

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

SUMMARY ORDER

1 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY
2 ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF
3 APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY
4 ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL
5 APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY
6 CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY
7 COUNSEL.

8 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
9 Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York,
10 on the 6th day of February, two thousand twelve.

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12 PRESENT: John M. Walker, Jr.,
13 Reena Raggi,
14 Susan L. Carney,
15 *Circuit Judges.*

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18 NATIONWIDE LIFE INSURANCE COMPANY,
19 *Defendant-Counter-Claimant-Appellant,*

20
21 NATIONWIDE FINANCIAL SERVICES INCORPORATED,
22 *Defendant-Counter-Claimant,*

23
24 v.

No. 10-4237-cv

25
26 LOU HADDOCK, TRUSTEE OF FLYTE TOOL &
27 DIE, INC. DEFERRED COMPENSATION PLAN,
28 PETER WIBERG, TRUSTEE OF CROWN TOOL
29 & DIE COMPANY INCORPORATED SALARY
30 DEFERRAL PROFIT SHARING, ALAN GOUSE,
31 TRUSTEE OF GREATER HFD EASTER SEAL
32 REHABILITATION CENTER, INCORPORATED,
33 TAX SHELTERED ANNUITY PLAN & MONEY
34 ACCUMULATION PENSION PLAN FOR THE
35 EMPLOYEES OF HARTFORD EASTER
36 REHABILITATION CENTER, INCORPORATED
37 TRUST, CHRISTOPHER ANDERSON,

1 TRUSTEE OF ANDERSON LAW FIRM, P.C.
2 401(K) PROFIT SHARING PLAN & TRUST,
3 FORMERLY THE ANDERSON & FERDON, P.C.
4 SECTION 401(K) PROFIT SHARING PLAN,
5 H. GRADY CHANDLER,

6 *Plaintiffs-Counter-Defendants-Appellees.*¹
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9 FOR APPELLANT: Charles C. Platt, Wilmer Cutler Pickering Hale and Dorr LLP, New York,
10 NY (*argued*); Thomas F. Clauss, Jr., Wiggin & Dana LLP, Stamford, CT,
11 Daniel H. Squire, Paul R.Q. Wolfson, Daniel P. Kearney, Jr., Wilmer
12 Cutler Pickering Hale and Dorr LLP, Washington, DC (*on the brief*).
13

14 FOR APPELLEES: Samuel Issacharoff, New York, NY (*argued*); William Bloss, Antonio
15 Ponvert III, Richard A. Bieder, Koskoff Koskoff & Bieder, P.C.,
16 Bridgeport, CT, Marc R. Stanley, Stanley Iola LLP, Dallas, TX, Roger L.
17 Mandel, Lackey Hershman, L.L.P., Dallas, TX, Gregory G. Jones, The
18 Law Offices of Gregory G. Jones, P.C., Southlake, Texas (*on the brief*).
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20 Appeal from the United States District Court for the District of Connecticut (Stefan R.
21 Underhill, Judge).

22 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND
23 DECREED that the order of class certification entered on November 6, 2009, is VACATED and
24 the case is REMANDED for further proceedings consistent with this order.

25 Appellant Nationwide Life Insurance Company (“Nationwide”) appeals from the district
26 court’s November 6, 2009 order certifying under Federal Rule of Civil Procedure 23(b)(2) a
27 plaintiff class of trustees of qualified employee benefit plans that are covered by the Employee
28 Retirement Income Security Act (“ERISA”) and that had variable annuity contracts with
29 Nationwide (or whose participants had such contracts) in a defined period of approximately 14
30 years ending in November 2009. Plaintiffs—who allege that they represent over 24,000

¹ The Clerk of Court is respectfully directed to amend the case caption as shown above.

1 qualifying plans—maintain that Nationwide is an ERISA fiduciary with respect to those plans.
2 They contend that Nationwide breached its fiduciary duties by collecting “revenue sharing
3 payments” from the mutual funds that it selected and tendered to the plans and from which the
4 plans and individual annuity holders made investment choices. In their suit, plaintiffs seek
5 principally (1) a declaratory judgment that Nationwide’s receipt of the mutual funds’ payments
6 violated ERISA, (2) an injunction prohibiting Nationwide from receiving such payments, and (3)
7 disgorgement of the payments already received by Nationwide. In an October 20, 2010 order
8 entered pursuant to Federal Rule of Civil Procedure 23(f), we granted Nationwide’s motion for
9 leave to appeal the class certification decision. The district court has stayed proceedings pending
10 decision in this appeal. We assume the parties’ familiarity with the facts and the record of prior
11 proceedings, which we reference only as necessary to explain our decision.

12 **1. Constitutional Standing**

13 As a preliminary matter, Nationwide argues that plaintiffs lack constitutional standing to
14 seek disgorgement, citing decisions by this Court holding “that an ERISA Plan participant or
15 beneficiary must plead a direct injury in order to assert claims [for monetary relief] on behalf of
16 a Plan.” See, e.g., Central States Se. & Sw. Areas Health & Welfare Fund v. Merck Medco
17 Managed Care, L.L.C., 433 F.3d 181, 200 (2d Cir. 2005). Nationwide misreads that line of
18 authority. Plaintiffs are ERISA Plan trustees, not “Plan participant[s] or beneficiar[ies].” Id.
19 Thus, their allegations of injuries to plans resulting from Nationwide’s alleged breaches of
20 fiduciary duties are in no sense indirect, and we have no difficulty concluding that plaintiffs have
21 properly pleaded the required injury-in-fact.

1 **2. Class Certification**

2 During the pendency of this appeal, the Supreme Court issued its opinion in Wal-Mart
3 Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (discussing, inter alia, Fed. R. Civ. P. 23(a) and
4 Fed. R. Civ. P. 23(b)(2)).² Wal-Mart teaches that Rule 23(b)(2) does not authorize class
5 certification when—despite the suitability of generalized injunctive or declaratory relief—“each
6 class member would [also] be entitled to an individualized award of monetary damages.” Id. at
7 2557. Thus, a class complaint alleging numerous individual claims for monetary relief may not
8 be certified under Rule 23(b)(2), “at least where . . . the monetary relief is not incidental to the
9 injunctive or declaratory relief.” Id. This holding rests on the due process concerns expressed
10 by the Wal-Mart Court with respect to adjudicating individualized claims for monetary relief:
11 members of a Rule 23(b)(2) class are not entitled to the notice and opt-out protections that are
12 afforded members of a class certified under Rule 23(b)(3). Id. at 2258-59. “Given that
13 structure,” the Court held, “we think it clear that individualized monetary claims belong in Rule
14 23(b)(3).” Id. at 2558.

15 Nationwide argues that plaintiffs’ claims are not suitable for class adjudication under
16 Rule 23(b). The decision in Wal-Mart significantly altered the applicable analysis for class
17 certification under Rule 23(b)(2). In its class certification order under Rule 23(b)(2), the district
18 court properly relied on our pre-Wal-Mart decision in Robinson v. Metro-North Commuter

² Although Nationwide’s brief adverts to Rule 23(a)’s requirements of commonality, typicality, and adequacy, Nationwide’s supporting arguments regarding that provision largely attack the merits of plaintiffs’ ERISA liability theories. Given the posture of this appeal, such merits arguments are not properly before us, and we need not discuss them beyond observing that we see no abuse of discretion in the district court’s conclusion that the putative class meets Rule 23(a)’s requirements. To the extent that Nationwide argues that plaintiffs’ case will require individualized proof, we think that is a matter for the district court to consider on remand in applying Rule 23(b)(3).

1 Railroad Co., 267 F.3d 147 (2d Cir. 2001). See Haddock v. Nationwide Fin. Servs., Inc., 262
2 F.R.D. 97, 121 (D. Conn. 2009). In Robinson, we applied a “predominance” test in determining
3 whether to certify a Rule 23(b)(2) class, balancing the relative importance of claims for
4 injunctive or declaratory relief with that of associated claims for monetary relief, and finding
5 Rule 23(b)(2) adjudication appropriate if claims for general injunctive or declaratory relief
6 predominated over those for individualized monetary relief. 267 F.3d at 162-64. In Wal-Mart,
7 however, the Supreme Court instructed that unless merely “incidental” to the requested
8 declaratory or injunctive relief, claims for individualized monetary damages preclude class
9 certification under Rule 23(b)(2). 131 S. Ct. at 2557-60. In the case at bar, if plaintiffs are
10 ultimately successful in establishing Nationwide’s liability on the disgorgement issue, the district
11 court would then need to determine the separate monetary recoveries to which individual
12 plaintiffs are entitled from the funds disgorged. This process would require the type of non-
13 incidental, individualized proceedings for monetary awards that Wal-Mart rejected under Rule
14 23(b)(2).

15 Plaintiffs moved for class certification under both Rules 23(b)(2) and 23(b)(3), however.
16 See Haddock, 262 F.R.D. at 120. Because the district court certified the class under Rule
17 23(b)(2), it did not reach the question of whether class certification would be appropriate under
18 Rule 23(b)(3). See id. We therefore vacate the district court’s November 2009 order and
19 remand the case for reconsideration of plaintiffs’ motion for class certification in light of the
20 Supreme Court’s decision in Wal-Mart.

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CONCLUSION

For the foregoing reasons, the district court’s order of class certification is **VACATED** and the case is **REMANDED** for further proceedings consistent with this Order.

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court