UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Joseph Hardesty, et al.	:	Case No.: 1:16-cv-00298
	:	
Plaintiffs,	:	Judge Black
	:	
vs.	:	
	:	
The Kroger Co., et al.	:	
	:	
Defendants.	:	

DEFENDANTS' MOTION FOR DECERTIFICATION

Defendants The Kroger Co. and Kroger G.O., LLC (collectively "Defendants") move to decertify the collective action conditionally certified by the Court on July 19, 2016. The evidence obtained during discovery demonstrates that the members of the collective are in no sense similarly situated. This Motion is supported by the attached Memorandum in Support, along with the discovery materials filed with the Court.

Respectfully submitted,

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DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION FOR DECERTIFICATION

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I. Introduction

Named Plaintiffs, former recruiters employed by Defendant Kroger G.O., LLC ("Kroger" or the "Company"), claim that they were misclassified as exempt from the FLSA's minimum wage and overtime requirements. Case law confirms that recruiters can properly be classified as exempt based on the level of discretion and independent judgment they exercise in providing employers with "best fit" candidates for available positions. Here, some named and opt-in Plaintiffs assert that they exercised **no** such discretion. Others testified that they exercised **full** discretion in recommending "best-fit" candidates to their stores. There can be no reasonable argument that Plaintiffs' claims should be resolved collectively based on this critical disparity.

The evidence obtained during discovery demonstrates that the members of the collective are in no sense similarly situated. As explained below, the sworn testimony of named and opt-in Plaintiffs both (1) contradicts the allegations in the Complaint and (2) varies dramatically with respect to critical elements associated with the application of the administrative exemption to CoRE recruiters.

These key differences are highlighted by comparing the testimony of opt-in Plaintiffs Marye Ward and Corbin Hom. Ward testified that she virtually never looked at candidate applications to determine whether to conduct a telephone interview and never rejected candidates so long as they did not use "the n-word" or otherwise cuss at her. On the other hand, Hom testified that he reviewed and rejected candidates based on his independent analysis of the content of their applications; conducted meaningful, substantive interviews to gather information he determined to be important; and rejected candidates on a daily basis using his "gut" and "intuition" based on the content of their responses to interview questions and his judgment regarding whether the

candidates possessed the customer service qualities that were vital to the positions for which he recruited.[1]

These are night and day differences that preclude any reasonable argument that this case should proceed as a collective action. Moreover, these differences are echoed by other named and opt-in Plaintiffs to varying degrees. At the end of the day, Plaintiffs cannot meet the higher standard and heavier burden of proof required at this second stage of certification where job descriptions and exempt status alone are ***insufficient*** as bases for collective action certification. Rather, in a misclassification case such as this, the Court must look at named and opt-in Plaintiffs' ***actual*** day-to-day duties in order to determine whether they are similarly situated.

As a result of the extensive variations in each Plaintiffs' individual employment settings and the individualized defenses Kroger will assert, trial of the named and opt-in Plaintiffs' claims under the administrative exemption would necessarily devolve into dozens of mini-trials, which would be unmanageable for this Court and any jury. Plaintiffs have not established – and cannot establish – any common nucleus of facts that would permit a class-wide adjudication of their misclassification claim. This case, therefore, cannot proceed as a collective action.

II. Statement of Facts

A. Kroger Establishes CoRE To Recruit In-Store, Customer Service Positions On A Nationwide Basis.

Prior to the creation of the Center of Recruiting Excellence ("CoRE"), Kroger stores were tasked with hiring their own personnel. (Declaration of Donald "Buck" Moffett ("Moffett Dec."), ¶ 1) As Kroger's footprint continued to expand, the Company began developing a centralized recruiting operation. (*Id.*, ¶ 2) Ultimately, Kroger developed CoRE with the objective of

[1] Other potential class members appear to agree with Hom, as only 24 out of the 171 individuals who received notice of the collective action have joined the case.

strengthening the quality of hires into hourly store positions through a dedicated team of recruiters who would conduct an individualized assessment of candidates. (*Id.*, ¶ 3) CoRE's stated purpose is "to provide stores with the highest quality candidates, supporting our business initiatives." (*Id.*, ¶ 4)

On or about October 31, 2014, Kroger began hiring full-time CoRE recruiters.[2] (Moffett Dec., ¶ 5) CoRE recruiters are generally responsible for selecting and identifying best-fit candidates for hourly, in-store positions in supermarket locations[3] across the country, developing novel approaches to solving various recruiting-related problems, and improving upon various recruiting-related practices. (Deposition of Rana Tavalali-Schiff ("Schiff Dep."), 12:21-24) Both named and opt-in Plaintiffs, however, have testified to stark differences regarding whether they had these duties and the amount of discretion and independent judgment they exercised – differences that mandate that the collective action be decertified as a matter of law.

B. Named and Opt-In Plaintiffs Provide Contradictory – And In Some Cases Polar Opposite – Testimony Regarding The Key Factors Related To The Administrative Exemption.

In an effort to support their misclassification claim, named Plaintiffs alleged in their Complaint that "[a]ll recruiters follow the same process in scheduling interviews set by Kroger, and are thus fungible/interchangeable with the other Recruiters at the call center." (Complaint, Doc. 1, ¶47) Actual testimony during depositions, however, establishes that nothing could be further from the truth. To be sure, some named and opt-in Plaintiffs provided a narrow description

[2] From approximately June 2014 to October 31, 2014, Kroger utilized KoncertIT as an intermediary between CoRE and various staffing agencies to fill recruiter positions during a "proof of concept" phase. (Moffett Dec., ¶ 6) During this "proof of concept" phase, CoRE utilized contracted recruiters to support a small portion of Kroger's operations in order to develop and implement various recruiting processes. (*Id.*, ¶ 7) Kroger provided KoncertIT with a contracted hourly rate for the contracted recruiters, but the Company does not know how KoncertIT or any other staffing agency paid its employees. (*Id.*)

[3] Some recruiters spend the majority of their time recruiting for General Office (administrative), pharmacy, and/or manufacturing positions that are not related to supermarket locations, raising yet another difference that supports decertification of the collective action and works against any effort by Plaintiffs to certify a Rule 23 class. (*See* Hardesty Dep. 43:3-15; 54:18-19; 82:24-25)

of their job duties and stated that they exercised no discretion and independent judgment in recommending candidates for in-store positions. But other named and opt-in Plaintiffs testified that they perform significant exempt job duties and admitted that they exercised full discretion and independent judgment in selecting and evaluating candidates for vital customer service roles. These night and day differences involve several areas that are critical to an analysis of the administrative exemption, as follows.

1. Named And Opt-In Plaintiffs Give Diametrically Opposed Testimony Regarding The Extent They Exercise Discretion And Independent Judgment In Selecting And Evaluating Candidates For In-Store Positions.

Named Plaintiffs Hardesty and Hickey, and opt-in Plaintiff Marye Ward, testified that they exercised little to no discretion in selecting candidates to interview for positions, interviewing candidates, and determining whether to reject candidates or recommend them for final in-store interviews. Other named and opt-in Plaintiffs have provided polar opposite testimony, which mandates the decertification of the collective action.

a. Members of the collective completely disagree about whether they exercised discretion and independent judgment in evaluating applications to select candidates for telephone interviews.

Named Plaintiff Hickey testified that she did not review candidates' applications to evaluate prior work experience and that she could not recall a single occasion where she decided not to select a candidate for a telephone interview based on the candidate's application. (Deposition of Madeline Hickey ("Hickey Dep.") 89:21-25; 91:18-23) Rather, Hickey stated that she "would talk with all the candidates, or attempt to" without regard to whether the candidates' applications indicated that they were a best-fit for the position in question. (Hickey Dep. 90:3-9) Hardesty similarly testified that he "never" evaluated an application and determined that the candidate was not qualified to work at Kroger and that he "called every single application" he

reviewed. (Deposition of Joseph Hardesty ("Hardesty Dep.") 86:9-14; 149:11-12) Ward also claimed that she would "just start" contacting candidates without reviewing their applications and would otherwise exercise no discretion whatsoever in selecting candidates for telephone interviews. (Deposition of Marye Ward ("Ward Dep.") 29:22-30:15; 32:8-11)

In stark contrast to this testimony, opt-in Plaintiff Kelly Rutledge testified that it was her duty to conduct an in-depth review of candidate applications to determine who to contact for telephone interviews. (Deposition of Kelly Rutledge ("Rutledge Dep.") 44:5-10; 44:15-45:16)[4] She paid careful attention to the candidates' education and employment histories, availability, and preferred positions throughout her employment to find best-fit candidates for the roles she recruited. (*Id.* at 34:20-35:16; 36:25-37:4; 44:15-45:16; 46:19-47:5; 49:3-6; 49:23-50:2; 53:20-54:15; 68:7-16; 72:22-25; 77:23-78:9) Rutledge was specifically looking for "consistency" in candidates' work histories and prior experience that would make them more attractive candidates for in-store roles (e.g., prior experience working at Subway would indicate that the candidate may be a good fit to work in the deli). (*Id.* at 35:6-13) Rutledge even ranked candidates based on their application materials to determine who to contact and used her discretion and independent judgment to reject **half** of the candidates whose applications she reviewed. (*Id.* at 46:6-18; 51:2-13; 75:18-76:4; 78:10-79:4)

Opt-in Plaintiff Corbin Hom similarly testified that he used complete discretion to evaluate candidate applications. He looked to see (1) if the candidate was in school (believing that those enrolled in school would not be as attractive to the stores because their availability would be limited); (2) what their position preferences were; (3) if their availability met the needs of the

[4] As depositions in this matter were continuing up to the filing deadline associated with the instant Motion, the Parties have stipulated to the filing of deposition transcripts without signatures where necessary. The Parties will update the relevant deposition filings with completed signature pages and/or reporter affidavits when they are received.

relevant open position(s); and (4) the candidate's work experience. (Deposition of Corbin Hom ("Hom Dep.") 43:2-44:1) Any one of these criteria could cause Hom not to contact a candidate for a telephone interview. (*Id.* at 44:18-23; 47:12-15; 47:22-48:4; 49:5-50:3)

Named Plaintiff Derek Chipman admitted that he also used discretion and independent judgment in deciding not to contact applicants. Moreover, the level of discretion he used varied depending on the CoRE team for which he was recruiting, the number of relevant candidates, and the position. (Deposition of Derek Chipman ("Chipman Dep.") 141:22-142:3; 145:12-148:2)[5] And opt-in Plaintiff Kim Burchett admitted that she used complete discretion, along with her years of recruiting experience, to evaluate candidate information to ensure she only contacted "best-fit" candidates for telephone interviews during some portions of the relevant class period but not others. (Deposition of Kim Burchett ("Burchett Dep.") 31:21-32:15; 32:19-24; 45:1-6; 62:12-16; 69:8-25; 71:21-23)

b. Members of the collective provide diametrically opposed testimony regarding the level of discretion and independent judgment they exercised in evaluating candidates during telephone interviews.

During their testimony, Hardesty and Ward again minimized their level of discretion with respect to conducting telephone interviews and recommending candidates for final in-store interviews after speaking to them. Hardesty testified that he was provided with a "script" and was told to "stay with the script" during the telephone interviews. (Hardesty Dep. 84:7) As a result, Hardesty never asked candidates follow-up or additional questions. (*Id.* at 84:3-5) In terms of

[5] Recruiters at CoRE are separated into approximately 20 teams that represent Kroger's different divisions. (Schiff Dep. 35:12-15) Each of Kroger's divisions have different needs that vary over time. For example, some divisions mostly had needs in hard-to-fill areas, while others have needs for specific roles. (Schiff Dep. 19:20-25) In fact, Hardesty testified that the differences between his team (Mass Hire) and the Nashville Division, which he sometimes supported, were "overwhelming." (Hardesty Dep. 42:21-43:1) Each team is run by a different supervisor. (Ward Dep. 58:24-25) Both named and opt-in Plaintiffs generally state that they do not know how recruiters on other teams – with different supervisors – performed their job duties. (*See, e.g.*, Hardesty Dep. 42:21-43:1; Hom Dep. 53:16-23; Rutledge Dep. 116:3-8; 138:22-139:1)

selecting candidates to recommend for final in-store interviews, Hardesty stated that he was told to pass along all candidates who "answered the question[s] with almost any answer" and that he scheduled final in-store interviews for anyone who "gave any kind of an answer that was halfway decent." (Hardesty Dep. 80:15-19; 82:1-5) Ward amazingly testified that she asked candidates questions outside of the provided script, but did not care what the answers were because she would select **any** candidate who answered the telephone for a final in-store interview so long as they did not call her "the n word" or cuss her out. (Ward Dep. 42:8-19; 44:11-15) After Ward set her first 18 interviews for the day, she would start to "care about what she was doing" and use more discretion in selecting best-fit candidates for positions, including specialty positions. (*Id.*at 55:7-11; 57:3-7)

Here again, testimony from other named and opt-in Plaintiffs is diametrically opposed to the testimony of Hardesty and Ward and contradicts Plaintiffs' allegation in their Complaint that recruiters exercise "no discretion" during the hiring process. (Doc. 1, ¶¶ 28, 46) Hom admitted that the interview "script" provided by Kroger was merely meant as a guide for recruiters to have a conversation with candidates and that he added three different questions to his interviews (which varied depending on the relevant time period) to gain additional information he felt was important in evaluating the candidate. (Hom Dep. 38:5-39:23)[6] After conducting his interviews, Hom used complete discretion and independent judgment in deciding whether to recommend candidates for final in-store interviews based on his evaluation of their personality and responses to his interview questions. Hom admitted that he rejected candidates on a daily basis following his interviews if they did not appear to be customer oriented based on his "gut" and "intuition." (*Id.* at 22:19-23:18; 24:23-26:1; 29:3-4) Hom understood that he was recruiting customer-facing positions and that

[6] Hom's testimony directly contradicts Plaintiffs' allegation in the Complaint that recruiters "were directed not to ask anything outside the scope of these three pre-established questions during the screening process." (Doc. 1, ¶ 27)

customer service was vital to Kroger's operations and customer retention. (*Id.* at 20:17-21:19) He therefore exercised his discretion and independent judgment to find "best-fit" candidates for the positions he recruited based on their enthusiasm, customer focus, and responses during the interview. (*Id.* at 21:20-22:14; 24:9-19; 40:11-21; 40:22-41:5) Whether to reject or recommend the applicant was entirely his decision to make; he never had to seek approval from anyone else. (*Id.* at 26:2-7; 92:9-12) This critical admission, which was echoed by other named and opt-in Plaintiffs, refutes the allegation in the Complaint that "management at the CoRE Center would review the applicant's responses and ultimately determine if an interview should be scheduled." (Doc. 1, ¶ 30) **Indeed, no recruiters testified that managers at CoRE reviewed their decisions to reject or recommend candidates.**

Named Plaintiffs Chipman and Hickey, and opt-in Plaintiffs Rutledge and Burchett, also testified to exercising significantly more discretion and independent judgment than Hardesty and Ward. Chipman admitted that he developed his own style of telephone interview to assist the evaluation process and that he declined candidates – in his sole discretion – after interviewing them. (Chipman Dep. 173:13-24; 178:5-14; 187:16-20) Notably, Chipman is aware that different CoRE recruiters assessed candidates differently during the telephone interviews. It is a "subjective analysis." (*Id.*at 181:6-16) Although Rutledge claimed that she did not routinely reject candidates after her telephone interviews (unlike at the application evaluation stage), she admitted that her focus was on providing stores with "quality" candidates who would provide excellent customer service. (Rutledge Dep. 37:2-4; 64:5-12; 80:15-23) Stores Rutledge supported hired between 47% and 57% of the candidates she recommended. (*Id.* at 38:7-19)[7] Although Hickey and Burchett stated that they were told to "follow the script as closely word by word as possible" and that, for

[7] Similarly, opt-in Plaintiff Rhonda Furr rejected nearly 20% of the candidates she interviewed during a sample four-week period. (Schiff Dep. 217:21-218:218:6; Exhibit 58)

some period of time, they were instructed to recommend any candidate who answered their questions during a telephone interview, regardless of what the answers were, they both admitted that at other times they had "full discretion" and decided whether to select a candidate based on their independent judgment about whether the candidate was a "best fit" for the position and store. (Hickey Dep. 56:17-21; 59:14-60:5; 105:18-19; Burchett Dep. 31:21-32:15; 32:19-24; 45:1-6; 62:12-16; 69:8-25; 71:21-23)[8]

2. Named And Opt-In Plaintiffs Contradict Each Other Regarding Whether They Have The Discretion To Directly Communicate With Store Hiring Personnel To Discuss And Continuously Improve The Hiring Process.

The testimony of named and opt-in Plaintiffs also reflect night and day differences regarding whether they had the discretion to directly communicate with store hiring representatives regarding candidates, needs, and the hiring process. Hardesty, Hickey, and Chipman each testified that they never communicated with store hiring representatives as part of their job duties. (Hardesty Dep. 60:8-11; Hickey Dep. 111:16-24; Chipman Dep. 87:18-88:17) The testimony of opt-in Plaintiffs Hom and Rutledge was exactly the opposite. Hom testified that he was encouraged to build relationships with local store hiring representatives. (Hom Dep. 60:4-16) He routinely communicated with these store-level employees so that they would "trust the candidates" he was sending them, to communicate regarding the flow of candidate applications coming to the stores, and to discuss problems with the hiring process. (*Id.* at 60:17-23; 61:9-23) Hom even developed a newsletter to send to local store personnel highlighting events being held in their areas

[8] Named and opt-in Plaintiffs also disagree about the discretion and independent judgment they utilized in managing their workload. For example, Hickey testified that she would simply start attempting to fill store openings based on what opening appeared first on a store's list without further analysis. (Hickey Dep. 85:19-86:3) Rutledge, on the other hand, testified that she analyzed her stores' needs (via accessing various reports) to determine which were the most pressing before she started her day. (Rutledge Dep. 106:9-17) Hom admitted that he, too, was expected to manage his workload and did so by analyzing reports to determine where he should devote his attention. (Hom Dep. 58:4-59:2) When Hom was not as busy on the recruiting side, he would turn his attention to coming up with ideas to improve efficiencies at CoRE. (*Id.* at 59:3-12)

of control that may prove to be fertile recruiting ground. (*Id.* at 65:8-23; Exhibit 3) Rutledge confirmed that she had **daily** communications with store hiring representatives to discuss similar issues. (Rutledge Dep. 27:1-30:21)

3. Testimony From Named And Opt-In Plaintiffs Varies With Respect To Whether They Developed And Implemented "Sourcing" Strategies To Improve Applicant Flow At Their Stores.

"Sourcing" – or generating candidates to apply for store positions – is a part of the recruiting process at CoRE. (Chipman Dep. 15:2-11; Hickey Dep. 110:14-17; 112:8-16) As with the other duties associated with recruiting best-fit candidates outlined above, the testimony of named and opt-in Plaintiffs varies significantly with respect to whether they engaged in candidate sourcing and the extent to which they exercised discretion and independent judgment in completing these duties.

Hickey, Rutledge, and Ward testified that they engaged in no sourcing activities at CoRE. (Hickey Dep. 81:25-82:6; Rutledge Dep. 93:16-19; Ward Dep. 61:13-18) On the other hand, named Plaintiff Derek Chipman used his discretion and independent judgment throughout his employment to create sophisticated sourcing plans. For example, he researched demographic and other information to develop different recruiting ideas for high schools, colleges and universities, recreation centers and community events, and "sourcing through current associates." (Chipman Dep.83:7-25, 89; Ex. 2) In addition to completing demographic reports and coming up with related sourcing ideas, Chipman and another recruiter worked together to develop other candidate flow ideas for five different stores in Kroger's Delta division. (98:19-99:4; Exs. 3, 11) The sourcing strategies varied depending on the characteristics of the particular store being analyzed. (*Id.* at 100:6-101:7) In completing this work, Chipman was "making educated guesses and synthesizing, as best [he] could, demographic and other information about the store with respect to recruitment strategy ideas." (*Id.* at 103:9-13) Chipman also worked on a committee tasked with coming up

with ideas to increase store applicant flow, traveled to Indianapolis to complete sourcing activities for new stores that were opening, and drafted a "Live Screening Event Proposal" to increase applicant flow to new stores with a considerable number of openings. (*Id.* at 114:3-8; 109:18-22, Ex. 4; 119:9-120:6)

Hardesty traveled to Texas to discuss and implement an idea he had to increase staffing numbers for stores in wealthy areas where Kroger was having a difficult time recruiting. (Hardesty Dep. 63:18-68:6) Hardesty drafted a proposal to partner with local high schools to recruit new talent, interacted with school administration officials, and attended a hiring event at one of the schools. (*Id.*) According to Hardesty, his idea was "very successful," and 70 to 80 students submitted applications. (*Id.*) Similar to Chapman, Hardesty also worked to get demographic information on some of the stores his team supported. He compiled his thoughts about specific locations, demographics, and how the information he analyzed affected potential recruiting strategies. (*Id.* at 163:4-164:1; Ex. 9)

4. Named And Opt-In Plaintiffs Have Varying Job Duties Related To Analyzing Internal Processes To Improve Efficiencies And Change The Way CoRE Operates.

Hickey and Ward testified that they had little to no duties with respect to analyzing internal CoRE processes to improve the recruiting function. In contrast, Hardesty, Chipman, Rutledge, and Hom all testified that they engaged in significant activities designed to analyze and improve how CoRE operated, as demonstrated by the chart below.

Hardesty	- Created a new script to guide recruiting for Kroger's General Office, which was a "different recruiting function" involving salaried positions at Kroger's headquarters. (Hardesty Dep. 43:2-44:23; 47:3-15)
Chipman	- Developed a plan for how CoRE could handle criminal history checks differently. (Chipman Dep. 123:13-125:12; Ex. 9) - Proposed ideas to make it easier for candidates to navigate Kroger's website. (*Id.* at 110:17-21; 111:9; Ex. 5)

	- Drafted a memorandum regarding changes that could be made to Kroger's Work Opportunity Tax Credit compliance to "add a lot" to the "Company's bottom line." (*Id.* at 127:13-25, Ex. 10)
Rutledge	- Drafted descriptions of unique positions she was recruiting for Roundy's (a new Kroger affiliate) to "sell" the positions to candidates. (Rutledge Dep. 86:12-24) - Conducted a survey of local store hiring personnel to "bridge gaps in communication" during the hiring process and drafted a presentation analyzing survey results. (*Id.* at 112:19-113:18)
Hom	- Liked to come up with ideas to improve efficiencies. (Hom Dep. 30:2-8) - Created a service request audit system to hold stores accountable for following proper procedures when communicating with CoRE about candidates. (*Id.* at 19:13-20:13; 66:18-67:15; Ex. 1) - Conducted a weekly analysis of his personal strengths, weaknesses, opportunities and concerns after analyzing his performance and potential areas for improvement across CoRE. (*Id.* at 68:15-25; 72:5-17; 73:10-74:5; Exs. 4-6) - Presented idea to have local stores with the highest needs recruit one out of every five applicants themselves so that the stores would share some of the burden and to ease the load on CoRE. Hom's supervisor loved the idea and passed it on to her manager for follow up. (*Id.* at 30:20-31:1; 31:4-32:4)
Burchett	- Worked to implement or "roll out" recruiting efforts for Kroger's Nashville Division by developing a "game plan" to have procedures and practices in place for CoRE recruiters to begin supporting the Division. These non-recruiting duties took up as much as 50% of Burchett's time during her employment. (Burchett Dep. 45:25-47:9; 48:16-25; 50:19-51:5)

Performing these exempt tasks was part of the job duties of some named and opt-in Plaintiffs but not others. As a result, decertification is appropriate.

5. Named And Opt-In Plaintiffs Differ With Respect To Whether They Conduct Training For Colleagues Who Are New To CoRE.

Hickey, Rutledge, Burchett, and Hom all helped train new CoRE recruiters as part of their job duties. (Hickey Dep. 81:8; Rutledge Dep. 110:2-23; Burchett Dep. 74:12-77:17; Hom Dep. 80:16-21) In fact, Burchett testified that most of her days as a Kroger employee were spent training new recruiters, making her work experience vastly different from other members of the collective. (Burchett Dep. 77:7-17) Hom's supervisor made training one of his specialties. As his team's

trainer, Hom conducted four days of training when new recruiters joined his team. (*Id.* at 80:22-81:11) On the other hand, training was not a part of the job duties of other named and opt-in Plaintiffs. (*See* Hardesty Dep. 51:6-18)

III. Legal Argument

The Court should decertify the collective action because the record, which is now much more fully developed than it was at the conditional certification stage, demonstrates that the named and opt-in Plaintiffs are not similarly situated under the rigorous standard applicable to the post-discovery second stage of the collective action certification procedure. To evaluate Plaintiffs' claims, the trier of fact will have to conduct an individualized, fact-intensive analysis of the job duties performed by each member of the collective to determine whether the administrative exemption has been satisfied. The named and opt-in Plaintiffs have testified to widely varying work situations and job duties that could directly affect the application of the administrative exemption. It would therefore be impossible for a jury to make a one-size-fits-all determination as to whether Plaintiffs were misclassified. For this reason, the collective action must be decertified.

A. Plaintiffs Bear The Burden To Show That All Members Of The Collective Are Similarly Situated.

The FLSA authorizes employees to pursue claims collectively against an employer "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To obtain collective treatment of their claims, Plaintiffs bear the burden of demonstrating that they and all members of the class they seek to represent are "similarly situated." *White v. Baptist Mem. Health Care Corp.*, 699 F.3d 869, 877 (6th Cir. 2012).

The Sixth Circuit utilizes a two-tiered approach to determine whether plaintiffs are similarly situated. *Id.* During the first "notice" stage, which has already been conducted in this

matter, the Court applies a "fairly lenient" standard. *Id.* The second stage, which is prompted by a motion for decertification such as Kroger's instant motion, "is where the rubber meets the road." *Pickering v. Lorillard Tobacco Co., Inc*., 2012 U.S. Dist. LEXIS 10421, *9 (M.D. Ala. Jan. 30, 2012). The inquiry at the second step is "fact-intensive," and one factor the court should consider is **"[a] need for individualized findings regarding different plaintiffs."** *Burdine v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 79807, **3-4 (E.D. Tenn. June 22, 2011) (emphasis added). Armed with far more information, the Court must make an in-depth factual analysis of the "similarly situated" question. *Pickering*, 2012 U.S. Dist. LEXIS 10421 at *9. The greater the differences among class members, the less likely it is that they are similarly situated. *Id.* The Court may then decertify the class, dismiss the opt-in plaintiffs without prejudice, and permit the original plaintiffs to pursue their individual claims. *Id*. (citing *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1214 (11th Cir. 2001)).

The similarities necessary to maintain a collective action must extend "beyond the mere facts of job duties and pay provisions." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008). In other words, Plaintiffs must establish not just that they "suffer from a single policy" but also that "proof of that policy or conduct in conformity with that policy proves a violation **as to all the plaintiffs**." *See Gentrup v. Renovo Servs., LLC*, 2010 U.S. Dist. LEXIS 143203 at **23-24 (S.D. Ohio Aug. 17, 2010) (citing *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567 (6th Cir. 2009)) (emphasis added). Courts consider three factors in resolving a motion for decertification:

1. the factual and employment settings of the individual class members,
2. the different defenses to which the class members may be subject on an individual basis, and
3. the degree of fairness and procedural impact associated with certifying the action as a collective action.

Frye v. Baptist Mem. Hosp., Inc., 2012 U.S. App. LEXIS 17791, *7-8 (6th Cir. 2012) (*citing O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009)). Each factor is weighed, and no one factor is dispositive. *Id*. Where individualized considerations predominate, fairness and procedural concerns require decertification. *Id*.

B. The Administrative Exemption Analysis Required In This Case Involves An Individualized Inquiry That Is Not Suited For Collective Treatment.

The only way to determine whether any individual recruiter does not meet the administrative exemption is to make an individualized examination into "what an employee **actually** does on a day to day basis." *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688 (6th Cir. 2001) (internal quotation omitted) (emphasis in original); *see also* 29 C.F.R. § 541.2 (the exempt status of any particular employee "must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations"). It is well-settled in federal law that the administrative exemption determination "is extremely individual and fact-intensive, requiring a detailed analysis of the time spent performing administrative duties and a careful factual analysis of the full range of the employee's job duties and responsibilities." *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 219 (D. Conn. 2003) (internal quotations omitted); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 499 (D.N.J. 2000) (holding collective treatment improper due to individualized nature of the inquiry required by the administrative exemption); *see also Donihoo v. Dallas Airmotive, Inc.*, Civ. No. 3:97-CV-0109-P, 1998 U.S. Dist. Lexis 2318, at *4-5 (N.D. Tex. Feb. 24, 1998) ("In deciding whether an employee fits into one of the many exempt categories delineated by the FLSA, the Court must conduct an inquiry into the employee's specific job duties.").

In this case, members of the collective disagree about whether they exercised **full** or **no** discretion in selecting "best fit" candidates for in-store roles and other issues critical to determining

whether recruiters fall within the administrative exemption. *See, e.g., Perry v. Randstad Gen. Partner (US) LLC*, 2015 U.S. Dist. LEXIS 61822 at *8 (E.D. Mich. May 12, 2015) (recruiters found to be exempt where "they had authority to assess candidates and whether to present certain candidates to the client" and focused "to make the determination whether a candidate would be the best 'fit' for a position and client"). The collective action should therefore be decertified.

C. The Conditional Class of Recruiters Should Be Decertified

Based on the foregoing legal standard, the evidence establishes that the collective action that has been conditionally certified in this case should be decertified on several grounds. First, there can be no question that the work experiences of named and opt-in Plaintiffs are worlds apart, as they disagree about what their job duties were and whether they possessed and/or utilized **no** or **full** discretion and independent judgment in completing their job duties. The resolution of these critical issues will require an individualized analysis of liability and damages and thereby render collective treatment of Plaintiffs' claims untenable. Second, the individualized defenses to Plaintiffs' allegations also make the class treatment of Plaintiffs' claims improper. Third, fairness and judicial economy would be harmed by the collective treatment of Plaintiffs' claims.

1. Named And Opt-In Plaintiffs' Factual and Employment Settings Are Worlds Apart.

In a misclassification case, a consideration of "disparate factual and employment settings" includes consideration of differences in individual employees' job duties and responsibilities. *Bearden v. AAA Auto Club South, Inc.*, 2013 U.S. Dist. LEXIS 44075 at **24-25 (W.D. Tenn. Mar. 18, 2013). "[J]ob duties are relevant to the similarly situated inquiry because job duties relate to whether [potential class members] were correctly classified as exempt from the FLSA's overtime requirements." *Wade v. Werner Trucking Co.*, 2012 U.S. Dist. LEXIS 156257, *11 (S.D. Ohio Oct. 31, 2012) (internal quotations and citation omitted). And, "[i]n ultimately determining

whether an employee is exempt from the FLSA, the Court must focus on 'the actual day-to-day activities of the employee rather than more general job descriptions contained in resumes, position descriptions, and performance evaluations.'" *Id.* at *15 (citing *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 400 (6th Cir. 2004). *See also, Bowman v. Crossmark, Inc.*, 2010 U.S. Dist. LEXIS 72350, *6 (E.D. Tenn. Jul. 19, 2010) (*conditional* certification was denied where "[t]he evidence in the record does not support plaintiffs' contention that retail representatives nationwide perform their [] duties exactly as they do and that they are required to perform the tasks as they do").

Here, the differences among members of the collective are night and day. Indeed, the Court need look no further than the testimony of opt-in Plaintiffs Corbin Hom and Marye Ward to grant Kroger's motion to decertify. These witnesses provided polar opposite testimony regarding the most critical issues related to the application of the administrative exemption to this case. Hom exercised **full** discretion and independent judgment in determining whether candidates for Kroger in-store positions would be interviewed and ultimately recommended for a final in-store interview.[9] (Hom Dep. 22:19-23:23:18; 24:23-26:7; 29:3-4) Ward testified that she exercised **no** discretion in performing these same job duties and could only recall rejecting three candidates who either called her "the n-word" or otherwise cussed her out. (Ward Dep. 42:8-19; 44:11-15) This polar opposite testimony mandates decertification. In addition, as outlined above, other named and opt-in Plaintiffs have testified to varying job duties and degrees of discretion and independent judgment that lands somewhere in between Hom and Ward. This wide disparity in employment settings and experiences further supports decertification.

[9] At most, recruiters send only two potential candidates for each store opening and the goal was that stores would hire approximately 50% of the candidates recommended. (Hom Dep. 29:5-14; 72:20-23) Simply put, recruiters' recommendations matter.

This case presents the Court with a situation nearly identical to *Hill v. R&L Carriers*, 2011 U.S. Dist. LEXIS 27997 (N.D. Ca. March 3, 2011), in which a dispatcher sued his former employer for unpaid overtime alleging that "he had very little discretion in performing his job." *Id.* at *12. The plaintiff claimed that he had to closely adhere to the company's operations manual to perform his duties, was required to seek management approval to perform functions such as "adjusting drivers' start times, bringing in drivers to replace regularly-scheduled drivers who were not able to work, or reassigning pick-ups and or deliveries in the event that a driver's truck broke down." *Id.* He also alleged that he played "a very limited role on personnel matters." *Id.*

The named plaintiff's testimony, however, was directly contradicted by one of the opt-in plaintiffs who testified that he made more independent decisions (stating that the purpose of the operations manual was really just to tell "a new employee how they expect them to function under R&L's guidelines"), provided training to fellow employees, and assisted in interviewing driver candidates. *Id.* at *13. Two other opt-in plaintiffs testified that they exercised a level of discretion and independent judgment somewhere between the above employees. *Id.* at **14-16.

The court determined that the record supported decertification of the collective action because of the differing and contradictory testimony regarding the application of the administrative exemption:

> All of this indicates that the circumstances of each City Dispatcher's employment situation differed, which would require an individual inquiry into whether each of them was properly classified as exempt. Defendant intends to assert defenses based on the administrative and executive employee exemptions. The requirements of the administrative exemption alone evince the necessity of individualized inquiries in this case. That exemption requires an inquiry into whether an employee's primary duty entailed the "performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and included the "exercise of discretion and independent judgment with respect to matters of significance." As described above, some City Dispatchers exercised more discretion

> than others. An investigation of the degree of each opt-in Plaintiffs' exercise of discretion would prove too unwieldy at trial.

Id. at *15. As in Hill, it cannot be disputed that – based on the testimony of named and opt-in Plaintiffs – "some [recruiters] exercised more discretion than others" in performing their job duties for Kroger. Hom testified that he used full discretion. Ward testified that she used none. Some members of the collective testified that, at some point in time, they were specifically instructed not to use discretion and independent judgment. Others testified to no such instruction and confirmed that they always exercised discretion and independent judgment as a recruiter. The remaining named and opt-in Plaintiffs also vary greatly and fall somewhere in between. In addition, as explained above, testimony from named and opt-in Plaintiffs differs significantly with respect to whether their duties included directly interacting with store hiring personnel, engaging in sourcing activities, performing activities related to improving efficiencies at CoRE, and engaging in exempt training duties.

Members of the collective have given diametrically opposed testimony regarding the most critical issues related to Kroger's liability under the FLSA. Under these circumstances, decertification is mandated.

2. <u>Defendants' Individualized Defenses Preclude Collective Treatment of Plaintiffs' Claims</u>

In a misclassification case in which different potential class members perform different job duties, an employer "will have highly individualized defenses to the various claims." *Oetinger v. First Residential Mortg. Network, Inc.*, 2009 U.S. Dist. LEXIS 61877, at *10 (W.D. Ky. July 15, 2009). In granting an employer's motion for decertification based, in part, on the "individualized defenses" prong, the *Oetinger* court stated:

> In order to assess either of the administrative or executive exemptions as a defense to a given plaintiff's claim, the Court would have to go through an individualized appraisal of the

> employee's duties and responsibilities. General managers in charge of running the teams[] may assign different duties to those working under them. They may also put a larger emphasis on trying to acquire clients[] . . . versus spending more time with each client . . . . These facts, which will vary between individuals, will matter in determining whether the administrative exemption applies to the employee.

Id.

The same is true here where, based on the testimony outlined above, there can be no question that the trier of fact will have "to go through an individualized appraisal" of each recruiter's actual job duties and responsibilities, which could vary by team, store assignments, supervisor, and the recruiter's individual circumstances. Indeed, Kroger's individualized defenses preclude the use of representative proof to establish liability. "Using representative proof is problematic if for every instance in which an opt-in plaintiff reported that she hired subordinates, there is an alternative response to the contrary." *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 586 (E.D. La. 2008). Relying on *Johnson*, the court in *Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111 (N.D. Ca. Feb. 24, 2011), decertified a collection action involving fitness center managers where "for every manager who says one thing about his other job duties and responsibilities, another says the opposite." *Id.* at 1133. This is exactly the case here, where named and opt-in Plaintiffs have testified to varying job duties and varying levels of discretion and independent judgment based on their particular circumstances. As a result, Kroger's administrative exemption defense would have to be analyzed separately with respect to each individual.

Representative proof simply will not work in this case. Therefore, because the collective treatment of Plaintiffs' allegations would deny Kroger its right to assert its defenses to each individual's claim, the collective action should be decertified.

3. Fairness and Judicial Economy Disfavor Collective Treatment of Plaintiffs' Claims

Lastly, considerations of fairness and judicial economy would be harmed, not advanced, should this matter proceed as a collective action. A collective action may benefit litigants and the judiciary to the extent it (1) lowers the cost to plaintiffs to vindicate their rights by pooling resources and (2) resolves common issues of law and fact in one action. *Oetinger*, 2009 U.S. Dist. LEXIS 61877, at *11 (citing *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). Where there is a "disparity between the duties, responsibilities, and amount of work performed by individuals," however, it "probably negates both benefits of a collective action." *Id.* This is because, in an administrative exemption case, a court would not be able to determine whether the stated exemption applies to the collective as a whole "and the individualized determinations may result in higher costs to plaintiffs." *Id.* Simply put, if the named and opt-in Plaintiffs are not similarly situated, "no judicial economy is to be gained by allowing their claims to proceed collectively. The only possible results are unfairness to [the employer] and manageability problems for the Court." *White v. Baptist Mem. Health Care Corp.*, 2011 U.S. Dist. LEXIS 52928 at *40 (W.D. Tenn. May 17, 2011).

Here, a trial would have enormous fairness problems because Plaintiffs cannot establish that they and all opt-ins are similarly situated. To the contrary, each litigant's right to overtime compensation under the FLSA hinges on individual experiences and an individual application of the administrative exemption to those experiences. Courts that have considered similar claims and related defenses have determined that such claims are far too individualized and cannot be managed at trial. *See, e.g., White*, 2011 U.S. Dist. LEXIS 52928 at **40-41. As one court held, it would be "senseless to proceed as a collective action when Plaintiffs' experiences . . . vary from

day to day, and from individual to individual." *Reed v. County of Orange*, 2010 U.S. Dist. LEXIS 6157, *50-51 (C.D. Cal. 2010).

Additionally, as stated above, this case cannot proceed based on representative evidence. Plaintiffs have either testified that the various CoRE teams operate differently or that they do not have any personal knowledge about the experiences of any collective members working on different teams under different supervisors. (*See, e.g.,* Hardesty Dep. 42:21-43:1; Hom Dep. 53:16-23; Rutledge Dep. 116:3-8; 138:22-139:1) Moreover, the record demonstrates that others' experiences are not proxies for one another.

On the other hand, Plaintiffs and the opt-ins would not be prejudiced if the collective action is decertified. Significant discovery has already been conducted, and Plaintiffs and the opt-ins are now aware of the various facts related to their potential claims. With this information in hand, opt-ins have a better understanding of the basis for individualized claims, and any person who is interested in pursuing his or her individual claim can do so.

For these reasons, fairness and judicial economy favor decertification of this matter.

IV. Conclusion

Plaintiffs have not met their burden of showing that they and the other CoRE recruiters who have joined this litigation are "similarly situated." Therefore, Defendants' Motion for Decertification should be granted and the Court should dismiss the claims of the Opt-In Plaintiffs without prejudice.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on this 9th day of June, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ David K. Montgomery
David K. Montgomery

4842-3568-5450, v. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Joseph Hardesty, et al.	:	Case No.: 1:16-cv-00298
Plaintiffs,	:	Judge Black
vs.	:	
The Kroger Co., et al.	:	
Defendants.	:	

DECLARATION UNDER PENALTY OF PERJURY OF DONALD "BUCK" MOFFETT PURSUANT TO 28 U.S.C. § 1746

I am Donald "Buck" Moffett and I am currently employed by Kroger as the Senior Director of Training and Leadership Development. From August 2014 through January 2016, I was employed by Kroger as the Director of the Center of Recruiting Excellence ("CoRE"). I am of legal age and competent to testify with respect to the matters stated below.

1. Prior to the creation of CoRE, Kroger stores were tasked with hiring their own personnel.

2. As Kroger's footprint continued to expand, the Company began developing a centralized recruiting operation.

3. Ultimately, Kroger developed CoRE with the objective of strengthening the quality of hires into hourly store positions through a dedicated team of recruiters who would conduct an individualized assessment of candidates.

4. CoRE's stated purpose is "to provide stores with the highest quality candidates, supporting our business initiatives."

5. On October 31, 2014, Kroger began hiring full-time CoRE recruiters.

6. From approximately June 2014 to October 31, 2014, Kroger utilized KoncertIT as an intermediary between CoRE and various staffing agencies to fill recruiter positions during a "proof of concept" phase.

7. During this "proof of concept" phase, CoRE utilized contracted recruiters to support a small portion of Kroger's operations in order to develop and implement various recruiting processes. Kroger provided KoncertIT with a contracted hourly rate for the contracted recruiters, but the Company does not know how KoncertIT or any other staffing agency paid its employees.

I, Donald "Buck" Moffett, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

6/8/2017
Date of Execution

Donald S. Moffett

4811-1754-6058, v. 1

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4811-1754-6058, v. 1

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