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Let the Punishment Fit the Crime: Sanctioning Absent Class Members for Failure to Respond to Postcertification Discovery Requests

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LET THE PUNISHMENT FIT THE CRIME: SANCTIONING ABSENT CLASS MEMBERS FOR FAILURE TO RESPOND TO POSTCERTIFICATION DISCOVERY REQUESTS

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Courts rarely allow defendants to take discovery of absent class members after class action certification. However, if a court does permit such discovery and some absentees fail to respond, should the court sanction the nonresponsive absentees? Under what circumstances should the court dismiss the nonresponsive absentees? When considering whether and what sanctions to impose, courts make a decision about the rights and role of absentees in class actions.

This Note examines postcertification absentee discovery sanctions through a discussion of group litigation. Next, it analyzes the reasoning of courts that have dismissed absentees, declined to dismiss absentees, and imposed other sanctions on absentees. Finally, this Note concludes that courts should generally dismiss opt-out absentees without prejudice, and dismiss opt-in absentees with prejudice.

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INTRODUCTION

In a Rule 23(b)(3) opt-out class action, a group of retail store managers allege that their employer incorrectly classified them as exempt from laws mandating overtime wages.[1] After the class is certified, the employer attempts to derail the class action by showing that it properly classified the employees as managerial employees. To this end, the employer moves to serve interrogatories on the employees, seeking information about their job duties. The court permits the discovery, but more than half of the employees fail to respond. The employer is now prejudiced because it lacks information that is crucial for its defense. Accordingly, the employer moves to dismiss the nonresponsive absentees. However, if the court orders dismissal, the employees must either opt in by completing the discovery or be excluded. How can the court ameliorate the employer's prejudice without distorting the opt-out scheme of the Rule 23(b)(3) class action?[2]

1. The facts described in this paragraph mirror the facts in *Cruz v. Dollar Tree Stores, Inc.*, Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956 (N.D. Cal. Mar. 8, 2011). *See infra* notes 296–302 and accompanying text.

2. *See infra* notes 347–51 and accompanying text.

Postcertification discovery of absentees is rarely used and is neither precluded nor endorsed by the Federal Rules of Civil Procedure (FRCP).[3] However, most courts have concluded that such discovery may be permissible where it is not being used to harass the absentees and the defendant cannot obtain the information from the class representative(s).[4] Yet, when such discovery is undertaken and some absentees fail to respond, courts are divided on whether and how to sanction the nonresponsive absentees.[5]

In Part I, this Note explores group litigation procedure, the due process rights of absent members, and discovery sanctions. In so doing, Part I provides a background for understanding the arguments addressed in Part II. Part II analyzes the decisions of courts that have dismissed nonresponsive absentees, courts that have declined to dismiss nonresponsive absentees, and courts that have imposed other sanctions on nonresponsive absentees. In Part III, this Note argues that courts should generally dismiss nonresponsive absentees without prejudice in opt-out actions, and with prejudice in opt-in actions.

I. SETTING THE STAGE: ALL ABOUT GROUP LITIGATION

This part provides the context for the conflict with an overview of the types of group litigation in which courts have ordered absent member discovery. First, Part I.A examines two types of federal group litigation: Rule 23 class actions and Fair Labor Standards Act[6] (FLSA) collective actions. Part I.B examines the procedure of state class actions. When discussing state class actions, Part I.B focuses on the procedures of California and Alaska, two states that have considered whether to dismiss nonresponsive absentees.

Next, Part I.C turns to a discussion of the due process rights of Rule 23 absentees, an issue that figures in plaintiffs' arguments against sanctioning nonresponsive members. Part I.D then examines when, how often, and in what types of cases federal and state courts have ordered absentee discovery. Part I concludes with an overview of federal and state discovery sanctions, many of which courts have considered imposing on absentees.

A. Federal Group Litigation: Rule 23 Class Actions and Fair Labor Standards Act Collective Actions

This section discusses Rule 23 class actions and FLSA class actions, two kinds of aggregate litigation in which courts have ordered discovery and ultimately sanctioned nonresponsive absentees. First, this section examines the history, procedural mechanisms, and policies behind Rule 23 class

3. *See infra* notes 143–45 and accompanying text.
4. *See infra* notes 147, 160–64 and accompanying text.
5. *See infra* Part II.
6. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

actions. Second, this section considers the history, procedural mechanisms, and policies behind FLSA collective actions.

1. Rule 23: History, Policy, and Certification Procedures

A class action is a form of group litigation in which a class representative sues on behalf of many people who have suffered the same harm.[7] Traditionally, it is said that the representative is the named plaintiff, and the members of the class are the absent members.[8] The named plaintiff stands in judgment for the absent members.[9] The individual members need not be present; by being adequately represented,[10] each member has "the functional equivalent of a day in court."[11] Accordingly, if there is any judgment in the action, the judgment binds all the members of the class.[12]

The procedure of class actions was originally an equitable mechanism developed to resolve common disputes in an efficient manner.[13] In federal court, class actions are governed by FRCP 23.[14] Rule 23 was created to protect the rights of class members and defendants, assure efficiency in litigation and remedies, and assist in law enforcement.[15] By encompassing all members that meet a class definition, class actions efficiently resolve claims with less risk of contrary judgments.[16] For defendants, class actions can be an opportunity to obtain a "bill of peace" on a set of identical claims by resolving all those claims at the same time.[17]

Further, class actions assist in regulation because the mechanism enables plaintiffs to sue for small injuries by combining many claims.[18] By combining many claims, the plaintiff has more resources with which to combat the defendant.[19] In turn, class action litigation of such claims can

7. *See* FED. R. CIV. P. 23(a); 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:1, at 2 (5th ed. 2011); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21, at 358–59 (2012) (explaining that a class action aggregates claims and thus can "increase the stakes" of the litigation).

8. 1 RUBENSTEIN, *supra* note 7, § 1:5, at 12.

9. *See id.*

10. Class members are represented by a class representative and class counsel. *See* FED. R. CIV. P. 23(a)(4), 23(g).

11. 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1786, at 496 (3d ed. 2005).

12. 1 RUBENSTEIN, *supra* note 7, § 1:5, at 12.

13. *See* Debra Lyn Bassett, *Pre-certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 359 (2002); *see also* FED. R. CIV. P. 23(a) advisory committee's note (1937 Adoption) (noting that Rule 23 is a restatement of the former Equity Rule 38).

14. FED. R. CIV. P. 23.

15. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1259–60 (2002).

16. *See* 1 RUBENSTEIN, *supra* note 7, § 1:9, at 26–27.

17. *See id.* § 1:9, at 27.

18. *See id.* § 1:7, at 18.

19. *See id.* § 1:7, at 19.

put pressure on repeat defendants to obey laws that might not otherwise be enforced.[20]

Absent members have few duties in class action litigation because the named plaintiff actively participates in the litigation on behalf of the class.[21] For instance, absent members generally do not have to appear before court or hire counsel.[22] According to the U.S. Supreme Court, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course."[23]

Rule 23 does not address the duties of absent members.[24] Thus, courts disagree about whether absent members should be subject to certain duties, such as the duty to answer discovery requests[25] and to be subject to counterclaims.[26] When making a decision about the duties of the absentees in a particular case, courts should consider the goals of the particular litigation.[27] Generally, courts should ensure that the absent members' rights are represented at each stage of the litigation.[28] Additionally, courts should seek to maintain the efficiency of class actions and judicial economy.[29] In Part I.D, this Note considers how courts have applied this analysis to absent member discovery.

A class action begins when the class representative files a complaint on behalf of a purported class.[30] The court then determines whether the class can be certified.[31] Because any judgment binds all absent members,[32]

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20. *See* Bone & Evans, *supra* note 15, at 1260 n.22 (explaining that individual plaintiffs' claims are too small to pursue in securities fraud and antitrust cases and thus some securities and antitrust laws would be underenforced without the class action mechanism). *But see* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 680 (1986) (noting that class actions carry a risk of overenforcement, because a fee-motivated plaintiffs' attorney might sue where a class member might be more concerned about the negative long-term impacts of the litigation).

21. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985); *see also* 1 RUBENSTEIN, *supra* note 7, § 1:5, at 12–13.

22. *See Phillips Petroleum Co.*, 472 U.S. at 810.

23. *Id.*

24. *See* FED. R. CIV. P. 23; 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 16:1, at 118 (4th ed. 2002).

25. *See infra* Part I.D.

26. *See* 5 CONTE & NEWBERG, *supra* note 24, § 16:1, at 120.

27. *See* Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002) ("The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context."); *see also* 5 CONTE & NEWBERG, *supra* note 24, § 16:1, at 120 (explaining that courts can consider the circumstances under which the absent members' duties have become relevant).

28. *See Devlin*, 536 U.S. at 10.

29. *See id.* at 11 (citing Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987) (observing that one of the purposes of class action litigation is "preventing multiple suits"); Jeremy Bertsch, Note, *Missing the Mark: The Search for an Effective Class Certification Process*, 39 VAL. U. L. REV. 95, 116 (2004).

30. *See* Bassett, *supra* note 13, at 360.

31. *See id.* at 363.

32. *See supra* text accompanying note 12.

certifying a class of members with the same interests is critical.[33] Such a binding judgment would be unfair if the class members did not have common interests.[34] Accordingly, the Rule 23(a) requirements ensure that the class members have the same interests and that maintaining a class action is feasible.[35] Additionally, all class actions must satisfy the requirements of one of the three Rule 23(b) class types.[36] The Rule 23(b) requirements further ensure class cohesion by limiting the kinds of class actions that can be maintained.[37]

The Rule 23(a) requirements are numerosity, commonality, typicality, and adequacy.[38] Under the numerosity requirement, the class must be so large that it is impractical to join the claims of all the class members.[39] The commonality requirement ensures that questions of law or fact are common to the class.[40] To satisfy the typicality requirement, the claims of the class representative(s) must be typical of the claims of the absent members.[41] Finally, under the adequacy requirement, the named plaintiff must "fairly and adequately protect the interests of the class."[42] As this Note will later discuss in Part I.C, adequacy is one of the mechanisms that protects absent members' due process rights.[43]

After a class action meets the Rule 23(a) requirements, it must meet the requirements of either (b)(1), (b)(2), or (b)(3).[44] There are two subcategories of Rule 23(b)(1) class actions.[45] Both kinds of (b)(1) class actions are mandatory class actions, meaning that absent members cannot

33. *See* FED. R. CIV. P. 23(a); Bone & Evans, *supra* note 15, at 1261–62 (explaining that proper class certification is critical because judgment in a Rule 23 action precludes absent members from bringing their claims to court again).

34. Such a class action would violate due process requirements because the absent members' interests would not be represented in court. *See* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940).

35. *See* FED. R. CIV. P. 23(a).

36. FED. R. CIV. P. 23(b).

37. *See* 1 RUBENSTEIN, *supra* note 7, § 1:3, at 5.

38. FED. R. CIV. P. 23(a).

39. *Id.* 23(a)(1); *see* Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (citing 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.05 (2d ed. 1985)) (explaining that numerosity is presumed where there are forty class members or more).

40. FED. R. CIV. P. 23(a)(2). Commonality of all issues of law or fact is not required; a core of shared legal issues or facts satisfies the commonality requirement. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

41. FED. R. CIV. P. 23(a)(3). Courts have struggled to define the meaning of the typicality requirement as distinguished from the adequacy requirement. Some courts have concluded that the typicality requirement strengthens the adequacy requirement, and assures that the representative will adequately represent the absent members. *See* 7A WRIGHT ET AL., *supra* note 11, § 1764, at 259–60.

42. FED. R. CIV. P. 23(a)(4). Adequacy must be scrutinized because "the fate of the class members is to a considerable extent in the hands of a single plaintiff," and the named plaintiff may have no stake or a nominal stake in the class action. Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002).

43. *See infra* notes 126–29 and accompanying text.

44. FED. R. CIV. P. 23(b).

45. FED. R. CIV. P. 23(b)(1).

request exclusion from the class.[46] Accordingly, courts are permitted, but not required, to notify the members of the class action.[47]

Rule 23(b)(1)(A) class actions are incompatible standards class actions and are appropriate where prosecuting individual actions would create a risk of inconsistent judgments.[48] These class actions are mandatory because allowing plaintiffs to sue individually would undermine the goal of reaching a consistent judgment.[49] Situations where a (b)(1)(A) class action can be maintained include individual suits concerning a riparian owner's rights and individual suits against a landowner regarding a nuisance.[50]

Rule 23(b)(1)(B) class actions are known as limited fund class actions.[51] These class actions are permitted where prosecuting individual claims would be dispositive of other individual claims.[52] However, in practice, Rule 23(b)(1)(B) class actions have been limited to cases that involve a finite recovery fund.[53] If class members sought relief from a finite fund individually, the fund could be drained, precluding or depleting recovery for other individuals.[54] Rule 23(b)(1)(B) class actions are mandatory because permitting individual suits would undermine the goal of fairly distributing the available funds.[55]

Rule 23(b)(2) class actions are known as injunctive relief class actions.[56] In (b)(2) class actions, the defendant has acted or refused to act in a way that generally applies to the whole class, making declaratory or injunctive relief appropriate.[57] Like (b)(1) class actions, (b)(2) class actions are mandatory class actions.[58] Rule 23(b)(2) class actions are mandatory because the relief sought necessarily applies to the entire class.[59] Accordingly, court notice to the class members is permitted but not required.[60]

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46. FED. R. CIV. P. 23(c)(2)(A).
47. FED. R. CIV. P. 23(b)(1), (c)(2)(A).
48. FED. R. CIV. P. 23(b)(1)(A); *see also* 1 RUBENSTEIN, *supra* note 7, § 1:3, at 5–6.
49. *See* 2 RUBENSTEIN, *supra* note 7, § 4:2, at 11–12
50. FED. R. CIV. P. 23(b)(1)(A) advisory committee's note (1966 Amendment).
51. *See* FED. R. CIV. P. 23(b)(1); 2 RUBENSTEIN, *supra* note 7, § 4:23, at 88.
52. *See* FED. R. CIV. P. 23(b)(1).
53. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 21.142, at 380–81 (noting that in (b)(1)(B) class actions, the judge must find that there is a limited fund and that the fund would be exhausted).
54. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 849–50 (1999) (decertifying a (b)(1) class in a suit against an asbestos manufacturer, because there was no evidence that the fund was limited and insufficient).
55. *See* 2 RUBENSTEIN, *supra* note 7, § 4:2, at 13–14.
56. FED. R. CIV. P. 23(b)(2); 2 RUBENSTEIN, *supra* note 7, § 4:26, at 97.
57. FED. R. CIV. P. 23(b)(2); *see, e.g.*, Walters v. Reno, 145 F.3d 1032, 1036 (9th Cir. 1998) (affirming the certification of a (b)(2) class where aliens charged with document fraud sued the Immigration and Naturalization Service, alleging that the agency's nationwide procedures violated their Fifth Amendment right to due process).
58. *See* FED. R. CIV. P. 23(c)(2)(A) (permitting, but not requiring, notice of class certification to the class members); 2 RUBENSTEIN, *supra* note 7, § 4:26, at 98.
59. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011).
60. FED. R. CIV. P. 23(b)(2), (c)(2)(A).

Rule 23(b)(3) class actions, known as damages class actions, are appropriate where common issues predominate over individual issues, and using class action procedure is a superior way to fairly and efficiently adjudicate the dispute.[61] It is often less clear that class action treatment is appropriate in damages class actions than in mandatory class actions, because individual issues may be significant.[62] Accordingly, a (b)(3) class action must meet the predominance and superiority requirements.[63] When analyzing predominance, courts assess whether common questions predominate over individual questions.[64] In doing so, courts compare individual claims and defenses to common claims and defenses.[65] In deciding whether a class action is a superior method, the court must consider the members' interest in maintaining individual actions, whether and what kind of litigation has already been started by the class members, how desirable it is to maintain the claims in that particular forum, and the difficulties of managing the action.[66]

Because damages class actions may be less cohesive than mandatory class actions,[67] damages class actions permit members to request exclusion from the class in a so-called "opt-out mechanism."[68] If an absent member is excluded from the class, any judgment in the action will not bind that member.[69] Additionally, (b)(3) absent members have the right to participate in the action by intervening in person or through an attorney.[70] Accordingly, courts must send "the best notice practicable" to the class members in clear and concise language.[71]

After the class is certified, the court can consider the claims and defenses of the parties.[72] However, certification legitimizes the class, which puts pressure on the defendant to settle the claims.[73] For defendants, the

61. FED. R. CIV. P. 23(b)(3); *see, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624–25 (1997) (holding that the predominance requirement was not satisfied by the class members' exposure to asbestos and interest in receiving compensation; in fact, each member's case was unique because the class members had different injuries and varying exposure to asbestos).

62. FED. R. CIV. P. 23(b)(3) advisory committee's note (1966 Amendment).

63. *Id.*

64. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 21.142, at 382.

65. *See id.*

66. FED. R. CIV. P. 23(b)(3)(A)–(D).

67. *See supra* note 62 and accompanying text.

68. FED. R. CIV. P. 23(c)(2)(B).

69. *See supra* text accompanying note 12.

70. FED. R. CIV. P. 23(c)(2)(B).

71. *Id.*; MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 21.31, at 459–60.

72. *See* Jeff Kosseff, Note, *The Elusive Value: Protecting Privacy During Class Action Discovery*, 97 GEO. L.J. 289, 295 (2008).

73. *See id.* (citing THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61 (1996), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$File/rule23.pdf).

possibility of an "all-or-nothing verdict" can be too risky, even if there is a low probability of a plaintiffs' verdict.[74]

While class actions can be a useful aggregative device, class actions are often brought by "entrepreneurial" lawyers, carry a risk of unmanageability, and can skew the outcome of a trial.[75] Plaintiffs' class action attorneys are incentivized to act as entrepreneurs in their own interest, because they stand to gain large fees from the litigation and are not closely monitored by free rider absent members.[76] Because of the entrepreneurial nature of class actions, class actions are driven by attorney's fees rather than by the interests of the class.[77] Where a plaintiffs' attorney's interests are unaligned with the interests of the class, an attorney may act contrary to the interests of the class.[78] Further, when individual issues or damages play a prominent role in a class action, the action may become unmanageable.[79] Finally, by combining many claims into one litigation, class actions raise the stakes of the litigation for the defendant.[80] As such, class actions increase the chances that the defendant will be held liable.[81]

2. Party Plaintiffs: Fair Labor Standards Act Collective Actions

Section 16(b) of the Fair Labor Standards Act allows an employee to bring an action on behalf of "similarly situated" employees against an employer for unpaid wages.[82] FLSA collective actions differ from Rule 23

74. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citing *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995)).

75. *See generally* Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 401–03 (2003) (discussing the drawbacks of American class actions and comparing them to foreign group litigation devices).

76. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991). *But see* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2056–57 (2010) (arguing that class actions lawyers should receive 100 percent of the settlement proceeds in small stakes cases, because those cases serve a deterrence function, not a compensation function); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105–07 (2007) (arguing that class counsel overcompensation and class member undercompensation should be of little concern, because class actions serve the purpose of deterring corporate wrongdoing).

77. *See* Coffee, *supra* note 20, at 680.

78. *See* Macey & Miller, *supra* note 76, at 12–13.

79. *See, e.g.*, Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2551 (2011) (decertifying a class of one and a half million women alleging sex discrimination in a Rule 23(b)(2) class action, because there was no common answer as to why the women were discriminated against).

80. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

81. *See id.*

82. 29 U.S.C. § 216(b) (2006).

class actions in both certification and discovery procedure.[83] While the certification procedure of Rule 23 class actions varies depending on the type of class action and claims asserted,[84] all FLSA actions are opt-in actions.[85] This means that the members must affirmatively consent to be included in the judgment.[86] The consenting members are known as "party plaintiffs."[87] Additionally, unlike Rule 23 class actions, discovery of FLSA members is a regular occurrence.[88]

The FLSA was enacted in 1938 to combat substandard workplace conditions that were detrimental to the health and well-being of workers.[89] Among other reforms, the FLSA set a minimum wage and required overtime pay for work over forty hours a week.[90] FLSA provisions are mainly enforced through collective actions brought under 29 U.S.C. § 216(b).[91] Additionally, the provisions of the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967 are enforced under § 216(b).[92]

Courts have split on § 216(b) certification procedure.[93] Section 216(b) itself does not provide any guidance on how to determine whether a group of employees is "similarly situated."[94] Most courts take an "ad hoc" two-step approach when deciding whether the employees are similarly situated, although a minority of courts apply Rule 23(a) requirements.[95]

The two-step certification process involves taking an "ad hoc" look at whether the employees in the action are similarly situated.[96] In the first step, the court reviews the complaint and supporting affidavits to determine whether a group of similarly situated employees exists.[97] If the court finds

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83. *See* Khadera v. ABM Indus. Inc., No. C08-417RSM, 2011 WL 3651031, at *1 (W.D. Wash. Aug. 18, 2011) (comparing the opt-in provision of § 216(b) to Rule 23); MANUAL FOR COMPLEX LITIGATION, *supra* note 7, § 32.42, at 811.

84. *See supra* Part I.A.1.

85. *See* 29 U.S.C. § 216(b).

86. *See id.*

87. *Id.*

88. *See infra* notes 101–02 and accompanying text.

89. *See* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules To Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 730–31 (2010).

90. *See id.* at 731.

91. *See* James M. Fraser, Note, *Opt-In Actions Under the FLSA, EPA, and ADEA: What Does It Mean To Be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 99 & n.35 (2005).

92. *See id.* at 105.

93. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 535 (2012).

94. 29 U.S.C. § 216(b) (2006).

95. *See* Moss & Ruan, *supra* note 93, at 535–36.

96. The first case to employ the two-step process was *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361–63 (D.N.J. 1987); *see also* Allan G. King & Camille C. Ozumba, *Strange Fiction: The "Class Certification" Decision in FLSA Collective Actions*, 24 LAB. LAW. 267, 275 (2009) (explaining the procedure of the *Lusardi* two-step).

97. *See* Anderson v. Cagle's, Inc., 488 F.3d 945, 953 (11th Cir. 2007). Because the first-step certification decision is based on pleadings and affidavits, the first-step certification

that the complaint identifies a group of similarly situated employees, the class is conditionally certified.[98] Notice of the collective action is sent to the employees, and the employees must return the consent form to the court to be included in the action.[99]

During the second step, the defendant employer ordinarily makes a motion to decertify the class, and the court reviews whether the members are similarly situated with more scrutiny.[100] The parties serve discovery on class members to determine whether the members are in fact similarly situated.[101] Unlike Rule 23 class actions, courts have broad discretion to order class-wide or representative sampling discovery of plaintiffs in FLSA collective actions.[102] In deciding whether the plaintiffs are similarly situated, the court can consider the employees' placement and locations, the employer's defenses against individual plaintiffs, and fairness and procedural considerations.[103] If the court finds that the plaintiffs are not similarly situated, the class is decertified and the plaintiffs are dismissed without prejudice.[104] If the court finds that the plaintiffs are similarly situated, the named plaintiff(s) and the defendant proceed to the merits of the case.[105]

Under the Rule 23(a) approach, the court determines whether the class is similarly situated by analyzing whether the class satisfies the 23(a) numerosity, commonality, typicality, and adequacy requirements.[106] At least one court has recognized that the opt-in mechanism of § 216(b) is contrary to the opt-out mechanism of Rule 23 class actions.[107] However, the court reasoned that this discrepancy does not necessarily make every

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standard is lenient. *See id.* (citing Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1214 (5th Cir. 1995)).

98. *See id.*

99. *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170–71 (1989) (holding that plaintiffs can seek court assistance in finding and notifying similarly situated members).

100. *See Anderson*, 488 F.3d at 953.

101. *See* 7B WRIGHT ET AL., *supra* note 11, § 1807, at 495–96; *see, e.g.*, *Anderson*, 488 F.3d at 953 (explaining that discovery informs the second step of the process).

102. *See* Smith v. Lowe's Home Ctrs., Inc., 236 F.R.D. 354, 357–58 (S.D. Ohio 2006) (surveying cases discussing FLSA discovery procedure and concluding that representative sampling discovery is appropriate during step-two certification of a 1,500 employee class); Coldiron v. Pizza Hut, Inc., No. CV03–05865TJHMCX, 2004 WL 2601180, at *2 (C.D. Cal. Oct. 25, 2004) (permitting individualized discovery of 306 employees, because Pizza Hut intended to challenge certification by alleging that the employees were not similarly situated); 7B WRIGHT ET AL., *supra* note 11, § 1807, at 486.

103. *See Anderson*, 488 F.3d at 953 (citing Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001)); *see also* Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1213 (5th Cir. 1995) (noting that *Lusardi* and other two-step cases do not define "similarly situated" and that, therefore, FLSA cases are analyzed on a case-by-case basis).

104. *Mooney*, 54 F.3d at 1214.

105. *Id.*

106. *See* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 268 (D. Colo. 1990). *But see* Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1105 (10th Cir. 2001) (arguing that the Rule 23(a) certification procedure runs contrary to Congress's intent).

107. *See Shushan*, 132 F.R.D. at 266 (citing Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975); LaChapelle v. Owens-Ill., Inc., 513 F.2d 286, 288 (5th Cir. 1975)).

part of Rule 23 inapplicable to FLSA collective actions, and the Rule 23(a) approach provides structure in the certification process.[108]

B. State Class Action Certification Procedure

This section explores the class action procedure used by states that have considered whether to dismiss nonresponsive members. It focuses on the procedure of two states that have produced two of the leading cases on absentee postcertification discovery sanctions: Alaska and California. In so doing, this section creates a background for the discussion of these cases in Part II.

State procedural rules fall into three categories with respect to class action procedure: Field Code states, original Rule 23 states, and amended Rule 23 states. In Field Code states, class action procedure is governed by the Field Code, the influential procedural reform code of the 1800s.[109] Original Rule 23 states use the original version of Rule 23, in which class action procedure is determined by the type of claim being asserted.[110] Amended Rule 23 states use one of the amended versions of modern Rule 23, certifying class actions under an older version of Rule 23(a) and 23(b).[111]

California uses Field Code class action procedure.[112] In the Field Code, class certification is based on the straightforward rule that "[W]hen the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."[113] Field Code procedure requires that there be an ascertainable class and interest in the common issues.[114]

Alaska's class action certification procedure tracks federal Rule 23 class action certification procedure.[115] Although some wording in Alaska's Rule

108. *See id.*

109. *See generally* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327–34 (1988) (discussing the features of the Field Code and their relation to modern procedural rules).

110. *See* 4 CONTE & NEWBERG, *supra* note 24, § 13:3, at 400.

111. *See id.* § 13:4, at 401–02; *see also* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173 (2005) (surveying variations in state class action discovery rules).

112. CAL. CIV. PROC. CODE § 382 (West 2007).

113. *See* 4 CONTE & NEWBERG, *supra* note 24, § 13:2, at 399–400. The Field Code merged law and equity into one code in 1848. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932, 939 (1987). The Field Code is the predecessor of about half the states' modern day procedural codes. *See id.*

114. *See* 4 CONTE & NEWBERG, *supra* note 24, § 13:2, at 400.

115. ALASKA R. CIV. P. 23.

23 differs from the current federal Rule 23, the substance of Alaska's certification procedure mirrors federal certification procedure.[116]

C. Due Process Rights of Rule 23 Absent Members: Notice and the Opportunity To Be Heard

This section discusses the due process rights of absent members. Class counsel often invoke these rights when arguing that courts should not impose sanctions on nonresponsive members.[117] The due process clause provides that the government shall not deprive any person of life, liberty, or property without due process of law.[118] The due process clause guarantees notice and the opportunity to be heard prior to a deprivation of life, liberty, or property.[119] Pursuant to the guarantee of the opportunity to be heard, all Rule 23 absent members are entitled to adequate representation.[120] However, an absentee's right to notice varies according to the type of class action.[121] In mandatory class actions, notice of any class certification decision is not required;[122] in opt-out class actions, notice of any class certification decision is mandatory.[123]

Class actions are an exception to the general rule that one cannot be bound by a judgment in a litigation to which one is not a party.[124] Because absent members do not actively participate in a class action, procedural mechanisms must ensure that the members' interests are protected.[125] The procedural mechanism of adequate representation ensures that absent members are bound by a judgment only where the named plaintiff adequately represents the class.[126] Consequently, the class representative must "fairly and adequately protect the interests of the class."[127] To fulfill this requirement, the class representative must not have interests that are incompatible with the interests of the absent members.[128]

Additionally, the plaintiffs' attorney must be experienced and qualified to represent the absent members.[129] Rule 23(g) builds on the adequate

116. FED. R. CIV. P. 23; ALASKA R. CIV. P. 23; *see also* SECTION OF LITIG., AM. BAR ASS'N, SURVEY OF STATE CLASS ACTION LAW 2012 ALASKA 21 (2012).
117. *See infra* Part II.A.2.
118. U.S. CONST. amend. V (provides for due process protections against the federal government); U.S. CONST. amend. XIV, § 1 (provides for due process protections against state and local governments).
119. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
120. *See* FED. R. CIV. P. 23(a)(4).
121. *See supra* notes 47, 58, 71 and accompanying text.
122. *See supra* notes 47, 58 and accompanying text.
123. *See supra* note 71 and accompanying text.
124. *See* Hansberry v. Lee, 311 U.S. 32, 40–41 (1940).
125. *See* 1 RUBENSTEIN, *supra* note 7, § 1:1, at 2–3.
126. *See Hansberry*, 311 U.S. at 42–43.
127. FED. R. CIV. P. 23(a)(4).
128. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968).
129. *See id.*

representation requirement of Rule 23(a)(4).[130] Under Rule 23(g), added in 2003,[131] the court appoints class counsel after considering counsel's experience, knowledge of the law, resources, and work already done on the particular claims.[132] Rule 23(g) was enacted because class counsel is "often critically important to the successful handling of a class action."[133]

In addition to the adequate representation requirement, absent members in (b)(3) class actions are protected by notice.[134] In (b)(1) and (b)(2) mandatory class actions, notice of a class certification decision is discretionary.[135] Because (b)(1) and (b)(2) classes are "homogeneous without any conflicting interests between the members of the class," a binding judgment is not unfair (provided that the absent members have been adequately represented).[136] The certification requirements of mandatory class actions make it less likely that there will be defenses or issues pertaining to individual members.[137]

By contrast, notice is an essential part of the (b)(3) class action mechanism.[138] Because (b)(3) actions do not have as much class cohesion as (b)(1) and (b)(2) actions, notice is an additional procedural safeguard that protects the interests of (b)(3) members.[139] The notice must describe the action and the member's rights in the action.[140] Additionally, the notice must provide the member with an opportunity to be excluded from the class

130. FED. R. CIV. P. 23(g) advisory committee's note (2003 Amendment).

131. *Id.*

132. FED. R. CIV. P. 23(g)(1)(C)(i); *cf.* Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B) (2006) (requiring that the court appoint as lead plaintiff the member who is most capable of adequately representing the absent members' interests and requiring the lead plaintiff to "select and retain counsel to represent the class").

133. FED. R. CIV. P. 23(g) advisory committee's note (2003 Amendment).

134. *See supra* note 71 and accompanying text.

135. *See supra* notes 47, 58 and accompanying text. However, reasonable notice is required in all Rule 23 class actions of any proposed settlement, voluntary dismissal, compromise, or claim for attorney's fees. FED. R. CIV. P. 23(e)(1), 23(h)(1). Accordingly, members of mandatory classes can protect their rights by objecting to a proposed resolution. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004).

136. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir. 1975); *accord* Durrett v. John Deere Co., 150 F.R.D. 555, 562–63 (N.D. Tex. 1993) (discussing the procedural due process requirements of (b)(1) and (b)(2) class actions, as compared to (b)(3) class actions).

137. 7AA WRIGHT ET AL., *supra* note 11, § 1786, at 496.

138. *Id.* at 492.

139. *See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 912–13 (1995) (citing *Durrett*, 150 F.R.D. at 562); *cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558–59 (2011) (explaining that in (b)(2) class actions, unlike in (b)(3) class actions, relief necessarily affects the entire class; therefore, notice is not mandatory).

140. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985). The notice must comply with the *Mullane* guidelines for notice: it must be the best practicable, reasonably calculated to inform the members of their rights, and offer the members an opportunity to object. *See id.* at 812.

and the opportunity to participate in the suit in person or through counsel.[141]

D. Postcertification Discovery of Absent Members: Rule 23 Class Actions, FLSA Collective Actions, and State Class Actions

This section discusses when and how absent members may be subject to discovery in Rule 23 class actions, FLSA collective actions, and California and Alaska state class actions. Courts are in disagreement as to whether, and to what extent, Rule 23 absentees should be subject to postcertification discovery.[142] The FRCP does not address the duties of absent class members.[143] Rule 23(d) states that courts may make orders that are required to efficiently run a proceeding and protect absent members, but does not contemplate orders directed to absent members.[144] Therefore, courts disagree as to whether absentees can be required to respond to discovery requests.[145] Courts have considered this potential duty in light of the facts and goals of the particular litigation.[146] A majority of the courts that have reached the issue have concluded that discovery of absentee members is permissible under certain circumstances.[147] However, some courts have also noted that such discovery should not be allowed as a routine matter, because it is contrary to the general policy that absent members need not participate in a class action.[148]

Courts have considered allowing discovery of absent members in all three kinds of Rule 23(b) class actions, FLSA collective actions, and state class actions.[149] However, many of the cases analyzing whether such

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141. *See id.*; *supra* note 70 and accompanying text.

142. Postcertification discovery is discovery relating to the merits of the class members' claim(s) or the defendant's defense(s). *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004–05 (7th Cir. 1971) (holding that discovery of absent members is permissible if justice requires it and the court takes precautionary measures to protect the absent members); *see also* 7B WRIGHT ET AL., *supra* note 11, § 1796.1, at 56–57 (noting that the majority of courts have allowed discovery, at least under some circumstances). *But see* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Fischer v. Wolfinbarger, 55 F.R.D. 129, 132 (W.D. Ky. 1971) (holding that discovery of absent members is not permissible).

143. *See* FED. R. CIV. P. 23.

144. *See* FED. R. CIV. P. 23(d); Jean F. Rydstrom, Annotation, *Absent Class Members in Class Action Under Rule 23 of Federal Rules of Civil Procedure As Subject to Discovery*, 13 A.L.R. FED. 255, § 2[a], at 257 (1972).

145. *See* 5 CONTE & NEWBERG, *supra* note 24, § 16:1, at 120.

146. *See supra* notes 27–29 and accompanying text.

147. *See* Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) (surveying absentee member discovery cases and concluding that most courts do not categorically reject discovery of absent members); *see also* 7B WRIGHT ET AL., *supra* note 11, § 1796.1, at 56–57 (noting that the majority of courts have allowed discovery of absent members).

148. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1004–05 (7th Cir. 1971); M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D. Mass. 1984) (citing *Dellums*, 566 F.2d at 187).

149. *See infra* Part II.

discovery is permissible are Rule 23(b)(3) class actions.[150] Discovery may be more useful to defendants in (b)(3) class actions than in mandatory class actions, because the class is less cohesive.[151] Additionally, ordering absent members to respond to discovery in mandatory Rule 23 class actions may be more coercive, because those members cannot opt out of the action.[152] Courts have considered allowing absentee discovery in many causes of action, including securities fraud,[153] actions for unpaid wages,[154] employment discrimination,[155] housing discrimination,[156] and antitrust suits.[157]

Diligent research has failed to uncover any instances in which courts have considered allowing discovery in Rule 23 negative value class actions.[158] Likely, defendants have not requested such discovery because the cost of the discovery would exceed any benefit that the defendant could obtain from the information.[159]

When deciding whether to permit absent member discovery, courts consider whether the requested discovery is appropriate in that particular litigation, the defendant's need for the information, and the potential burden on the absent members.[160] Courts have granted discovery when the information relates to common issues, the requests are not unduly burdensome, and the requested information is unavailable from the

150. *See, e.g.*, *Brennan*, 450 F.2d at 1001 (noting that the class members could choose to be excluded from the class); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2009 WL 1458032, at *7–11 (N.D. Cal. May 26, 2009) (holding that the class action satisfied the Rule 23(b)(3) requirements of predominance and superiority).

151. *See supra* note 62 and accompanying text.

152. *See* Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 699 (S.D.N.Y. 1975) (permitting discovery of (b)(1) absentees, but noting a conflict of interest between the passive absent members and the information-seeking defendant); *see also* United States v. Trucking Emp'rs., Inc., 72 F.R.D. 101, 104 (D.D.C. 1976) (allowing discovery of absent members in a defendant class, but noting that such discovery might be coercive because defendant absentees do not have the opportunity to opt out of the class).

153. *See, e.g.*, Arleth v. FMP Operating Co., Civ.A. No. 90-1663, 1991 WL 211521, at *5–6 (E.D. La. Oct. 8, 1991) (securities fraud class action).

154. *See, e.g.*, *Cruz*, 2011 WL 843956, at *5–8 (employment class action seeking overtime pay).

155. *See, e.g.*, Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1555–57 (11th Cir. 1986) (sex discrimination action seeking injunctive and monetary relief).

156. *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir. 1974). The court held that the party seeking discovery has the burden of showing that the discovery is proper. *Id.* at 340. However, in the racial housing discrimination case at issue, the defendant did not prove that absent member discovery was necessary. *See id.* at 340–41.

157. *See, e.g.*, Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (declining to dismiss nonresponsive absent members in an antitrust case alleging price fixing of school milk).

158. *See, e.g.*, 5 CONTE & NEWBERG, *supra* note 24, § 16:3, at 133–43 (providing examples of cases where courts considered the permissibility of absent member discovery).

159. *See infra* note 161 and accompanying text.

160. 7B WRIGHT ET AL., *supra* note 11, § 1796.1, at 56–59.

representative parties.[161] Because only common questions are appropriately resolved in a class action, courts have routinely rejected postcertification discovery requests where they pertain solely to individual issues.[162] Courts have also rejected discovery requests where it is evident that the discovery requests are being used as a tactic to scare class members or to decrease the size of the class.[163] Additionally, courts have expressed concern about discovery requests that are overly complicated or technical.[164]

Absent members argue that they have an interest in not actively participating in a class action,[165] not being unduly burdened by discovery,[166] and maintaining the efficiency of class actions.[167] Absentees argue that a defendant may use discovery as a tactic to harass absent members.[168] Such discovery may discourage a member from remaining in the class, or force a member to hire individual counsel to complete the request.[169]

What is more, permitting absent member discovery undermines the efficiency and intent of Rule 23 class actions by, in effect, creating an opt-in procedure.[170] Rule 23 is an opt-out scheme which includes all class

161. Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621 (S.D. Tex. 1991) (citing Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977); United States v. Trucking Emp'rs., Inc., 72 F.R.D. 101, 104 (D.D.C. 1976)).

162. *See* Redmond v. Moody's Investor Serv., 92 CIV. 9161 (WK), 1995 WL 276150, at *1 (S.D.N.Y. May 10, 1995) (citing Enter. Wall Paper Mfg. Co. v. Bodman, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 700 (S.D.N.Y. 1975)).

163. *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974) (reversing an order dismissing nonresponsive members because the defendant never proved that the discovery was not a scare tactic); *see also* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (noting that one of the absent members wrote to the court requesting exclusion from the class because the discovery requests were intimidating).

164. *See, e.g.*, Collins v. Int'l Dairy Queen, 190 F.R.D. 629, 632–33 (M.D. Ga. 1999) (denying discovery, in part because the interrogatories were so technical that the absent members would require the assistance of an accountant or an attorney); Kline v. First W. Gov't Sec., Inc., No. CIV.A. 83-1076, 1996 WL 122717, at *5 (E.D. Pa. Mar. 11, 1996) (noting that the requested interrogatories were complicated, weighing in favor of denying the discovery request).

165. *See Redmond*, 1995 WL 276150, at *1 (citing *Robertson*, 67 F.R.D. at 699).

166. *See Dellums*, 566 F.2d at 187 (citing *Clark*, 501 F.2d at 340–41).

167. *See Wainwright*, 54 F.R.D. at 534 ("The usefulness of Rule 23 would end if class members could be subjected to Rule 33 and forced to spend time, and perhaps engage legal counsel, to answer detailed interrogatories.").

168. *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir. 1986) (finding that the interrogatories were propounded as a tactic to reduce class size); 5 CONTE & NEWBERG, *supra* note 24, § 16:3, at 138–39.

169. *See Wainwright*, 54 F.R.D. at 534; John J. Madden & Denise G. Paully, *Making the Class Determination in Rule 23(b)(3) Class Actions*, 42 FORDHAM L. REV. 791, 807 (1974); *cf.* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1002 (7th Cir. 1971) (noting that class counsel encouraged the absentees to seek help from either their personal lawyer or class counsel when answering the interrogatories).

170. *Compare* Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313, 319 (D. Colo. 1999) (holding that the proposed questionnaire must be optional, because a mandatory

members unless they request exclusion.[171] Such a procedure helps to resolve disputes efficiently by resolving as many claims as possible in one litigation.[172] By ordering discovery, courts force members to affirmatively participate in, or opt into, the action.[173] Plaintiffs argue that this effectively transforms a class action into a "massive joinder" of many individual claims.[174]

Defendants argue that they have an interest in obtaining information that may be necessary to prove a defense.[175] Defendants may seek discovery from absent members to obtain information to support an affirmative defense,[176] to prove that there is no claim,[177] or to prove that a class lacks interest in proceeding as a whole.[178] Additionally, absent member discovery may illuminate the scope of the litigation and provide information for negotiating a settlement.[179]

Ironically, discovery of absent members may undermine the efficiency of Rule 23 in a way that disadvantages not only absent members, but also defendants. If a court orders discovery and some members do not respond, the court might dismiss the nonresponsive members.[180] If those nonresponsive members are excluded from the action but can later sue the defendant on the same claim, the defendant may be subject to repetitive individual litigation if it cannot reach settlements with those individual

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questionnaire would create an opt-in scheme running contrary to Rule 23), *with* Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956, at *7 (N.D. Cal. Mar. 8, 2011) (rejecting plaintiffs' argument that mandatory discovery creates an opt-in scheme).

171. *See supra* note 68 and accompanying text.

172. *See supra* notes 16–18 and accompanying text.

173. *See Wainwright*, 54 F.R.D. at 534.

174. *Id.*

175. *See* Redmond v. Moody's Investor Serv., 92 CIV. 9161 (WK), 1995 WL 276150, at *1 (S.D.N.Y. May 10, 1995) (citing Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 699 (S.D.N.Y. 1975)). However, class counsel may also have an interest in obtaining the information, as it can be helpful in assessing the strength of the class's case. *See Schwartz*, 185 F.R.D. at 320 (noting that the questionnaire would assist both the defendant and class counsel in discovery proceedings).

176. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1005 (7th Cir. 1971) (seeking discovery to prove a lack of liability).

177. *See, e.g.*, Barham v. Ramsey, 246 F.R.D. 60, 63 (D.D.C. 2007) (seeking evidence that would tend to disprove a constitutional violation by police during a mass arrest); *Schwartz*, 185 F.R.D. at 315 (seeking evidence to disprove plaintiffs' reliance claims).

178. *See* FED. R. CIV. P. 23(b)(3)(A); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1552 (11th Cir. 1986) (noting that the trial court dismissed the employment class action after many members failed to respond to discovery, because there was not sufficient numerosity). *But see* Guy v. Abdulla, 57 F.R.D. 14, 15 (N.D. Ohio 1972) (denying discovery because "the delineation of appropriate classes is a question of law").

179. *See* Madden & Paully, *supra* note 169, at 807. Such information may also be of benefit to class counsel. *See Schwartz*, 185 F.R.D. at 320.

180. *See infra* Part II.A.

members.[181] In sum, absent member discovery could lead to a defendant being unable to obtain a "bill of peace."[182]

Two Rule 23 cases, one permitting absentee discovery and the other denying it, illustrate how courts have grappled with the defendant's need for information and the absentees' interest in not being burdened. In *Dellums v. Powell*,[183] demonstrators who had been arrested while protesting the Vietnam War brought a Rule 23(b)(3) class action against the chief of the capitol police, claiming false arrest, false imprisonment, and Fourth Amendment violations.[184] At trial, absent members gave testimony that established that policemen beat the demonstrators while arresting them.[185] On appeal, Powell, the chief of police, argued that the testimony was improperly admitted because the FRCP did not permit discovery of absent members.[186] The D.C. Circuit surveyed case law pertaining to absentee discovery.[187] The court held that such discovery is permissible where the requests are related to common questions, are made in good faith and not unduly burdensome, and where the requested information is not available from the representatives themselves.[188] Further, the court noted that Powell had the names of all the class members and could readily serve discovery requests on the members.[189] Accordingly, the D.C. Circuit affirmed the district court's decision to admit the absent member testimony.[190]

By contrast, in *Wainwright v. Kraftco Corp.*,[191] a district court found that discovery of absent members is categorically impermissible.[192] In *Wainwright*, Georgia school boards brought a class action against milk companies, alleging that the milk companies fixed prices in violation of the Sherman Antitrust Act.[193] The milk companies served interrogatories and document production requests on the school boards and then moved to compel the school boards to answer.[194] The district court denied the milk companies' motion and held that they would not be permitted to take discovery of the absent members.[195] The court reasoned that forcing the absentees to respond would undermine the efficiency of Rule 23, essentially making the class action a "massive joinder."[196] Further, the court held that

181. *See supra* text accompanying notes 16 and 17.
182. *See supra* note 17 and accompanying text.
183. 566 F.2d 167 (D.C. Cir. 1977).
184. *See id.* at 173–75.
185. *See id.* at 187. The testimony was intended to establish bad faith and malice on the part of the police. *See id.* at 188.
186. *See id.* at 187.
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. 54 F.R.D. 532 (N.D. Ga. 1972).
192. *See id.* at 534.
193. *See id.* at 533.
194. *See id.*
195. *See id.* at 535.
196. *See id.* at 534.

absent members are not parties under Rule 23 and, therefore, are not subject to party discovery rules.[197]

Among the courts that have permitted discovery in Rule 23 class actions, there has been a split on the issue of which party should bear the cost.[198] Some courts have ordered the defendant to pay,[199] likely reasoning that the defendant requested the discovery and therefore should bear the costs. One court has ordered the defendant and plaintiffs' counsel to split costs, reasoning that the discovery benefitted both the plaintiff's case and the defendant's case.[200]

While there has been dispute about whether to allow discovery of Rule 23 absentees, courts have generally agreed that discovery of FLSA collective action plaintiffs is permissible.[201] Unlike in Rule 23 class actions, FLSA plaintiffs have chosen to opt into the action;[202] accordingly, subjecting those plaintiffs to discovery raises fewer concerns of coercion. Additionally, the discovery phase is a crucial component in the second step of the two-step process, because it allows the court to assess whether the members are similarly situated with a higher level of scrutiny.[203]

Similarly to courts considering Rule 23 absent member discovery, state courts also disagree on whether absent members can be subject to discovery in state class actions.[204] California state courts are the only state courts that have considered in multiple cases whether absentees should be subject to discovery.[205] In California state class actions, defendants are sometimes permitted to take discovery of absent members, but such discovery is not permitted as a matter of course.[206] Case law indicates that defendants in a California state class action have a due process right to discovery from

197. *See id.* (explaining that absent members cannot be parties, because absent members have the option of intervening or formally entering the class action). However, after the Supreme Court's decision in *Devlin*, it is clear that absent members can be parties. In that case, the Supreme Court held that an absent member can be a party for some purposes, depending on the procedural context of the litigation. *See* Devlin v. Scardelletti, 536 U.S. 1, 9–10 (2002).

198. *See* Schwartz v. Celestial Seasonings, Inc., 185 F.R.D. 313, 319 (D. Colo. 1999) (noting that some courts have held that the party seeking to serve a questionnaire must bear the costs of the questionnaire).

199. *See id.*

200. *See id.* at 319–20; *cf.* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (holding that the petitioner must bear the cost of notice to class members).

201. *See supra* note 102 and accompanying text.

202. 29 U.S.C. § 216(b) (2006).

203. *See supra* notes 100–02 and accompanying text.

204. *See* TEX. R. CIV. P. 42(f) ("Unnamed members of a class action are not to be considered as parties for purposes of discovery."). *But see* Spoon v. Superior Court, 182 Cal. Rptr. 44, 47 (Cal. Ct. App. 1982) (permitting absent member discovery).

205. *See* Caroll J. Miller, Annotation, *Absent or Unnamed Class Members in Class Action in State Court As Subject to Discovery*, 28 A.L.R. 4TH 986, § 1, at 987–93 (1984) (discussing five California state court cases and one Louisiana state court case addressing the permissibility of absent member discovery).

206. *See Spoon*, 182 Cal. Rptr. at 47.

absent members.[207] Therefore, absent members are not automatically immune from discovery requests.[208] However, California state courts find that discovery restrictions are necessary to maintain the effectiveness of the class action.[209] Accordingly, the defendant must prove that the interrogatories concern matters that are necessary to the trial of class issues, are not unduly burdensome on absentees, and will not foreseeably decrease the class size.[210]

Alaska state courts have not yet ruled on whether and to what extent absentees in Alaska state class actions are subject to discovery.[211] In *International Seafoods of Alaska, Inc. v. Bissonette*,[212] the Alaska Supreme Court surveyed federal case law regarding the permissibility of absent member discovery.[213] However, the Alaska Supreme Court did not endorse or reject absent member discovery.[214]

E. Rule 37 Discovery Sanctions and State Discovery Sanctions

Courts draw on their federal or state sanction powers when imposing sanctions on nonresponsive absent members.[215] Accordingly, Part I.E explores federal discovery sanctions as well as California and Alaska state discovery sanctions. This section discusses the purpose of such sanctions and the different kinds of permitted sanctions. Next, it considers the standards by which courts analyze whether, and which, sanctions are warranted.

Under the authority of Rule 37, federal courts can impose sanctions on parties for failure to comply with discovery orders.[216] Federal courts use their Rule 37 authority to impose sanctions on absent members in Rule 23 class actions and FLSA collective actions when those members fail to respond to discovery.[217] Rule 37 discovery sanctions serve several

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207. *See id.* at 51.

208. *See id.*

209. *See* Danzig v. Superior Court, 151 Cal. Rptr. 185, 190 (Cal. Ct. App. 1978) (citing Bisgeier v. Fotomat Corp., 62 F.R.D. 118 (N.D. Ill. 1973)) (explaining that the purpose of class actions is to eliminate repetitive litigation and alleviate the participation burden on absent class members).

210. *See id.* at 191.

211. *See* Appellees' Brief at 42, Int'l Seafoods of Alaska, Inc. v. Bissonette, 146 P.3d 561 (Alaska 2006) (No. S-11568), 2005 WL 3125938.

212. 146 P.3d 561 (Alaska 2006).

213. *See id.* at 568–69. The Alaska Supreme Court's approach to absent member discovery sanctions will be discussed in Part II.B.1.

214. *See id.*

215. *See infra* Part II.

216. FED. R. CIV. P. 37. Rule 37 is not the exclusive authority for discovery sanctions. Under 28 U.S.C. § 1927, any person who unreasonably delays court proceedings can be required to pay costs and attorney's fees. *See* 28 U.S.C. § 1927 (2006). Additionally, courts possess common law sanction powers. *See* Olivieri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986) (discussing courts' inherent powers to "supervise and control" court proceedings).

217. *See, e.g.*, Hernandez v. Starbucks Coffee Co., No. 09-60073, 2011 WL 2729076, at *4–7 (S.D. Fla. June 22, 2011) (denying defendant's motion to dismiss with prejudice

purposes: they are a specific deterrent to the noncompliant party, a general deterrent to others, and ensure that the noncompliant party will not benefit from his or her failure to respond.[218] However, courts must also take care to ensure that a sanction is warranted, particularly when imposing the harshest litigation-ending sanctions.[219] Litigation-ending sanctions are disfavored because they preclude resolution on the merits, thereby raising due process concerns.[220] Accordingly, the Supreme Court has held that a sanction must be fair and must be related to the claim that is at issue in the discovery order.[221] When deciding whether a sanction is fair, a court analyzes a noncompliant party's culpability and course of behavior in the particular case.[222]

Given the fact-specific nature of sanction imposition, there is no rigid test that dictates whether or which sanctions should be imposed.[223] Rather, courts are free to consider a number of factors.[224] Courts have considered, among other factors, the willfulness and bad faith of the party in not complying with the order,[225] the prejudice to the opposing party,[226] whether lesser sanctions would be effective,[227] whether the noncompliant party was warned of the sanction,[228] and the policy favoring disposing of cases on the merits.[229]

Under Rule 37(b), federal courts may impose the following sanctions, in ascending order of severity, for failure to comply with court ordered discovery: direct that facts related to matters in the discovery order be taken as established for the purposes of the action; prohibit the noncompliant party from presenting certain claims, defenses, or evidence;

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nonresponsive FLSA party plaintiffs under Rule 37(b)); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956, at *8 (N.D. Cal. Mar. 8, 2011) (granting defendant's motion to dismiss without prejudice nonresponsive Rule 23 class members under Rule 37(b)).

218. *See* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) (noting that sanctions can serve as both a specific deterrent and a general deterrent); Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 71 (2d Cir. 1988).

219. *See* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209–10 (1958).

220. *See id.* (noting that dismissal without a hearing of the merits implicates Fifth Amendment due process problems).

221. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982).

222. *See id.* at 707–08 (analyzing the noncompliant party's behavior and concluding that the trial court's sanction—deeming jurisdictional facts established—was just).

223. *See* Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992).

224. *See* Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered Uniformity*, 104 DICK. L. REV. 471, 500–01 (2000) (noting that the Supreme Court has not offered guidance on which factors courts should consider when imposing sanctions, and suggesting that courts analyze eight factors in a balancing test).

225. *See* Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984).

226. *See id.*

227. *See id.*

228. *See Ehrenhaus*, 965 F.2d at 921.

229. *See id.*

strike pleadings; stay proceedings until the discovery order is completed; dismiss the action; render a default judgment; or hold a party in contempt of court.[230] In addition to or instead of these sanctions, courts can order the noncompliant party and/or the attorney representing the noncompliant party to pay expenses caused by the noncompliance, unless such an award would be unjust.[231] An award of expenses may be unjust if other severe sanctions have already been imposed.[232] Under Rule 37(d), a court can impose Rule 37(b) sanctions and/or expenses when a party fails to attend its own deposition or answer interrogatories.[233]

The Supreme Court has held that courts should not dismiss with prejudice when a party is unable to comply due to external factors.[234] However, dismissal may be warranted if a party has not complied due to willfulness, bad faith, or fault.[235] The Supreme Court has explained that when a party makes a good-faith effort to comply with discovery, due process concerns weigh against dismissing the action.[236]

When dismissing a claim, a court can either dismiss the claim with prejudice or without prejudice.[237] Dismissal with prejudice extinguishes the party's claim forever;[238] on the other hand, dismissal without prejudice ends only the present litigation.[239] A party dismissed without prejudice may refile the same suit on the same claim.[240]

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230. FED. R. CIV. P. 37(b)(2)(A)–(E).

231. FED. R. CIV. P. 37(b)(2)(E). Costs can be awarded for, among other things, attorney's fees for the cost of preparing or prosecuting a motion for sanctions. *See, e.g.*, Poliquin v. Garden Way, Inc., 154 F.R.D. 29, 33 (D. Me. 1994) (awarding the fees and costs associated with bringing a motion for compliance and a motion for sanctions).

232. *See* Eric C. Surette, Annotation, *Sanctions Available Under Rule 37, Federal Rules of Civil Procedure, Other Than Exclusion of Expert Testimony, for Failure To Obey Discovery Order Not Related to Expert Witness*, 156 A.L.R. FED. 601, § 10[b], at 692 (1999).

233. FED. R. CIV. P. 37(d)(1)(A), 37(d)(3).

234. *See* Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

235. *See id.* (holding that the district court erred in dismissing a Swiss holding company with prejudice for its failure to produce bank documents, because the holding company could not produce bank documents due to a conflict of laws).

236. *See id.* at 209 ("[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").

237. *See* Sharif v. Wellness Int'l Network, Ltd., 376 F.3d 720, 725 (7th Cir. 2004) (comparing judicially created notice requirements for dismissal with prejudice and dismissal without prejudice).

238. *See* Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992) (citing Meade v. Grubbs, 841 F.2d 1512, 1520 n.6 (10th Cir. 1988)).

239. *See Sharif*, 376 F.3d at 725.

240. *See id.* (noting that where there are statute of limitations problems, dismissal without prejudice may have the same effect as dismissal without prejudice).

A court can also exclude a noncompliant party from presenting evidence in support of a particular claim or defense.[241] This sanction is especially appropriate when the noncompliant party frustrated discovery or when the evidence obtained from discovery would be necessary to build a claim.[242] Most courts have excluded evidence only when the noncompliant party has acted in bad faith, or when the failure causes incurable prejudice because of the due process concerns raised by the lack of evidence.[243]

Both California and Alaska state rules set forth discovery sanctions that mirror the discovery sanctions set forth in Rule 37. Under Alaska's Rule 37(b), a court can, among other sanctions, direct that facts be taken as established for the purposes of the litigation, prohibit a party from introducing evidence, strike out pleadings, or treat a party in contempt of court.[244] Similar to federal court powers, Alaska state courts can order the noncompliant party to pay costs and fees, unless the failure was justified or such an award would be unjust.[245] California's Code of Civil Procedure authorizes courts to impose discovery sanctions under five categories: monetary sanctions, issue sanctions, evidence sanctions, terminating sanctions, and contempt sanctions.[246]

II. HARSH PUNISHMENT OR FAIR GAME? SANCTIONING NONRESPONSIVE ABSENTEES

Part II discusses the decisions of courts that have considered whether, and how, to sanction absent members for failure to respond to postcertification discovery requests. First, this part explores the decisions of courts that have dismissed noncompliant members with prejudice and courts that have dismissed noncompliant members without prejudice. Next, it considers the reasoning of courts that have refused to dismiss noncompliant members. Finally, this part discusses the decisions of courts that have imposed lesser sanctions: exclusion of evidence, exclusion of new claims, and monetary sanctions.

Few courts have considered whether to impose discovery sanctions on absentees.[247] Accordingly, this section discusses the handful of leading cases on the issue. Most courts agree that only willful or bad faith misconduct on the part of absentees warrants imposing sanctions at all.[248]

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241. *See* FED. R. CIV. P. 37(b)(2)(B); Callwood v. Zurita, 158 F.R.D. 359, 362 (D.V.I. 1994) (prohibiting the defendant Attorney General, who violated four discovery orders, from presenting evidence to disprove the allegations in the plaintiff's complaint).

242. *See* Slawotsky, *supra* note 224, at 484.

243. *See id.*

244. ALASKA R. CIV. P. 37(b), 37(d).

245. ALASKA R. CIV. P. 37(b)(2)(E).

246. CAL. CIV. PROC. CODE § 2023.030 (West 2007).

247. Rydstrom, *supra* note 144, at 257.

248. *See, e.g.*, Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir. 1986) (holding that dismissal for violation of discovery orders should be considered only if the nonresponsive members acted in bad faith); Hernandez v. Starbucks Coffee Co., No. 09-

Many courts have found that ignoring repeated requests for discovery constitutes bad faith misconduct.[249]

A. Dismissal

Part II.A details the decisions of courts that have dismissed absent members for failure to respond to discovery requests. First, this section discusses the decisions of courts that have dismissed nonresponsive members with prejudice. Second, it discusses the decisions of courts that have dismissed nonresponsive members without prejudice. Finally, Part II.A explores the decisions of courts that have declined to dismiss nonresponsive members.

1. Extinguishing Absent Member Claims Forever: Dismissal with Prejudice

Courts rarely invoke dismissal with prejudice. There are three leading cases in which courts have done so.[250] Out of those three cases, only one case is an opt-out class action; the other two cases are opt-in class actions.[251] Because opt-in absent members have affirmatively opted into the class, and thus are more like real parties, a failure to respond shows greater bad faith in opt-in class actions than it does in opt-out class actions.[252]

The cases that order dismissal with prejudice reflect bad-faith misconduct on the part of the absent members.[253] In *Brennan v. Midwestern United Life Insurance Co.*[254] and *Hernandez v. Starbucks Coffee Co.*,[255] the noncompliant members each received three warnings before the court contemplated dismissal.[256] In *Estrada v. RPS, Inc.*,[257] the absent members

60073, 2011 WL 2729076, at *6 (S.D. Fla. June 22, 2011) (assessing whether the absentees acted in bad faith when ignoring three court orders); Arleth v. FMP Operating Co., Civ.A. No. 90-1663, 1991 WL 211521, at *6 (E.D. La. Oct. 8, 1991) (denying dismissal of the nonresponsive members, in part because the members did not act in bad faith).

249. *See, e.g.*, *Hernandez*, 2011 WL 2729076, at *7 n.7 (finding that failure to comply with three court orders is evidence of willfulness and bad faith); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956, at *5 (N.D. Cal. Mar. 8, 2011) (noting that ignoring discovery requests and warnings is evidence of willfulness, bad faith, and fault).

250. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971); *Hernandez*, 2011 WL 2729076; Estrada v. RPS, Inc., No. BC210130, 2003 WL 25715846 (Cal. Super. Ct. Oct. 17, 2003), *appeal dismissed*, 23 Cal. Rptr. 3d 261, 267–68 (Cal. Ct. App. 2005).

251. *See infra* notes 259–90 and accompanying text.

252. *See infra* notes 278, 288 and accompanying text.

253. *See infra* notes 262, 276, 288 and accompanying text.

254. 450 F.2d 999 (7th Cir. 1971).

255. No. 09-60073, 2011 WL 2729076 (S.D. Fla. June 22, 2011).

256. *See infra* notes 262, 273 and accompanying text.

257. No. BC210130, 2003 WL 25715846 (Cal. Super. Ct. Oct. 17, 2003).

acted in bad faith by refusing to respond to a questionnaire after they had already been in contact with class counsel.[258]

In *Brennan*, the Seventh Circuit dismissed absent members with prejudice from a Rule 23(b)(3) opt-out securities fraud class action.[259] The plaintiffs alleged that Midwestern United Life Insurance Co. committed securities fraud by aiding and abetting a securities dealer who never delivered the stock that the plaintiffs purchased.[260] The trial court had permitted the defendant to serve interrogatories on the absentees for two purposes: to determine the amount of each member's claim and to obtain information to prove that it was not liable.[261] Many members failed to respond, even after class counsel sent a reminder letter and two warning letters to the nonresponsive members.[262] Consequently, upon the defendant's motion, the district court dismissed the nonresponsive absentees with prejudice.[263] The Seventh Circuit affirmed the dismissal, reasoning that dismissal with prejudice was a permissible sanction because it compels response.[264] However, the court recognized that dismissal of absent members is a "drastic" sanction; the members took no affirmative action and were represented by the named plaintiff, but their claims would be extinguished forever.[265] Yet the Seventh Circuit found that dismissal with prejudice was warranted because the noncompliant members ignored multiple warnings.[266]

Two courts have dismissed absent members with prejudice in opt-in class actions.[267] In *Hernandez*, a district court held that nonresponsive members in a FLSA action can be dismissed with prejudice, but only after the members have been warned that noncompliance could result in dismissal.[268] The plaintiffs argued that the class members were improperly classified as store managers who were exempt from overtime pay.[269] After certification, the defendant served three interrogatories and four document requests on the absent members.[270] The requests sought information relating to the employees' resumes and job applications after working at Starbucks, as

258. *See infra* note 287 and accompanying text.
259. *See Brennan*, 450 F.2d at 1001, 1006.
260. *See id.* at 1001.
261. *See id.* at 1005.
262. *See id.* at 1002.
263. *See id.*
264. *See id.* at 1004–05.
265. *See id.* at 1003–04; *see also id.* at 1004 n.2 (noting that, while exclusion from the class may be an appropriate remedy in many cases, the trial judge did not abuse his discretion by dismissing the members in this case).
266. *See id.* at 1004 n.2.
267. *See infra* notes 268–90 and accompanying text.
268. *See* Hernandez v. Starbucks Coffee Co., No. 09-60073, 2011 WL 2729076, at *6 (S.D. Fla. June 22, 2011).
269. *See* Complaint & Demand for Jury Trial, Reed v. Starbucks Coffee Co., No. 09-60073 (S.D. Fla. Jan. 15, 2009), 2009 WL 3488645.
270. *See Hernandez*, 2011 WL 2729076, at *1.

well as any previous testimony about working for Starbucks.[271] Starbucks sought to use the evidence at trial and in support of its motion to decertify the class.[272] Out of 732 members, 376 members failed to respond for nearly a year despite three orders requesting a response.[273] The court decided to give the nonresponsive members a final written warning, but planned to dismiss the members with prejudice if they still failed to respond.[274]

Like the *Brennan* court, the *Hernandez* court was influenced by the fact that the absent members refused to respond to three warnings.[275] The court found that the noncompliant members acted in willful bad faith when they failed to respond to the three court orders.[276] However, the *Hernandez* court distinguished opt-in FLSA actions from opt-out actions.[277] The court explained that the defendant is presumed to be prejudiced when opt-in absentees fail to respond to class wide discovery.[278] The court's finding of prejudice supported the court's finding that the members acted willfully and in bad faith.[279]

In *Estrada*, pick-up and delivery drivers sought damages for unpaid labor expenses in a California state class action.[280] The plaintiffs claimed that they were improperly classified as independent contractors, and thus were entitled to repayment of expenses incurred during their work.[281] Functionally, *Estrada* was an opt-in class action because the absent members had to respond to a conditional certification questionnaire to be considered for inclusion in the class action.[282] After defining the class, the court ordered that another questionnaire be sent to the absent members.[283] The second questionnaire was intended to gather evidence relating to damages and the issue of whether the plaintiffs were employees or independent contractors.[284] Ultimately, the court dismissed with prejudice the members who did not respond to the second questionnaire.[285]

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271. *See id.* at *2. Starbucks requested information about the employees' subsequent job applications because it sought information about how the employees described their job duties.

272. *See id.* at *1–2.

273. *See id.* at *2.

274. *See id.* at *6.

275. *See supra* notes 262–64, 273 and accompanying text.

276. *See Hernandez*, 2011 WL 2729076, at *6.

277. *See id.* at *5.

278. *See id.* (citing Colozzi v. St. Joseph's Hosp. Ctr., No. 5:08-CV-1220 (DNH/DEP), 2010 WL 3433997, at *4 (N.D.N.Y. July 20, 2010)).

279. *See id.* at *5–6.

280. *See* Estrada v. RPS, Inc., No. BC210130, 2003 WL 25715846 (Cal. Super. Ct. Oct. 17, 2003), *appeal dismissed*, 23 Cal. Rptr. 3d 261, 267–68 (Cal. Ct. App. 2005).

281. *See id.*

282. *See id.* The first questionnaire was intended to ascertain whether the potential members fit the class definition. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

Like the *Brennan* court and the *Hernandez* court, the *Estrada* court was influenced by the members' bad-faith refusal to respond.[286] The *Estrada* members' nonresponse was in bad faith because they had previously been in contact with class counsel when answering the conditional class certification questionnaire.[287] Additionally, like the *Hernandez* court, the *Estrada* court explicitly found that the members' willful refusal to respond prejudiced the defendant employer.[288] The defendant was prejudiced because the requested information directly involved the issues of the case.[289] Further, the members' refusal to respond deprived the employer of its due process right to discovery under California law.[290]

2. Giving Absent Members a Break: Dismissal Without Prejudice

This subsection analyzes the two leading decisions in which courts have ordered dismissal of absentees without prejudice. Both decisions reflect concern for the absent members' due process rights.[291] Showing concern for the noncompliant members' right to be heard, the *Cruz* court allowed individual members to continue with their claims by ordering dismissal without prejudice and tolling the statute of limitations.[292] The *Cruz* court ordered dismissal because the members acted in bad faith, there was prejudice to the defendant, and lesser sanctions would have been ineffective.[293] In his *Brennan* dissent, then-Judge John Paul Stevens argued that the nonresponsive absentees should be dismissed as a matter of procedure, because their interests diverged from the interests of the representative when they failed to respond to the interrogatories.[294] Thus, the nonresponsive members were not adequately represented, and the court lacked power to bind them in judgment.[295]

In *Cruz*, a Rule 23(b)(3) opt-out employment class action, the plaintiffs alleged that their employment status was improperly classified.[296] As a result, defendant Dollar Tree Stores failed to pay overtime wages and provide rest and meal breaks.[297] Dollar Tree Stores served document requests and interrogatories that were related to the class members' work

286. *See id.*; *supra* notes 262, 276 and accompanying text.
287. *See Estrada*, 2003 WL 25715846.
288. *See id.*; *supra* note 278 and accompanying text.
289. *See Estrada*, 2003 WL 25715846.
290. *See id.*; *supra* note 207 and accompanying text.
291. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1006–07 (7th Cir. 1971) (Stevens, J., dissenting); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956, at *6 (N.D. Cal. Mar. 8, 2011).
292. *See Cruz*, 2011 WL 843956, at *6. The court noted that this solution ameliorated the *Wainwright* court's due process concerns. *See id.*
293. *See infra* notes 303–18 and accompanying text.
294. *See infra* notes 319–24 and accompanying text.
295. *See infra* notes 319–24 and accompanying text.
296. *See Cruz*, 2011 WL 843956, at *1.
297. *See id.*

hours and job responsibilities.[298] After many class members failed to respond, the class members were mailed two letters warning of case-dispositive sanctions.[299] Concerned with the right to be heard, the court dismissed the nonresponsive members without prejudice and tolled the statute of limitations as to those members.[300] Further, the *Cruz* court declined to dismiss members whose final warning letters were returned as undeliverable.[301] The court reasoned that dismissing these members would be unfair because they never had a final opportunity to respond.[302]

The court used the Ninth Circuit's five-part test to assess whether a case-ending sanction was warranted and then surveyed case law pertaining to absent member dismissal.[303] The court found that four of the five factors—the public's interest in resolution, the court's need to manage its docket, prejudice to the defendant, and the effectiveness of lesser sanctions—supported dismissal.[304] The factor favoring the resolution of cases on the merits did not support dismissal.[305]

Additionally, the *Cruz* court found that *Brennan* was persuasive authority in support of dismissal and that *Wainwright* was unpersuasive.[306] Following the reasoning of *Brennan*, the *Cruz* court found that Dollar Tree Stores did not use the interrogatories as a tactic to scare or confuse class members.[307] Further, the court ameliorated the due process problems that concerned the *Wainwright* court by allowing members to continue individually with their claims.[308]

The *Cruz* court found that Dollar Tree Stores would be prejudiced if the nonresponsive members' claims were not dismissed.[309] Without the discovery responses, it would be difficult for Dollar Tree Stores to identify which class members best supported its case.[310] Accordingly, Dollar Tree Stores would be disadvantaged when determining which members to call as

298. *See* Defendant Dollar Tree Stores, Inc.'s Notice of Motion & Motion to Dismiss Claims of Class Members Who Failed To Respond to Defendant's Discovery; Memorandum of Points & Authorities (Fed. R. Civ. P. Rule 37) at 10, *Cruz*, Nos. 07-2050 SC, 07-4012 SC, 2010 WL 7368356. The interrogatories sought information about the amount of time that the members worked each week, the amount of the time that the members engaged in various work-related tasks, the members' job duty certifications, and the members' rest and meal breaks. *See id.*

299. *See Cruz*, 2011 WL 843956, at *1–2.

300. *See supra* notes 291–92 and accompanying text.

301. *See Cruz*, 2011 WL 843956, at *3–4.

302. *See id.* at *3.

303. *See id.* at *3–8.

304. *See id.* at *4.

305. *See id.*

306. *See id.* at *5–6.

307. *See id.* at *6.

308. *See id.*; *see also* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972).

309. *See Cruz*, 2011 WL 843956, at *4.

310. *See id.*

adverse or rebuttal witnesses.[311] Further, some of the outstanding discovery responses could potentially be useful to Dollar Tree Stores' experts.[312]

Additionally, lesser sanctions would be ineffective.[313] Monetary sanctions would not ameliorate Dollar Tree Stores' prejudice and would be impossible to collect from absentees.[314] Claim preclusion of the discovery-related claims would be tantamount to dismissal, because the requested discovery concerned all of the members' claims.[315]

Finally, the *Cruz* court found the absentees' behavior to be in bad faith.[316] The court noted that the Ninth Circuit has held that dismissal is justified only where the party's behavior has shown "willfulness, bad faith, and fault."[317] The nonresponsive members had acted in bad faith because they had ignored multiple warning letters.[318]

In his *Brennan* dissent, then-Judge Stevens focused on the court's jurisdictional power to bind the absent members.[319] He argued that nonresponsive members should be excluded from the class because of their right to adequate representation.[320] Citing *Hansberry v. Lee*,[321] Judge Stevens explained that a litigant can represent absent parties only to the extent that the litigant and the absent parties' interests align.[322] Judge Stevens reasoned that the nonresponding absent members had some interest in not revealing the information requested in the interrogatories and that this interest put them outside the class represented by the named plaintiff.[323] He concluded that the nonresponsive members should have had a choice to request exclusion from the class as an alternative to responding to the interrogatories.[324]

3. Disadvantaging the Defendant: Dismissal Is Not Warranted

This subsection analyzes the reasoning of courts that have declined to dismiss absent members for failure to respond to discovery requests. It first

311. *See id.*
312. *See id.*
313. *See id.*
314. *See id.*
315. *See id.*
316. *See id.* at *5.
317. *See id.* at *3 (citing Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007)).
318. *See id.* at *5.
319. *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999, 1006–07 (7th Cir. 1971) (Stevens, J., dissenting).
320. Judge Stevens found that dismissal with prejudice would create serious representation problems. *See id.* at 1007. Note, however, that the *Cruz* court implicitly condoned dismissal with prejudice. *See Cruz*, 2011 WL 843956, at *4 ("The Court notes that it is not imposing the most severe sanction available.").
321. 311 U.S. 32 (1940).
322. *See Brennan*, 450 F.2d at 1006–07.
323. *See id.* at 1007.
324. *See id.*

examines whether sanctions lesser than dismissal can be appropriate and whether discovery requests coupled with a threat of dismissal can intimidate absent members. Then, it examines the bad-faith requirement. Finally, it considers whether dismissal of absent members creates an opt-in scheme.

Dismissal is one of the harshest sanctions because it is litigation ending.[325] Consequently, plaintiffs argue that courts should impose lesser sanctions on noncompliant members, if lesser sanctions are available.[326] In *Cox v. American Cast Iron Pipe Co.*,[327] a Rule 23(b)(2) employment sex discrimination action, the Eleventh Circuit reversed the trial court's decision dismissing members who did not respond to interrogatories.[328] The *Cox* court found that the trial judge did not consider lesser sanctions, and stated that there is an abuse of discretion if lesser sanctions would have sufficed.[329]

Similarly, in *Wouters v. Martin County*[330] an FLSA collective action brought by emergency medical service personnel to recover overtime pay, the Eleventh Circuit found that a lesser sanction was available and reversed the dismissal of noncompliant members.[331] At the trial level, the defendant had requested the award of attorney's fees to cover the cost of preparation for the motion to dismiss, but the trial court had dismissed the noncompliant plaintiffs instead.[332] Because a lesser sanction was available, dismissal was inappropriate.[333]

Courts have shown concern that the threat of a sanction as severe as dismissal can intimidate class members.[334] A dismissal order can potentially reduce the class size and thereby undermine the Rule 23 policy that all members are included unless they request exclusion.[335] In *Easton & Co. v. Mutual Benefit Life Insurance Co.*,[336] a securities fraud class action,

325. *See supra* notes 219–20 and accompanying text.

326. *See* Wouters v. Martin Cnty., 9 F.3d 924, 933–34 (11th Cir. 1993) (citing Ford v. Fogarty Van Lines, Inc., 780 F.2d 1582, 1583 (11th Cir.1986)); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir. 1986) (citing Ford v. Fogarty Van Lines, Inc., 780 F.2d 1582, 1583 (11th Cir.1986)). *But see* Int'l Seafoods of Alaska, Inc. v. Bissonette, 146 P.3d 561, 569 (Alaska 2006) (noting that, while the trial judge chose to impose the less severe sanction of excluding evidence, the judge could have imposed a harsher sanction).

327. 784 F.2d 1546 (11th Cir. 1986).

328. *Id.* at 1556–57. There was no evidence that the members even received the discovery requests. *See* Reply Brief for Plaintiffs-Appellants Preference at 24, *Cox*, 784 F.2d 1546 (Nos. 84-7382, 84-7462), 1985 WL 670612.

329. *Cox*, 784 F.2d at 1556.

330. 9 F.3d 924 (11th Cir. 1993).

331. *See id.* at 934.

332. *See id.* at 933–34.

333. *See id.* at 934.

334. *See* Easton & Co. v. Mut. Benefit Life Ins. Co., Nos. 91-4012 (HLS), 92-2095 (HLS), 1994 WL 248172, at *5 (D.N.J. May 18, 1994); Robertson v. Nat'l Basketball Ass'n, 67 F.R.D. 691, 700–01 (S.D.N.Y. 1975).

335. *See Easton*, 1994 WL 248172, at *5.

336. Nos. 91-4012 (HLS), 92-2095 (HLS), 1994 WL 248172 (D.N.J. May 18, 1994).

the district court expressed concern that members might be intimidated by an interrogatory request warning of potential dismissal sanctions.[337] Ultimately, the court permitted the defendant to serve discovery on the absentees.[338] However, the court ordered the defendant to redraft the interrogatory request to eliminate a warning of dismissal.[339] Similarly, in *Robertson v. National Basketball Ass'n*,[340] a mandatory 23(b)(1) class action, the court stipulated that discovery would not be enforced with the threat of dismissal.[341] The court explained that it had a duty to protect absentees from harassment.[342]

The Eleventh Circuit has declined to dismiss absentees when there is no showing of bad faith on the part of the absentees.[343] In both *Cox* and *Wouters*, the Eleventh Circuit held that dismissal requires a showing of willful bad faith.[344] In *Cox*, the Eleventh Circuit refused to affirm the trial court's dismissal order, because the trial court neglected to make a finding of bad faith.[345] Similarly, in *Wouters*, the court reversed the dismissal of the noncompliant members because there was no finding of bad faith by the trial court.[346]

Plaintiffs argue that dismissing noncompliant members in an opt-out action creates an opt-in action, which reduces efficiency and is inconsistent with the policies of Rule 23.[347] As discussed in Part I, one of the purposes of Rule 23 is to enhance efficiency.[348] By encompassing all members who did not request exclusion, opt-out class actions decrease the number of actions that will be brought on the same claim.[349] Plaintiffs argue that requiring absent members to respond to discovery creates an opt-in action, because the members have to take an affirmative action to remain in the class.[350] Requiring such affirmative action is contrary to the all-encompassing rationale of Rule 23.[351] Further, forcing plaintiffs to respond or be dismissed is contrary to the Supreme Court's view of the passive role

337. *See id.* at *5.
338. *See id.* at *6.
339. *See id.* at *5 (explaining that there is no need to consider the sanction of dismissal when there is not yet any evidence that the members would not respond).
340. 67 F.R.D. 691 (S.D.N.Y. 1975).
341. *See id.* at 699–701.
342. *See id.* The court also noted that any discussion of dismissal would be academic, because the class action was mandatory. *See id.* at 701.
343. *See* Wouters v. Martin Cnty., 9 F.3d 924, 934 (11th Cir. 1993); Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1556 (11th Cir. 1986).
344. *See Wouters*, 9 F.3d at 934 (citing *Cox*, 784 F.2d at 1556).
345. *See Cox*, 784 F.2d at 1556.
346. *See Wouters*, 9 F.3d at 934.
347. *See, e.g.*, *Cox*, 784 F.2d at 1557; *see also supra* note 16 and accompanying text.
348. *See supra* notes 16, 172 and accompanying text.
349. *See supra* note 16 and accompanying text.
350. *See, e.g.*, *Cox*, 784 F.2d at 1557 (explaining that requiring members to respond to discovery in a Rule 23(b)(2) class action effectively makes the class action an opt-in class action).
351. *See supra* note 349 and accompanying text.

of absent members.[352] By forcing a member to choose between dismissal and response, that member is no longer "not required to do anything . . . . [but] sit back and allow the litigation to run its course."[353]

In *Cox*, the Eleventh Circuit reasoned that dismissal of noncompliant absentees is contrary to the opt-out scheme of Rule 23.[354] The *Cox* court noted that the Rule 23 advisory committee specifically rejected an opt-in approach.[355] Further, requiring an affirmative action may intimidate members, effectively "freezing" out their claims.[356] If absentees' claims are frozen, it follows that total class action damages awards will decrease (assuming that the members do not continue their claims individually).[357]

Courts have also considered whether dismissal creates an opt-in scheme when deciding whether to permit discovery in the first place.[358] In *Kline v. First Western Government Securities, Inc.*,[359] a securities fraud action, the court denied the defendant's motion to serve discovery on absentees.[360] The court explained that serving discovery and then filing a motion to dismiss nonresponsive members was a "back door" way to create an opt-in action.[361] By creating a choice between response or dismissal, such a scheme would force absentees to opt in or be excluded.[362] On the other hand, in *Schwartz v. Celestial Seasonings, Inc.*,[363] a Rule 23(b)(3) securities class action, a district court permitted the defendant to serve discovery on absent members.[364] However, the court found that a potential motion to dismiss would create an opt-in class action, and therefore decided to make the questionnaire optional.[365]

B. Considering Other Options: Exclusion of Evidence, Estoppel of New Claims, and Monetary Sanctions

Part II.B discusses the decisions of courts that have imposed sanctions lesser than dismissal on noncompliant absentees. Diligent research has

352. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).
353. *See id.*
354. *See Cox*, 784 F.2d at 1556–57.
355. *See id.* at 1557.
356. *See id.* (citing Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. I), 81 HARV. L. REV. 356, 397–98 (1967)).
357. *See supra* note 349 and accompanying text.
358. *See, e.g.*, Kline v. First W. Gov't Secs., Inc., No. CIV.A. 83-1076, 1996 WL 122717, at *2 (E.D. Pa. Mar. 11, 1996).
359. No. CIV.A. 83-1076, 1996 WL 122717 (E.D. Pa. Mar. 11, 1996).
360. *See id.* at *1.
361. *See id.* at *2.
362. *See id.*
363. 185 F.R.D. 313 (D. Colo. 1999).
364. *See id.* at 319. The interrogatory sought information about the members' purchase and sale of the stock at issue, in what capacity the members were stockholders, and what resources the members used when deciding to purchase the stock. *See id.* at 317.
365. *See id.* at 319 (changing the language of the questionnaire to communicate that a response is encouraged, but not mandatory).

shown that few courts have considered imposing sanctions other than dismissal on absentees. Accordingly, this section discusses four leading cases in which courts considered imposing alternative sanctions. This section analyzes a decision affirming the exclusion of evidence, a decision excluding new claims, and two decisions discussing monetary sanctions.

1. Exclusion of Evidence

In *International Seafoods of Alaska, Inc.*, the Alaska Supreme Court affirmed a trial court's order excluding any evidence provided by nonresponsive members.[366] In that case, a class of commercial salmon fishers alleged that the defendant fish buyer promised to pay a more competitive price on salmon than what it had actually paid.[367] The fish buyer served two interrogatories on absentees to determine what documents or statements the class members relied on in believing that the defendant owed them a higher price per pound.[368] When many members failed to respond, the fish buyer moved to dismiss the nonresponsive members without prejudice.[369] The trial court declined to dismiss the members, noting that dismissal is the harshest sanction.[370] Instead, the trial court limited the evidence that the plaintiffs could produce at trial to the evidence that was provided by the responding class members during discovery.[371] This precluded the noncompliant members from testifying or offering evidence at trial.[372] On appeal, the defendant argued that the sanction was meaningless, because the nonresponsive members were not participating in the case and thus were never going to offer evidence or testify.[373] At the same time, those members increase the contingency fee for plaintiffs' counsel because they would still be eligible for money damages.[374]

The Alaska Supreme Court affirmed the trial court's decision to exclude evidence.[375] The court recognized the noncompliant members' interest in not being unduly punished, citing *Brennan*.[376] However, the court also noted that a harsher sanction would have been within the judge's discretion.[377]

366. *See* Int'l Seafoods of Alaska, Inc. v. Bissonette, 146 P.3d 561, 562 (Alaska 2006).
367. *See id.* at 563.
368. *See* Brief of Appellant at 14, *Int'l Seafoods of Alaska, Inc.*, 146 P.3d 561 (No. S-11568), 2005 WL 1550881.
369. *See Int'l Seafoods of Alaska, Inc.*, 146 P.3d at 568.
370. *See id.* at 568–69.
371. *See id.* at 569.
372. *See id.* at 565.
373. *See* Brief of Appellant at 50–54, *Int'l Seafoods of Alaska, Inc.*, 146 P.3d 561 (No. S-11568), 2005 WL 1550881.
374. *See supra* notes 76–77 and accompanying text.
375. *See Int'l Seafoods of Alaska, Inc.*, 146 P.3d at 569.
376. *See id.* at 568–69.
377. *See id.* at 569.

2. Estoppel of New Claims

In *Arleth v. FMP Operating Co.*,[378] stockholders sued the issuing corporation and its successor in interest for securities fraud.[379] The court denied the defendants' motion to dismiss absentees who failed to respond to interrogatories concerning evidence of reliance.[380] However, the court estopped the nonresponsive members from raising new claims or rights.[381] The court found that dismissal was an overly harsh sanction and that the defendants had not proven that this harsh sanction was warranted.[382] Further, the court explained that it had a duty to protect the absent members and to give them their day in court.[383] Yet, the court recognized the defendants' concern that the nonresponsive members might unfairly surprise the defendant by raising new claims after discovery had concluded.[384] Accordingly, the court estopped nonresponsive members from raising new claims or rights.[385]

3. Monetary Sanctions

In *Wouters*, the Eleventh Circuit reversed the dismissal of noncompliant members after finding that a monetary sanction would have sufficed.[386] At the trial level, some members had failed to respond to a set of interrogatories.[387] Consequently, the defendant requested the award of attorney's fees for the cost of preparation of the motion to dismiss.[388] However, the trial court rejected the request and instead dismissed the noncompliant plaintiffs.[389] On appeal, the Eleventh Circuit agreed with class counsel that the absent members' nonresponse did not prejudice the defendant.[390] After the interrogatories had been delivered, the defendant had deposed each class member and obtained full answers to the interrogatory questions.[391]

The Eleventh Circuit found that the district court erred when it rejected the lesser sanction of attorney's fees and dismissed the noncompliant

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378. No. 90-1663, 1991 WL 211521 (E.D. La. Oct. 8, 1991).
379. *Id.* at *1.
380. *See* Brief of Appellees/Cross-Appellants at 32, Arleth v. Freeport-McMoran Oil & Gas Co., 2 F.3d 630 (5th Cir. 1993) (No. 92-03313), 1993 WL 13129218.
381. *See Arleth*, 1991 WL 211521, at *5.
382. *See id.* at *5–6 (finding that the defendants had not shown an urgent need for the information or bad faith on the part of the nonresponsive members).
383. *See id.* at *6.
384. *See id.* at *5.
385. *See id.*
386. *See* Wouters v. Martin Cnty., 9 F.3d 924, 934 (11th Cir. 1993).
387. *See id.* at 933.
388. *See id.* at 934.
389. *See id.*
390. *See id.* at 933–34.
391. *See id.* at 933.

plaintiffs.[392] As such, the Eleventh Circuit implied that monetary sanctions would have been appropriate. Further, the court stated that the decision did not preclude the district court's ability to impose lesser sanctions against the plaintiff or plaintiffs' attorney.[393]

By contrast, in *Cruz*, a district court found that monetary sanctions are neither feasible nor practical.[394] In that case, the court considered imposing monetary sanctions on nonresponsive absentees but decided that the monetary sanctions would be difficult to collect and would not lessen the prejudice to the defendant.[395] The *Cruz* court did not address the issue of monetary sanctions against class counsel.[396]

III. DISCOVERING A BALANCE: SANCTIONS SHOULD DEPEND ON THE TYPE OF GROUP LITIGATION

In Part III, this Note endorses a solution that combines the reasoning of *Hernandez* and *Cruz*. This solution best balances defendants' and plaintiffs' interests because it takes into account the type of class action, the degree of prejudice to the defendant, and the level of bad faith on the part of the absentees. Part III first sets guidelines for ordering discovery of absentees. Then, it describes the solution and assess problems with it. Finally, it addresses an implication of the solution.

A. Guidelines for Absentee Discovery

Postcertification discovery of absentee members should continue to be a rare occurrence in Rule 23 class actions and state class actions, because such discovery is contrary to the general policy that absentee members need not participate in class actions.[397] Courts should continue to assess whether discovery is warranted by analyzing whether the requested discovery is appropriate in that particular litigation, the defendant's need for the information, and the potential burden on the absent members.[398] Discovery requests are appropriate only where they relate to common issues and where the information is unavailable from the representative parties.[399] Courts should deny complicated or technical discovery requests because such requests may confuse absentees.[400] By confusing absentees, those requests may discourage absentees from remaining in the action.[401]

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392. *See id.* at 934.
393. *See id.*
394. *See* Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 843956, at *4 (N.D. Cal. Mar. 8, 2011).
395. *See id.*
396. *See id.*
397. *See supra* note 21 and accompanying text.
398. *See supra* note 160 and accompanying text.
399. *See supra* notes 161–62 and accompanying text.
400. *See supra* note 164 and accompanying text.
401. *See supra* note 169 and accompanying text.

Absentee discovery in FLSA collective actions is common and is an exception to the general rule that courts should not order absentee discovery.[402] In FLSA collective actions, members are required to affirmatively opt in and discovery is a crucial component of the two-step process.[403] Accordingly, discovery requests are less suspect in these actions because the "party plaintiffs" are more like real parties.[404] Although courts have broad power to order discovery in FLSA cases,[405] courts should order discovery only to the extent necessary and should consider the burden on the party plaintiffs.

B. The Hernandez*/*Cruz *Solution*

By implementing these procedures, courts will rarely have to consider whether to sanction noncompliant absentees. However, if a court must reach this issue, the court should first send a warning to the absentees.[406] The warning should include a response deadline[407] and inform the noncompliant absentees of the possible range of sanctions for continued nonresponse.[408]

While a warning might intimidate some members,[409] it also might encourage response. More importantly, though, a court-issued warning will alleviate or forestall due process problems by giving the absentees notice of potential sanctions,[410] while protecting their right to their day in court.[411]

If the absentees still fail to respond after a warning, the court can begin to assess whether dismissal of the noncompliant absentees is warranted. First, the court should consider whether the action is an opt-in class action or an opt-out class action.[412] Generally, courts should dismiss opt-out members without prejudice and dismiss opt-in members with prejudice. As the *Hernandez* court explained, an absentee's failure to respond demonstrates greater bad faith in an opt-in class action than in an opt-out class action.[413] In an opt-in class action, the members have affirmatively shown interest in the action and thus are more like real parties.[414] Accordingly, when opt-in members fail to respond (assuming receipt of the discovery request), they

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402. *See supra* note 102 and accompanying text.
403. *See supra* notes 86, 101–02 and accompanying text.
404. *See supra* note 87 and accompanying text.
405. *See supra* note 102 and accompanying text.
406. Both the *Hernandez* and *Cruz* courts issued warnings to nonresponsive absentees. *See supra* notes 268, 299 and accompanying text.
407. Warning letters typically have a deadline for response after which the members are considered nonresponsive. *See supra* notes 268, 299 and accompanying text.
408. *See supra* notes 273–74, 299 and accompanying text.
409. *See supra* notes 341–42 and accompanying text.
410. *See supra* Part I.C.
411. *See supra* note 11 and accompanying text.
412. *See supra* notes 277–79 and accompanying text.
413. *See supra* notes 277–79 and accompanying text.
414. *See supra* notes 86–87 and accompanying text.

are willfully ignoring the request.[415] Such ignorance is grounds for a court to make a finding of bad faith.[416]

By contrast, an opt-out member's nonresponse could indicate either a lack of interest, nonreceipt of the request,[417] or willful bad faith. It is difficult for a court to discern which of the three motivations underlies an opt-out member's nonresponse. Accordingly, a court should not generally impose the harshest sanction on opt-out members, but should instead dismiss opt-out members without prejudice.

Further, if an opt-out member's discovery request or warning letter is returned as undeliverable, the court should decline to dismiss that member.[418] As the *Cruz* court explained, members who do not receive a final warning letter do not receive a final opportunity to respond.[419] Similarly, members who do not receive an initial discovery request are never informed that their participation was required. Because these members never received such notice, it would be a violation of their due process rights to dismiss them.[420]

Next, the court should consider the degree of prejudice that the defendant has suffered due to the absentees' nonresponse.[421] Because courts should order absentee discovery only where the information is necessary to the defendant's claims or defenses,[422] nonresponse will usually result in great prejudice to the defendant. If the discovery is necessary, there are grounds for harsher sanctions.[423] Accordingly, if the defendant is greatly prejudiced, a court can consider ordering dismissal with prejudice.[424] However, courts should be more reluctant to order dismissal with prejudice in an opt-out class action, because it is usually unclear whether the absentees have acted in bad faith.[425]

Finally, if the action is an opt-in class action, the court should take into account the level of bad faith on the part of the absent members, as the *Hernandez* court did.[426] Courts should analyze the level of the absentees' bad faith by considering how many warnings the absent members have ignored and for how long they have ignored them.[427] If the opt-in absentees have ignored multiple warnings and/or not complied for a long period of time, the court should order dismissal with prejudice.[428] As part of the first

415. *See supra* notes 277–79 and accompanying text.
416. *See supra* note 276 and accompanying text.
417. *See supra* notes 301–02 and accompanying text.
418. *See supra* notes 301–02 and accompanying text.
419. *See supra* notes 301–02 and accompanying text.
420. *See supra* Part I.C.
421. *See supra* notes 226, 289 and accompanying text.
422. *See supra* note 160 and accompanying text.
423. *See supra* note 289 and accompanying text.
424. *See supra* notes 226, 289 and accompanying text.
425. *See supra* note 417 and accompanying text.
426. *See supra* note 276 and accompanying text.
427. *See supra* note 275–76 and accompanying text.
428. *See supra* notes 266, 273–76 and accompanying text.

step of this solution, the court will have already sent at least one warning.[429] Failure to respond to this warning and any subsequent warnings (assuming the warnings were received), demonstrates bad faith on the part of the absent members.[430]

Because evidence of bad faith is often difficult to establish in opt-out class actions, dismissal with prejudice generally will not be warranted in such actions. In opt-out class actions, it is difficult to discern the motivation behind an absentee's nonresponse.[431] Accordingly, courts will often be unable to assess whether such members have acted in bad faith at all.[432] Given that evidence of bad faith is necessary for dismissal with prejudice,[433] courts should not dismiss opt-out members with prejudice.

To summarize, noncompliant absentees in opt-out actions should usually be dismissed without prejudice, and noncompliant absentees in opt-in actions should usually be dismissed with prejudice.[434] However, a court can impose a harsher sanction on opt-out absentees if the defendant has been severely prejudiced by those absentees' failure to respond.[435] If the action is an opt-in class action and the absentees have acted with a high level of bad faith, the court should order dismissal with prejudice.[436]

C. Problems with the Hernandez*/*Cruz *Solution*

Absent members will argue that this solution undercuts the accepted passive role of absent members,[437] creates an opt-in action for opt-out members,[438] and gives defendants a tactical mechanism with which to eliminate class members.[439] Class action advocates will argue that this solution undermines the efficiency of class actions because it does not lead to a defendant obtaining a bill of peace.[440] This Note discusses and rebuts each argument, in turn.

First, opponents will argue that dismissing absentees distorts the passive role that the Supreme Court has envisioned for absent members.[441] Absentees will argue that creating a choice between response and dismissal forces them to be active in a class action.[442] However, any sanction lesser than dismissal will not meaningfully ameliorate the prejudice that the

429. *See supra* note 408 and accompanying text.
430. *See supra* notes 276, 318 and accompanying text.
431. *See supra* note 417 and accompanying text.
432. *See supra* note 417 and accompanying text.
433. *See supra* notes 223–29, 343 and accompanying text.
434. *See supra* notes 412–20 and accompanying text.
435. *See supra* notes 421–24 and accompanying text.
436. *See supra* notes 426–32 and accompanying text.
437. *See supra* notes 352–53 and accompanying text.
438. *See supra* notes 347–51 and accompanying text.
439. *See supra* notes 163, 168 and accompanying text.
440. *See supra* note 17 and accompanying text.
441. *See supra* notes 352–53 and accompanying text.
442. *See supra* notes 21–23, 353 and accompanying text.

defendant has suffered from nonresponse.[443] As previously discussed, discovery requests should be propounded only when the information is necessary to the defendant's claims or defenses.[444] It follows that the defendant suffers prejudice when the absentees fail to provide such necessary information.[445]

Imposing a meaningful sanction is paramount when weighing the defendant's interest in the information against the members' interest in maintaining a passive role.[446] Monetary sanctions against class counsel, exclusion of new claims, or exclusion of the nonresponsive members' evidence will not ameliorate the defendant's prejudice.[447] Monetary sanctions against nonresponsive class members will not ameliorate the defendant's prejudice and are nearly impossible to collect.[448] These solutions do not cure the defendant's prejudice because the nonresponsive members are still included in the action.[449] On the other hand, an order of dismissal will meaningfully ameliorate a defendant's prejudice because the nonresponsive members causing the prejudice will be excluded from the action.[450]

Second, absentees will argue that dismissing opt-out members without prejudice in Rule 23 class actions creates an opt-in action that undermines the efficiency of Rule 23.[451] Although dismissing opt-out members without prejudice undermines the efficiency of a particular case,[452] such dismissal will not undermine the efficiency of Rule 23 class actions as a whole. Discovery of absent members is rarely permitted because of the strict standards for such discovery,[453] and thus, absentee exclusion will be rare.[454] Therefore, class actions will remain an efficient mechanism that facilitates resolution of many similar claims.

Third, absent members will argue that permitting dismissal of absentees gives defendants a tactical tool that can potentially reduce class size.[455] This concern is unfounded because courts should deny any discovery request that is intended to decrease class size.[456] A court's initial analysis of whether to permit discovery will eliminate any tactical uses of absentee discovery.[457]

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443. *See supra* notes 314, 373 and accompanying text.
444. *See supra* notes 160–64 and accompanying text.
445. *See supra* notes 278, 288–89 and accompanying text.
446. *See supra* note 373 and accompanying text.
447. *See supra* Part II.B.
448. *See supra* note 314 and accompanying text.
449. *See supra* Part II.B; *supra* note 374 and accompanying text.
450. *See supra* notes 373–74 and accompanying text.
451. *See supra* notes 347–51 and accompanying text.
452. *See supra* note 172 and accompanying text.
453. *See supra* notes 160–64 and accompanying text.
454. *See supra* notes 160–64 and accompanying text.
455. *See supra* notes 163, 168 and accompanying text.
456. *See supra* notes 163–64 and accompanying text.
457. *See supra* notes 163–64 and accompanying text.

Fourth, class action advocates will argue that ordering dismissal of opt-out absentees without prejudice deprives defendants of a "bill of peace."[458] When absentees are dismissed without prejudice, defendants could be subject to repetitive, individual suits.[459] However, concern for absentees' due process rights outweigh defendants' need for a bill of peace. As previously discussed, the motivation behind an opt-out member's nonresponse is unclear.[460] Because an opt-out absentee may not have received the discovery request, dismissal could be without notice to that absentee.[461] As such, absentee dismissal implicates due process concerns about notice and the right to be heard.[462] Dismissal without prejudice forestalls or ameliorates these due process problems because it allows an absentee to continue pursuing a claim.[463]

The proposed solution has implications for the Rule 23(b)(3)(A) requirement that courts assess the class members' interest in individually controlling the prosecution of their claim.[464] Absentees may refuse to respond to a discovery request because they lack interest in the claims[465] or wish to bring their claims individually.[466] A lack of response may indicate that the absentees want to individually control the litigation and would prefer that a class action not be maintained on their behalf. Accordingly, if many absentees fail to respond to discovery requests, there may be grounds for a court to decertify a class.[467]

CONCLUSION

Courts are in disagreement about whether dismissal is an appropriate sanction when absentees fail to respond to postcertification discovery requests. This issue implicates due process concerns and raises questions about the role, rights, and duties of absent members. Courts should strive to impose a sanction that ameliorates the defendant's prejudice while recognizing absent members' due process rights.

Courts should dismiss nonresponsive absentees because dismissal is the only sanction that meaningfully ameliorates a defendant's prejudice. Courts can protect absentees' due process rights by issuing a warning of potential sanctions. Yet, when opt-out absentees fail to respond, it is difficult for courts to discern whether that nonresponse is in bad faith. Accordingly, courts should generally dismiss nonresponsive opt-out members without prejudice. By contrast, because opt-in absentees have

458. *See supra* note 17 and accompanying text.
459. *See supra* notes 180–82 and accompanying text.
460. *See supra* note 417 and accompanying text.
461. *See supra* Part I.C.
462. *See supra* Part I.C.
463. *See supra* note 308 and accompanying text.
464. *See supra* note 66 and accompanying text.
465. *See supra* note 417 and accompanying text.
466. *See supra* note 66 and accompanying text.
467. *See supra* notes 61–66 and accompanying text.

shown interest in the class action, their nonresponse is in bad faith. Therefore, courts should generally dismiss nonresponsive opt-in members with prejudice.