8</sup>

Some courts have avoided the problem by choosing to decline supplemental jurisdiction over the state law claims.<sup>9</sup> However, it is not clear that the supplemental jurisdiction statutes allow this. Supplemental jurisdiction is conferred by 28 U.S.C. § 1367(a), and its language is clear: “...in any civil action of which the district courts have original jurisdiction, the district courts *shall have* supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”<sup>10</sup> The word “shall” indicates that the court *must* exercise this jurisdiction, and both the D.C. Court of Appeals and district courts in this circuit have interpreted this language as placing a limit on the situations in which a district court can decline to exercise its supplemental jurisdiction.<sup>11</sup> Indeed, the Ninth Circuit Court of Appeals has cautioned that “[b]y use of the word ‘shall,’ the statute makes clear that if power is conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories

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<sup>8</sup> *Thorpe v. Abbot Laboratories*, 534 F.Supp.2d 1120 (N.D.Cal. 2008).

<sup>9</sup> See e.g. *Neary v. Metropolitan Property and Casualty Ins. Co.*, 472 F.Supp.2d 247 (D. Conn. 2007). Other courts have been able to avoid this situation when they have original jurisdiction over the state-law claims, for example through the Class Action Fairness Act of 2005 (CAFA).

<sup>10</sup> 28 U.S.C. § 1367(a) (emphasis added).

<sup>11</sup> *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 415, 424 (D.C.Cir. 2006); *Bamonte v. City of Mesa*, 2007 WL 2022001 (D.Ariz. 2007).

specifically enumerated in section 1367(c) applies.”<sup>12</sup> In *Lindsay v. Gov’t Employees Ins. Co.*, the D.C. Circuit specifically evaluated the potential conflict between Rule 23 and the FLSA, and concluded that a procedural difference was not a valid basis on which to decline supplemental jurisdiction: “[w]hile there is unquestionably a difference – indeed, an opposite requirement – between opt-in and opt-out procedures, we doubt that a mere procedural difference can curtail section 1367’s *jurisdictional* sweep.”<sup>13</sup> As a result, the Court cannot simply decline jurisdiction for any reason; it may only do so based on one of the enumerated reasons in Section 1367.

This case appears to satisfy the requirements for supplemental jurisdiction. The complaint alleges that members of both potential classes performed similar work and were forced to pay tips and other money that deprived them of overtime compensation as a result of similar actions by their employers. These claims derive from a common nucleus of operative fact and would form part of the same Article III case or controversy.<sup>14</sup> Accordingly, if the Court is to decline jurisdiction, it must find its reason in one of the listed exceptions to Section 1367.

The Court has found none. The closest case would arise under Section 1367(c)(4), which states that a district court may decline to exercise supplemental jurisdiction over a state law claim if, “in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” The procedural disparity between these two mechanisms is not a sufficient reason, and the court does not find any other “compelling reasons” that justify declining supplemental jurisdiction

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<sup>12</sup> *Executive Software N. Am. V. U.S. Dist. Ct. for the Cent. Dist. Of Cal.*, 24 F.3d 1545, 1555 (9th Cir. 1994).

<sup>13</sup> *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 415, 424 (D.C.Cir. 2006)(emphasis in original).

<sup>14</sup> *Id.*

here.<sup>15</sup> Cases that have declined supplemental jurisdiction, for example, have done so because either the number or the type of state claims heavily predominated over the federal claims.<sup>16</sup> For example, in *Neary v. Metropolitan Property and Casualty Company*, there were potential claimants from all 50 states, which would have required the court to evaluate 50 different states' laws.<sup>17</sup> The court found that this resolution was better left to each individual state.<sup>18</sup> Here, however, the Court will only need to evaluate the laws of a single state: Alaska. Courts in similar "single-state" situations have routinely proceeded with certification.<sup>19</sup> Likewise, courts may decide to decline supplemental jurisdiction where the number of state-law claimants might "vastly outnumber" the FLSA claimants.<sup>20</sup> But here, there will likely be a 1:1 ratio of state law claimants to FLSA claimants; at the least, there is no indication that the state law claimants would sufficiently overwhelm the FLSA claimants and require the court to decline jurisdiction.

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<sup>15</sup> *Executive Software N. Am. V. U.S. Dist. Ct. for the Cent. Dist. Of Cal.*, 24 F.3d 1545, 1555 (9th Cir. 1994). In the Ninth Circuit, the court should undertake a "a case-specific analysis...to determine whether declining supplemental jurisdiction comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004).

<sup>16</sup> *Neary v. Metropolitan Prop. And Cas. Ins. Co.*, 472 F.Supp.2d 247, 252 (D.Conn. 2007).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; see also *Acquilino v. Home Depot U.S.A., Inc.*, 2006 WL 2023539 (D.N.J. 2006); *Glewwe v. Eastman Kodak Co.*, 2006 WL 1455476 (W.D.N.Y. 2006).

<sup>19</sup> See e.g. *Torres v. Gristede's Operating Group*, 2006 WL 2819730 (S.D.N.Y. 2006); *Mendez v. Radec Corp.*, 411 F.Supp.2d 347 (W.D.N.Y. 2006); *Lee v. ABC carpet & Home*, 236 F.R.D. 193 (S.D.N.Y. 2006).

<sup>20</sup> *De Ascencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003).

Defendants argue that in a practical sense, the dueling procedures are likely to cause confusion and thus render the case unmanageable. This position finds some support in decisions from other circuits.<sup>21</sup> However, the growing trend in this circuit has been to find otherwise.<sup>22</sup> Notably, many of these rulings were made at an early stage in the litigation, and were decided in the context of a motion to dismiss or motion to strike. As a result, these decisions simply examined whether the two mechanisms were compatible in *theory* – a very different question from whether they are compatible in practice. Far fewer courts have evaluated this problem in the framework of an actual motion to certify.<sup>23</sup> Nevertheless, courts have recognized that once a case is past the Rule 12 stage, the question of whether concurrent opt-in and opt-out proceedings may be “unworkable or would unduly confuse potential plaintiffs...is a fact-specific and case management issue.”<sup>24</sup>

Here, Defendants contend that the class would be unworkable in practice. They argue that a parallel action would confuse class members because they would receive both opt-in and opt-out notices. Defendants contend that the limited age and education of the potential class

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<sup>21</sup> See e.g. *LaChapelle v. Owens-Illinois*, 513 F.2d 286 (5<sup>th</sup> Cir. 1975); *Otto v. Pocono Health System*, 457 F.Supp.2d 522 (M.D.Pa. 2006).

<sup>22</sup> *Bamonte v. City of Mesa*, 2007 WL 2022001 (D.Ariz. 2007); *RDO-BOS Farms, Inc.*, 2007 WL 273604 (D.Or. 2007); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474 (E.D.Cal. 2006); *Breeden v. Benchmark Lending Group*, 229 F.R.D. 623 (N.D.Cal. 2005); *Tomlinson v. Indymac Bank*, F.S.B., 359 F.Supp.2d 898 (C.D.Cal. 2005); *Barnett v. Washington*, 2004 WL 2011462 (N.D.Cal. 2004), *Kelley v SBC Inc.*, 1998 U.S. Dist. LEXIS 18463 (N.D.Cal. 1998).

<sup>23</sup> Even so, courts in this circuit have not shied away from certifying such a parallel action. See e.g. *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 494 (E.D.Cal. 2006).

<sup>24</sup> *Ellison v. Autozone*, 2007 WL 2701923 (N.D.Cal. 2007).

members would exacerbate this problem. However, the Court is confident that this problem could be alleviated, if needed, by carefully controlling the wording and timing of any notices. For example, the two notices could be issued serially instead of simultaneously, so that class members would not receive two potentially conflicting notices at the same time. The parties could also carefully word the notices to minimize confusion.

More significantly, the solution to this problem is not to decline jurisdiction or remand the case to state court. Remanding the state-law claims would only create a situation in which class members receive similar messages from different courts; this is likely to create *more* confusion, not less. By consolidating the efforts in a single forum, the Court can more tightly control the content of these messages to ensure consistency and minimize confusion. Likewise, judicial economy weighs against dismissing these claims, which would only force a state court to duplicate the efforts that this court has already undertaken.

In sum, based on the evidence and arguments currently before it, the Court finds no jurisdictional impediment to a parallel FLSA/Rule23 action. Admittedly, this case is at an early stage and the Court has little evidence on which to base its ruling. As a result, it is possible that discovery might produce evidence that changes the Court's opinion. At this point, however, the limited record forces the Court to conclude – as it did in its previous order – that this case appears to be no different than the numerous Ninth Circuit cases that have allowed FLSA and Rule 23 actions to proceed in parallel. Nevertheless, for the reasons outlined below, the Court concludes that Plaintiffs have not yet met the *evidentiary* burdens required to obtain certification.

**B. PLAINTIFFS HAVE NOT MADE A SUFFICIENT SHOWING FOR CERTIFICATION UNDER THE FLSA.**

Plaintiffs contend that the Court should certify their federal claims as a collective action under the FLSA. The Court concludes that this certification is premature.

Under the FLSA, an employer is liable to its employees for any unpaid overtime compensation.<sup>25</sup> An employee can maintain an action on behalf of himself “and other employees similarly situated.”<sup>26</sup>

To be certified as a collective action under the FLSA, plaintiffs must demonstrate that they are “similarly situated.”<sup>27</sup> Although neither the FLSA nor the Ninth Circuit Court of Appeals has specifically defined what “similarly situated” means, the Fifth, Tenth, and Eleventh Circuits – and various district courts in the Ninth Circuit – have adopted a two-tiered approach. Under that approach, a court determines, “on an *ad hoc* case-by-case basis, whether plaintiffs are ‘similarly situated.’”<sup>28</sup>

The first stage is typically termed the “notice stage,” and the court “makes a decision – usually based only on the pleadings and any affidavits which have been submitted – whether

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<sup>25</sup> See 29 U.S.C. §§ 207(a), 216(b).

<sup>26</sup> 29 U.S.C. § 216(b).

<sup>27</sup> *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001); see also *Does I through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1064 (9th Cir. 2000); 29 U.S.C. § 216(b).

<sup>28</sup> *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001); *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001); *Wynn v. Nat’l Broadcasting Co., Inc.*, 234 F.Supp.2d 1067, 1081-82 (C.D.Cal. 2002); *Adams v. Inter-Con Sec. Sys.*, 242 F.R.D. 530, 536 (N.D.Cal. 2007).

notice of the action should be given to potential class members.<sup>29</sup> The determination “is made using a fairly lenient standard, and frequently results in ‘conditional certification’ of a representative class.”<sup>30</sup> Still, courts may require a “modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law.”<sup>31</sup> Conditional certification allows the named plaintiffs to send notice to all potential plaintiffs. After the case is conditionally certified, and proceeds through discovery, defendants will generally make a later motion to decertify the class. At that point, the court can make a more detailed evaluation of whether the plaintiffs are similarly situated (and whether the collective action is procedurally superior), and either allow the class to proceed, or dismiss the opt-in plaintiffs without prejudice.

While the evidence required to clear the certification hurdle is low, it is still a hurdle that must be cleared. Plaintiffs must provide at least *some* evidence establishing that they meet the requirements of the statute and that others are similarly situated.<sup>32</sup> Here, they have not done so. The only evidence that Plaintiffs have provided is the affidavits of the named plaintiffs. However, these 2 page, 6-7 paragraph affidavits fail to adequately support Plaintiffs’ claims. First, the affidavits fail to establish that Plaintiffs are similarly situated with the other class members that they allege worked such overtime. For example, while the motions state that the

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<sup>29</sup> *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995).

<sup>30</sup> *Id.* at 1212.

<sup>31</sup> *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y.1997); *Thiessen*, 267 F.3d at 1102; *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 169-172 (1989).

<sup>32</sup> *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Bishop v. Petro-Chemical Transport, LLC*, 2008 WL 2811194 (E.D.Cal 2008).

potential class contains employees who worked *more than 40 hours a week* without receiving overtime pay, the affidavits simply state that “[t]here were pay periods when I was not paid at least minimum wage.”<sup>33</sup> The affidavits also do not satisfy the Court that there are other employees who are similarly situated and wish to opt in.<sup>34</sup> This is not a unique requirement, and other courts have also requested that former employees offer evidence that others desire to opt into their litigation before sending notices of collective action to potential class members.<sup>35</sup>

At best, the evidence currently before the court merely suggests that the plaintiffs have an *individual* action, not a *collective* action. Plaintiffs have offered no evidence that others wish to join the suit; no affidavits from any other potential class members, or testimony in Plaintiffs own affidavits that these events happened to anyone else who might be “similarly situated.” While the allegations contained in Plaintiffs’ *pleadings* that suggest that there are others, the pleadings are not facts – they do not provide the “modest *factual* showing” that this Court would require to certify a collective action. Although the Court has little doubt that Plaintiffs will ultimately be able to procure this evidence, its absence suggests that certification is premature at this point.

Accordingly, the Court concludes that Plaintiffs have failed to adequately establish that this case should be certified as a collective action, and denies the motion without prejudice.

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<sup>33</sup> See e.g. *Aff. Of Jennifer Prater, Pl. ’s Mot., Ex. 1, ¶ 6.*

<sup>34</sup> See e.g. *Dybach v. Florida Dep’t of Corrections*, 942 F.2d 1562 (11th Cir. 1991).

<sup>35</sup> See e.g. *Parker v. Rowland Express, Inc.*, 492 F. Supp. 2d 1159 (D. Minn. 2007) (plaintiffs not entitled to conditional certification simply to seek out others who might want to join the action).

**C. PLAINTIFFS HAVE NOT MADE A SUFFICIENT SHOWING FOR CERTIFICATION UNDER FRCP 23.**

Plaintiffs also seek to certify their state law claims as a class action under Rule 23(b)(3).

For the reasons explained below, the Court denies this request.

Plaintiff's request for certification is governed by Rule 23.<sup>36</sup> This rule provides a two-part analysis, and contains a variety of conditions that be met before a case is certified as a class action. The case may be certified only if it meets all of the prerequisites of section 23(a), and at least one of the prerequisites of 23(b).

The first test occurs under Section 23(a). Pursuant to that section, plaintiffs may sue as representative parties only if:

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

Meeting these requirements does not end the inquiry; the next step is to evaluate the case under Section 23(b). That section explains that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

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<sup>36</sup> See FED. R. CIV. P. 23.

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Plaintiffs must show that each of Rule 23(a)'s prerequisites – along with an appropriate 23(b) ground – is met.<sup>37</sup> They must provide whatever evidence is needed to establish these prerequisites: declarations or other admissible evidence showing numerosity, typicality, commonality, etc.<sup>38</sup>

The burden is high: a class action “may only be certified if the trial court is satisfied, after a ‘rigorous analysis,’ that the prerequisites of Rule 23(a) have been satisfied.”<sup>39</sup> In contrast to the FLSA – which contemplates a conditional certification phase, based on fairly lenient standards – Rule 23 is more exacting. Conditional certification was once an option under Rule 23(c)(1), but it was eliminated in 2003; the statute was amended and the language allowing this conditional certification was removed. Instead, courts are encouraged to withhold certification until the requirements of Rule 23 are met.<sup>40</sup>

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<sup>37</sup> *Taylor v. Safeway Stores, Inc.*, 523 F.2d 263, 270 (10th Cir. 1975).

<sup>38</sup> *See e.g. Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

<sup>39</sup> *General Tel. co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

<sup>40</sup> *See* FED.R.CIV.P. 23(c)(1) *advisory committee notes*.

Here, Plaintiff has failed to provide sufficient evidence to establish that it meets the requirements for certification. As a result, certification under Rule 23 is premature.

As an initial matter, Plaintiffs have failed to establish that the claims of the named plaintiffs are typical of the class as a whole, or that these two named plaintiffs will adequately represent the rest of the class. Under Rule 23, the claims of the named plaintiffs must be typical of the class. Here, the complaint alleges that Defendants violated the AWhA by requiring plaintiffs to work more than 40 hour workweeks. However, Plaintiffs have provided only two declarations – from the named plaintiffs – to support the allegations in their complaint. No Plaintiff testifies that she ever worked more than 40 hours in any given week, as would give rise to a claim under the AWhA. As a result, it is not clear that these declarations are sufficient to support the named plaintiffs’ *own* AWhA claims, let alone to adequately share and represent the claims of others. Simply put, at this point it is not clear that the named plaintiffs would be adequate representatives with claims typical of the class as a whole.

It is also unclear whether Plaintiffs have met the numerosity requirements of Rule 23. Under section 23(a), a class action may be warranted when the class is so numerous that joinder of all members is impracticable. Yet none of Plaintiffs submissions provide any insight into *how* large the potential class might be. While the Court does not need an exact number in order to certify the class, the evidence currently available fails to provide any number *at all*. Plaintiffs have cited various cases in which courts certified class actions with as few as 25 people.<sup>41</sup> Yet they fail to tie this authority to the facts of this case. Plaintiffs have not offered any insight into

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<sup>41</sup> *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F.Supp. 1404 (D. Md. 1984)

how *many* people - 1, 100, 1000 - might be affected here. As a result, the Court has no basis on which to determine whether class action status is even necessary, let alone evaluate whether it provides the superior procedure to adjudicate these claims.<sup>24</sup>

Accordingly, the Court concludes that Plaintiffs' request to certify this case as a class action under Rule 23 is premature. Their motion is denied without prejudice.

**D. DEFENDANTS' REQUEST THAT THE COURT FASHION AN "OPT-IN" PROCEDURE FOR ANY PROPOSED RULE 23 CLASS IS NOT SUPPORTED BY AUTHORITY.**

Finally, Defendants request that if the Court does decide to certify Plaintiffs' state law claims as a class action, it do so as an "opt-in" class to better comport with the parallel FLSA action and avoid confusing the class members.<sup>43</sup> However, it is not clear that the Court has the power to create such an "opt-in" mechanism under Rule 23, and the Court will not evaluate this option without further briefing from the parties.

Defendants seem to assume, without analysis, that the Court could fashion an opt-in class action if it so desired. Yet Defendants offer no authority for this unusual proposition, and other courts have been hostile to this idea. Indeed, the Second Circuit Court of Appeals has held that Rule 23 does not allow courts to fashion an opt-in class during the liability phase.<sup>44</sup> In *Kern v.*

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<sup>42</sup> Although it is unclear why Plaintiffs have not yet provided an estimate of the potential class size, it may simply be because they lack any insight into it at this early stage in the litigation. However, this merely underscores the Court's conclusion that a request to certify this case as a class action is premature when both the parties and the Court lack critical evidence needed to determine whether a class action is the superior vehicle for these claims.

<sup>43</sup> *Def's Opp. at 2-3. (Docket No. 50).*

<sup>44</sup> *Kern v. Siemens Corp.*, 393 F.3d 120, 124-125 (2nd Cir. 2004).

*Siemens Corp.*, the court of appeals reversed a district court’s attempt to fashion an “opt-in” class action, and concluded that Rule 23 class actions can only proceed as opt-out cases:

“...substantial legal authority supports the view that by adding the “opt out” requirement to Rule 23 in the 1966 amendments, Congress prohibited “opt in” provisions by implication...Courts have generally echoed Justice Kaplan's view that “opt in” provisions are contrary to Rule 23 . See *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir.1974) (“[T]he requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B) ....”); *Enter. Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y.1980)... Eminent authorities on the Rules agree. See 5 James Wm. Moore, et al., *Moore's Federal Practice* § 23.104[2][a][ii] (3d ed. 2004) (“There is no authority for establishing ‘opt-in’ classes in which the class members must take action to be included in the class. Indeed, courts that have considered ‘opt-in’ procedures have rejected them as contrary to Rule 23.”).”<sup>45</sup>

Moreover, the Court of Appeals also rejected the district court’s attempt to fashion such a procedure under its equitable powers:

Contrary to the District Court's assertion, Rule 23 offers the exclusive route to forming a class action. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (“[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers ....The text of a rule thus proposed and reviewed limits judicial inventiveness.”).<sup>46</sup>

Accordingly, the Court will not attempt to decide this issue without further assistance from the parties. Defendants may brief this issue, if desired, in any future motions regarding certification.

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<sup>45</sup> Id. at 124-125.

<sup>46</sup> Id. at 128.

#### **IV. CONCLUSION**

For the reasons explained above, Plaintiffs' motion to certify their federal claims as a collective action under the FLSA (Docket No. 40) and motion to certify their AWAHA claims as a class action under Rule 23 (Docket No. 42) are **DENIED WITHOUT PREJUDICE**.

Dated at Anchorage, Alaska, this 30<sup>th</sup> day of September, 2008.

/s/ Timothy Burgess  
TIMOTHY M. BURGESS  
UNITED STATES DISTRICT JUDGE