UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH HARDESTY, et al., Individually and on behalf of All Others Similarly Situated	:	Case No. 1:16-cv-00298
	:	Judge Timothy Black
Plaintiffs,	:	
v.	:	**NAMED AND OPT-IN PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT KROGER'S MOTION FOR DECERTIFICATION**
THE KROGER CO., et al.,	:	
Defendants.	:	

Defendants The Kroger Co. and Kroger GO, LLC ("Defendant" or "Kroger")'s Motion for Decertification of this collective action should be denied. In moving for decertification, Kroger makes multiple mischaracterizations of law and fact to the Court, including the following:

- Kroger wrongly implies that cases dependent upon the application of the FLSA administrative exemption are factually incapable of collective action or class action treatment (*See* p. 19 of Defendants' Motion). Kroger then attempts to use a few trivial (and nonexistent) distinctions between the CoRE Recruiters to incorrectly argue that the CoRE Recruiters are not similarly situated.

- Kroger ignores the fact that its misclassification of the CoRE Recruiters was the result of a ***single*** policy decision in 2014 to classify all CoRE Recruiters as exempt from the FLSA pursuant to the administrative exemption. It is disingenuous for Kroger to claim that this Court must undergo an individualized analysis of each CoRE Recruiter's exempt status, when Kroger readily recognized in 2014 that there was no need to do so.

- Kroger's exaggeration of the few trivial (and nonexistent) distinctions among class members is contradicted by the fact that CoRE Recruiters were entirely interchangeable between teams and divisions, and in fact were consistently interchanged throughout their employment by Kroger.

- The testimony from Opt-In Class Members, together with Kroger's own documents and testimony, make clear that all CoRE Recruiters had the same non-exempt primary job duties of screening and scheduling online applicants for in-store interviews.

For the foregoing reasons, and those stated more specifically in this Memorandum in Opposition, Named Plaintiffs and the collective class members they represent respectfully request that this Court maintain the collective class action, and deny Defendant's Motion for Decertification.

COMBINED TABLE OF CONTENTS AND SUMMARY

I. FACTUAL BACKGROUND[1]

A. Kroger's establishment of CoRE and the "CoRE Recruiter" Position

Kroger's CoRE recruiters are similar to each other in that they all worked at Kroger's Center of Recruiting Excellence ("CoRE") where they performed similar tasks. CoRE is a call center located in Blue Ash, Ohio which employs approximately 200 Kroger employees, with roughly 120 or more being labeled as "Recruiters." (30(b)(6) Deposition of Rana Schiff, 20:21-21:5). The CoRE facility began as a "proof of concept" in June 2014, in which a group of contract employees, paid on an hourly basis, tested the CoRE recruiting "process" for multiple Kroger divisions. (Schiff Dep. 16:21-24). Kroger's training documents set forth this "process" as follows:

(*Id.* at 98:17-23; *See also* **Exhibit 1** to Affidavit of Joshua M. Smith, Esq., attached hereto as **Exhibit A**). While CoRE Recruiters screen and schedule such applicants for in-store interviews, *the actual interview of an applicant, hiring decision, and onboarding is made by the local store*. (*Id.*; *See also* Schiff Dep. 12:25-13:4).[2]

[1] For the Court's convenience, Named Plaintiffs have provided portions, but not all, of the facts and citations set forth in its Motion for Certification, Doc#55, which sets forth in detail the background of CoRE and the common job duties of CoRE Recruiters. The Named Plaintiffs hereby incorporate all such facts and citations set forth in that filing into this Memorandum in Opposition.

[2] Kroger, through the Current CoRE General Manager Rana Schiff, attempts to distort this common process by claiming CoRE Recruiters are "generally responsible for *selecting* and *identifying* best-fit candidates for hourly, in-store positions in supermarket locations across the country," "developing novel approaches to solving various recruiting-related problems," and "improving upon various recruiting-related practices." (Defendant's Motion to

As for the CoRE "Recruiters," former CoRE General Manager Buck Moffett testified that the Recruiters' "main purpose" was simply "making sure that the individuals that went to the stores were representative of the Kroger brand[,]" and "ensur[ing] that the person that they are *forwarding* to the store meets our expectations for someone that would interact with our customers…it's also assessing them as a *potential fit* for the Kroger organization." (Moffett Dep. 20:24-21:6; 40:18-24)(emphasis added). When asked how this task was performed, Moffett indicated that it was done through a "phone screen." (*Id.* at 21:7-18).

B. Kroger makes a uniform policy decision to classify CoRE Recruiters as FLSA Exempt

In late 2014, Buck Moffett made a single, uniform decision to classify all CoRE Recruiters as exempt under the FLSA. (Moffett Dep. 48:8-49:8). In making this decision, Moffett relied upon a single corporate position profile (i.e., a job description) which he "revised" from previous versions and provided to Kroger's counsel in order to uniformly determine the CoRE Recruiters' exempt status. (*Id.* at 32:20-33:10; 39:4-13); *See also* "Recruiter Corporate Position Profile," attached as **Exhibit 2** to Smith Affidavit). Moffett also indicated he "took partnership" with Kroger's legal team and the human resources team, seeking their opinions based on "duties I saw the recruiters having, asked for their partnership." (*Id.* at 33:14-24).

The corporate position profile, as revised by Moffett, lists the following position summary for *all* recruiters:

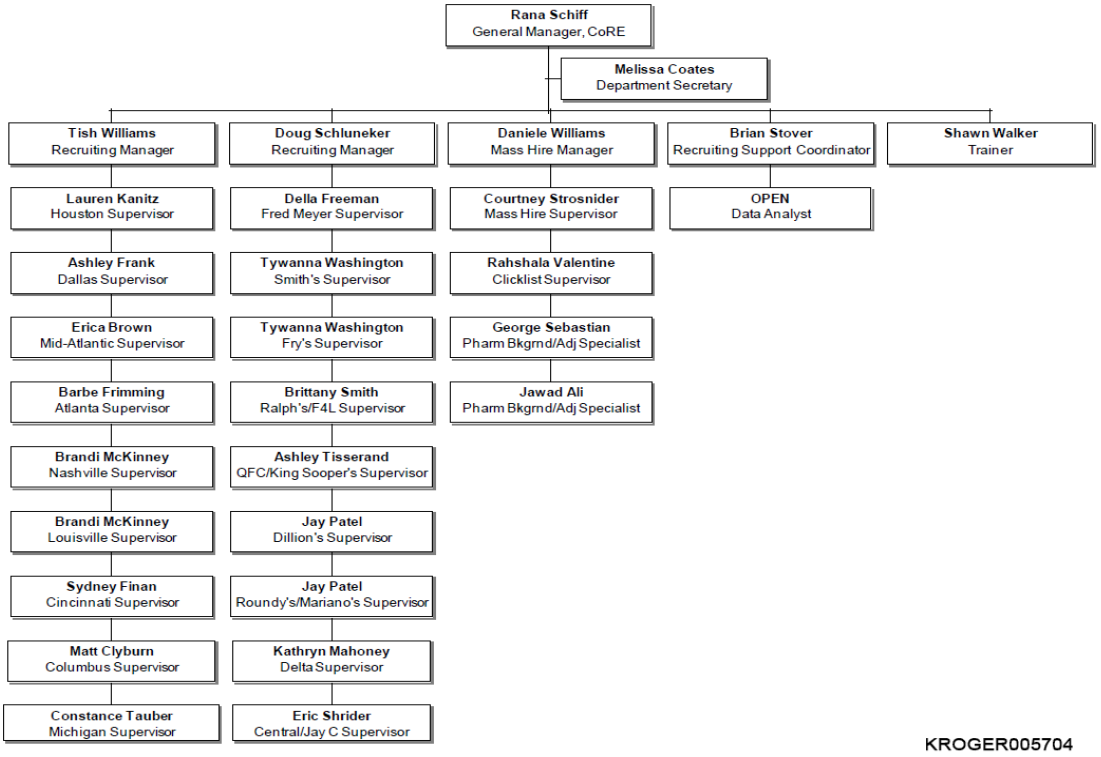
> The Recruiter will be part of a dedicated recruiting team providing our grocery retail stores with best-fit candidates for hourly store positions. The Recruiter will *assess and screen applications*, conduct *phone screens*, prepare interview packages, and *present stores with a qualified slate of applicants*. The Recruiter will also be responsible for ensuring candidates and store teams have positive recruiting experiences by keeping them informed throughout the process and answering their questions. Role model and demonstrate the company's core values of respect, honesty, integrity, diversity, inclusion and safety of others.

Decertify, Doc#7, pg. 7). However, a review of Ms. Schiff's cited testimony provides no such reference to "developing novel approaches" or "improving upon various recruiting-related practices." (*See* Schiff Dep. 12:21-24).

(**Exhibit 2** to Smith Affidavit). The profile also lists certain "essential job functions" for CoRE Recruiters, which indicate up front that Recruiters will "*screen candidate applications* using best-fit criteria such as availability and behavioral assessment," and "*conduct phone screens* to confirm interest and availability and share information about the position." (*Id.*). As set forth above, Moffett made this determination with respect to *all* Recruiters, based on their common job duties and a common job description.

C. CoRE Recruiters are entirely interchangeable among various recruiting teams.

CoRE Recruiters were separated into various teams (e.g., Houston, Atlanta, Fry's, Ralph's, Mass Hire) based upon geographic region or Kroger divisions at CoRE. (*See also* Schiff Dep. 37:4-15). This division is set forth in Kroger's provided organizational chart:



(*See* **Exhibit 3** to Smith Affidavit).

Despite such division, all CoRE Recruiters were entirely interchangeable between teams in performing their duties, and were in fact consistently interchanged. Former CoRE Manager Buck Moffett indicated that he would regularly move recruiters to different divisions at CoRE to ensure division needs were met:

> A. So I would make sure that the staffing stayed consistent, so if we had folks that left or if we had folks that, you know, had potentially gone on leave or anything, to make sure the divisions had the support that they needed to be able to meet their hiring goals.
>
> So if we needed to hire additional folks **or if we needed to move folks around within teams**, then we would – I would monitor that to make sure that they were supported as they needed to be.
>
> Q. And you could do that to cover some needs if some areas were more pressed than others, **to move some recruiters around to different divisions; is that correct**?
>
> A. **That's correct**.

(Moffett Dep. 106:7-23). Class members also confirmed this fact, indicating that they would regularly support other teams' "needs" as part of their regular job duties. (Hardesty Dep. 31:21-32:4; Chipman Dep. 79:2-8; Hickey Dep. 68:1-69:2; Rutledge Dep. 14:25-15:3; 58:15-59:2; Ward Dep. 26:8-23; Burchett Dep. 47:13-24). Opt-In Kelly Rutledge further explained this, indicating that she worked for other teams "quite frequently." (Rutledge Dep. 58:18-59:21). She indicated that CoRE instituted a "CoRE all blitz" that would take place on Wednesdays, in which the supervisors would rotate their teams to various other teams who had hiring needs, and their team would assist. (*Id.*). In addition to the "CoRE all blitzes," Rutledge also testified to assisting other teams *on a daily basis* with their regular needs:

> Q. And from – would that be the extent of your working with other teams is through these blitzes?
>
> A. No, it wasn't just for the CoRE all blitz. If we were slow on work and other teams had a high amount of needs, we would hop on their inbound

> and take phone calls for them and schedule interviews for that division. There would also be times where we would take outbound calls. So we would reach out to another division or vice versa and take a store and begin calling on applicants. That happened very regularly. Daily.

(*Id.* at 59:22-60:10). Similarly, Marye Ward testified that if a team does not have enough people "everybody's in the queue." (Ward Dep. 26:18-23). This would include calls for an east coast team, or the mass hire team. (*Id.* at 27:1-11).

D. <u>CoRE Recruiters' primary job duties are screening online job applicants and scheduling in-store interviews</u>

CoRE Recruiters had the primary job duty of screening online job applicants and scheduling them for in-store interviews. All of the deposed class members testified that, in one way or another, they performed such duties on a regular basis:

(1) Reviewed applications in preparation for conducting a phone screen: (Hardesty 85:21-86:8; Chipman 138:1-17; Hickey 86:25-87:24; Rutledge 44:15-45:11; Burchett 27:17-21, 62:12-19; Hom 42:23-43:9; Ward 29:17-30:8);

(2) Conducted phone screens of online applicants, typically using a Kroger provided script. (Hardesty 79:24-80:19; Chipman 170:2-21; Hickey 51:22-52:19; Rutledge 65:15-66:5; Burchett 58:21-59:6; Hom 36:18-38:24; Ward 38:16-40:17); and

(3) Scheduled applicants for an in-store interview if they were able to provide answers to the screening questions. (Hardesty 89:24-90:3; Chipman 79:14-25; Burchett 66:5-7; Hickey 54:10-14; Rutledge 58:2-12; Burchett:63:13-19; Hom 28:9-17; Ward 33:6-11).

(*See also* Declarations of Named and Opt-In Plaintiffs, Exhibit E-L of Named Plaintiff's Motion for Certification). Many of the class members testified that these screening and scheduling functions were their main or primary duty, (Chipman Dep. 83:3-6; Hardesty Dep. 174:25-175:7; Hickey Dep. 47:20-21; Rutledge 121:14-16), and no class member testified that they did not perform these tasks.

Kroger similarly concedes in its Fed. R. Civ. P. 30(b)(6)[3] testimony, provided by current CoRE General Manager Rana Schiff, that all CoRE Recruiters perform the three main duties of (1) reviewing candidate's applications; (2) phone screening candidates and scheduling interviews; and (3) forwarding candidates to store specific job requisitions. (Schiff Dep. 102:4-103:9; *See* also pg. 18 of **Exhibit 4** to Smith Affidavit).

Kroger-provided weekly call data also shows that **CoRE Recruiters spent the vast majority of their workdays performing these three main duties**. (*See* **Exhibit 5** to Smith Affidavit). Specifically, a review and analysis of Kroger's phone records indicates that class members averaged *upwards of 85% of a CoRE Recruiter's day in "recruiting time," making outbound and receiving inbound calls* from online job applicants: [4]

Class Member	Average Recruiting Time
Joseph Hardesty	86%
Derek Chipman	83%
Alexandra Cooper	94%
Marye Ward	72%
Rhonda Furr	73%
Curtis Flint	95%
Matt Taske	87%
Michael Kovatch	87%
Amanda Gayhart	80%

Class Member	Average Recruiting Time
Jessica Conroy	93%
Corbin Hom	86%
Ckris Matibiri	86%
Rondalyn West	85%
Craig McIntire	92%
Wahid Lewis	93%
Jacob Cress	81%
Jalen Johnson	81%
Kelly Rutledge	86%
Latasha Moore	84%

[3] Rana Schiff is Kroger's designated Fed. R. Civ. P. 30(b)(6) witness with respect to providing information on CoRE policies and procedures pertaining to CoRE Recruiters. (Schiff Dep., Exhibit 1). The purpose of designating a 30(b)(6) witness is to preclude a party from having to guess which corporate official they need to depose in an attempt to learn a corporate party's version of an issue and to "avoid the practice of 'bandying' by the corporation, where individual officers or employees disclaim knowledge of material facts that are clearly known to the corporate entity. *Janko Enters. v. Long John Silvers, Inc.*, 2014 U.S. Dist. LEXIS 185334, *15 (W.D. Ky. Apr. 2, 2014). As a 30(b)(6) witness, Ms. Schiff's answers are binding on Kroger in the same way the answers of any other witness are binding on that witness. *Kelly Servs. v. Creative Harbor, LLC*, 846 F.3d 857, 867 (6th Cir. Jan 23, 2017). Ms. Schiff's answers are the answers of Kroger with respect to whether the CoRE Recruiters are similarly situated.

[4] These averages were calculated by dividing the "total recruiting time" for a CoRE Recruiter in a particular week (shown in spreadsheets attached as **Exhibit 5** to Smith Affidavit) by the staffed time less the recruiter's time in "lunch" (staffed time (-) hours in lunch). These averages are summaries of evidence provided by Kroger. Certain class members, including Madeline Hickey, Kimberly Burchett, Sara Elkins-Schumann, Christian Bradley, Jeremy Hadden, and Lawanna Haskins, were not employed during periods in which Kroger provided weekly aux spreadsheet data. As such, these individuals' call averages are not included in the chart.

TOTAL AVERAGE	**85.47%**

(*See* Kroger "Aux Record Spreadsheets" attached as **Exhibit 5** to Smith Affidavit). The testimony of the CoRE Recruiters also confirms that the majority of the remaining 14.5% of a CoRE Recruiter's time was spent engaging in the same preparation for, or accounting of, the performance of the CoRE Recruiter's primary duties on the phone system. (Hardesty Dep. 112:7-18; Chipman 216:5-217:16; Rutledge Dep. 122:24-123:4; 126:1-7; Hickey Dep. 99:11-100:2)

1. All CoRE Recruiters review online job applications using Kroger-provided software.

In performing their screening and scheduling functions, class members all utilized the same Kroger-provided software "KnowMe" (Kroger's "Applicant Tracking System"). (Schiff Dep. 207:21-23). The purpose of this was to review the applicant's online job application to look for an applicant's minimum qualifications, including their availability, that they met minimum age requirements for a position, their job preference, and that their application did not contain items that Kroger determined to make them un-hireable (criminal history, re-hire status, etc.). (*Id.* at 103:10-22).

Kroger makes blatantly exaggerated attempts to claim that some class members conducted "in-depth reviews" and used "complete discretion" in reviewing such online applications.[5] A complete review of deposition testimony, however, reveals this contention to be false. First, contrary to Kroger' contentions, Opt-In Plaintiff Kelly Rutledge testified as to the limited nature of what was reviewed:

[5] A review of Kroger's motion reveals that it is largely based upon the repetition of unsubstantiated exaggerated phrases, including "night and day" (pp. 4, 6, 8, 13), "extensive variations" (p. 6), "stark differences" (p. 7), "stark contrast" (p. 9), "varies significantly" (p. 14), "vastly different" (p. 16), "worlds apart" (p. 20), and "wide disparity" (p. 21). All of the above are clearly intended to prevent the Court from seeing that any differences between the CoRE Recruiters are either trivial or nonexistent. (*See* Defendant's Motion for Decertification, Doc#47 pp. 4, 6-9, 13-14, 16, 20-21).

> Q. What was your process when you were reviewing applicants for open positions?
>
> A. To walk you through what my eyes went to as I open an application, to the best of my ability, as I can recall, the first thing that I did was check to see if applicants were already in the process at any other locations, if they were already scheduled for an interview at another store, if they had already been phone-screened and declined or declined from the store, and just any other employments – or employment, excuse me, application status that might be in the system.
>
> Beyond that, I would look to see if they've ever been employed with Kroger before, then I would look to see what their top two positions of interest are as well as their availability start date.
>
> After that I would view their weekly availability as far as shifts are concerned. And then below that fell education and employment history.

(Rutledge Dep. 44:15-45:11). Rutledge stated that the determining factors in whether to call an applicant for a "phone screen" were (1) whether the candidate had been declined recently by a store; (2) whether the candidate had a criminal background which fell on a decline list provided by Kroger; (3) whether the candidate had availability that would meet the store's stated needs; or (4) whether the candidate currently worked for a competitor. (*Id.* at 46:19-47:5; 47:16-48:15; 49:3-17). While Rutledge sometimes looked at "employment history," this was simply as a "means to understand their background to try to help sway them into the right position for them." (*Id.* at 35:8-16). Rutledge never testified to declining or rejecting an applicant because they had no work history or education. Indeed, this would make little sense as the vast majority of positions for which CoRE Recruiters scheduled interviews (i.e., bagger, cashier, stocker, etc.) required no prior job experience or education.

Opt-In Plaintiff Corbin Hom similarly testified that the determining factors in whether to schedule an applicant were (1) criminal background; (2) age requirements; and (3) availability and job preference. (Hom Dep. 46:17-47:21). Similar to Rutledge, he indicated that while he might

check work experience, he "wasn't too hopped up on that" and would utilize it simply as a means to sway an applicant into a particular open position. (*Id.* at 43:4-9; 49:7-17).

Other class members testified to a similarly minimal process in reviewing applications. Named Plaintiff Derek Chipman indicated he was primarily looking at applicant availability, age requirements, and rehire eligibility status when he reviewed an applicant's online job application. (Chipman Dep. 139:18-140:7). Named Plaintiffs Joseph Hardesty and Madeline Hickey stated that they would primarily review an applicant's availability and job preference prior to making a call. (Hardesty Dep. 85:21-86:8; Hickey Dep. 86:25-87:11). Hickey indicated she would also sometimes review an applicant's employment background, if it was provided, though (like the others) she never testified to declining an applicant based upon work history. (*Id.* at 87:22-24).

Other class members testified to an even simpler process of reviewing applications. Opt-In Kim Burchett testified that during her employment (November 2014-March 2015), CoRE Recruiters basically "had to call whoever applied," which is exactly what she did. (Burchett Dep. 62:12-23). Opt-In Marye Ward testified that she would contact all applicants, because she was required to contact 45 people and schedule 18 interviews per day. (Ward Dep. 28:23-29:3). Thus, a review of the CoRE Recruiter's actual testimony confirms that, at most, only trivial differences existed with the *de minimus* aspects of the performance of their duties and that they always remained interchangeable with one another.

2. All CoRE Recruiters conduct "phone screens" using a standard Kroger "recruiting script."

Following the online job application review, ***all*** CoRE Recruiters would conduct a "phone screen" using a "Recruiting Script" provided by Kroger. This script included detailed instructions for all CoRE Recruiters, including (1) Introduction and Position details; (2) Screening Questions;

(3) Scheduling an Interview; and (4) Declining a Candidate. (*See* **Exhibit 6** to Smith Affidavit). The "screening questions" on the script are outlined in bold, red font, which state:

1. What is it about working at (Banner Name) that interests you the most?
2. As a (Position Title), what specific things would you do or say in order to provide friendly customer service to our customers?
3. Can you tell me about a work or academic related experience that you are most proud of?[6]

(*Id.*). The portions of the script in bold font were required to be read word-for-word. (Hom Dep. 37:22-38:4; Rutledge Dep. 69:4-13; *See also* Schiff Dep. 131:1-18). As long as an applicant provided minimal answers to the three screening questions (or sometimes any answer at all), Recruiters would generally schedule the applicant for an in-store interview. (Whitlow Dep. 17:16-22; Chipman Dep. 171-172:4-25, 1-15; Hickey Dep. 55:19-56:21; Hardesty Dep. 80:15-81:6; Hom Dep. 24:9-16, 25:1-15; Rutledge Dep. 75:14-17; Ward Dep. 40:21-25; 42:8-24; Burchett Dep. 66:5-7).

Similar to the application review, Kroger embellishes testimony in order to claim the "phone screen" process was different for each recruiter. However, a more detailed review of Opt-In testimony reveals that this is simply not true. Opt-In Plaintiff Corbin Hom, who Kroger heavily focuses on as someone who used "compete discretion and independent judgment,"[7] provides a simple overview of what the "phone screen" process looks like:

> Q. What was the process?
>
> A. So – I can repeat it all to you right now if you want, but basically we would ask them if they're still interested in the location that they applied to, tell them the position we're reaching out to them about, tell them about the starting rate of pay,

[6] In 2016, following the filing of the present lawsuit, the screening questions in the script appear to have been revised with the following three questions: (1) what specific actions could you take as a (Position Title) to make sure we provide exceptional service to our customers; (2) We also seek to provide an environment where our associates and customers will feel valued and inspired. If you were hired as a (Position Title), what could you do to appreciate our customers?; and (3) We encourage you to make decisions and take action to provide excellent customer service. Tell me about a challenge or situation that you have faced and how you helped to resolve it. *See* **Exhibit 7** to Smith Affidavit).

[7] (*See* Defendant's Motion for Decertification, Doc#47, pg. 11).

> and let them know that there's a chance for that to increase if they have comparable work experience.
>
> And I'd tell them about the – their schedule a little bit, just how we don't have any say as to what their exact schedule would be, but I could give them, you know, they're looking for days and evenings, or it looks like they can, you know, work with their availability.
>
> And then, other than that, just jump right into the questions, and then closing it out, just tell them all about, you know, the details of the interview, you know, what to expect, what to bring.
>
> Tell them that they'll get drug tested and background check, things like that, and that the outcomes are just contingent on favorable outcomes of those.

(Hom Dep. 36:14-37:16). Hom indicated he would ask the three questions on the script, and would schedule an applicant for an in-store interview as long as they very simply gave "customer-oriented answers." (Hom Dep. 24:23-25:15; 38:9-11). Hom also indicated he may ask one or two extra related questions, including "what customer service means to them" and "why they're interested in Kroger." (*Id.* at 38:16-24).[8] At one point Hom also inquired about previous work experience on the call if the candidate did not mark it on their application, as he "kind of just wanted to learn a little bit more about them." (*Id.* at 39:8-15). However, he also indicated he later dropped this question. (*Id.*). Hom also testified that candidates did not have to have any previous comparable work experience to be scheduled. (*Id.* at 22:15-18). Hom indicated that these responses encompassed how he would determine whether an applicant met the minimum qualifications to schedule them for an in-store interview. (*Id.* 26:24-27:4).

Opt-In Kelly Rutledge testified to a very similar process in performing a phone screen. (Rutledge Dep. 65:15-66:5). Rutledge simply looked for responses that were "upbeat," that they were "able to answer the questions," and that they "could show some competency to customer

[8] While Hom labels these as "extra" questions, they appear to fall under the same umbrella of the three questions outlined in the script.

service." (*Id.* at 68:10-16). **Rutledge estimated that she only declined about 3% of candidates she spoke with**, and mainly did so when an applicant used foul language in the screening process. (*Id.* at 74:10-75:17).

Other class members similarly testified to looking for "minimal" responses to the questions in the script. Named Plaintiff Chipman testified that as long as an applicant attempted to answer the questions, and did not provide a blatantly bad answer, they would be scheduled for an in-store interview. (Chipman Dep. 172:5-11). Per Chipman, examples of bad answers are using the "F-word" or indicating that he/she was fired after a conflict with the applicant's manager. (*Id.* at 172:14-23). Named Plaintiff Hickey indicated that she would often schedule a candidate for an interview so long as the candidate simply "answered the questions." (Hickey Dep. 55:10-12). Opt-In Kim Burchett indicated she was directed to schedule everyone unless they answered "I don't know." (Burchett Dep. 63:17-19). Named Plaintiff Joseph Hardesty indicated that "[q]uite frankly, if they answered the questions with almost any answer, we were told to schedule the interview." (Hardesty Dep. 80:17-19). Opt-In Marye Ward indicated she would "very rarely" reject an applicant, and could only think of circumstances where a candidate might "cuss" her out or call her the "N-word" in declining them. (Ward Dep. 42:8-24).

The fact is, every class member has testified to using the same Kroger-provided script, and scheduling applicants to an in-store interview so long as they provided some minimal type of answer to routine Kroger-provided screening questions. Critically, *no class members* testified to using any discretion in the hiring process beyond the ability to schedule an applicant for an in-store interview.[9] As indicated above, the method by which each CoRE Recruiter used the Kroger

[9] Kroger's also provides a footnote in its brief claiming differences as to how CoRE Recruiters would exercise discretion and independent judgment in "managing their workload." (*See* Defendant's Motion for Decertification, Doc#47, pg. 13, fn.8). To be clear, any alleged "discretion" in managing work load is the classic example of a vague, *de minimis* task which does not establish a distinction, let alone any exemption under the FLSA. Certainly, even front

script and performed the phone screen for the purpose of merely forwarding on potential candidates was completely interchangeable.

E. All CoRE Recruiters have minimum numbers of calls to be made and interviews to be scheduled.

CoRE Recruiters were required to meet a daily minimum numbers of calls made and interviews scheduled per day, further emphasizing that reviewing applications, performing phone screens, and scheduling interviews are the CoRE Recruiters' primary job functions. Opt-In Plaintiff Kim Burchett testified that when she became a Kroger employee, her minimum number of interviews to be scheduled went from 20 to 25 interviews set per day. (Burchett Dep. 53:13-16). Named Plaintiff Derek Chipman testified that Recruiters were told to schedule roughly 20 interviews per day. (Chipman Dep. 178:8-12). Opt-In Plaintiff Kelly Rutledge testified that she was consistently "coached" during one-on-ones with her supervisor for not meeting the more important "quantity" aspect of the job. (Rutledge 39:14-20; 40:13-22). Opt-In Plaintiff Marye Ward testified that "you have to make 45 calls and 18 interviews scheduled" per day, and because of this she felt compelled to call everyone who applied to her stores until she met that number. (Ward 28:2-3; 30:9-15). Opt-In Corbin Hom testified that he was required to provide his supervisor with his weekly "numbers," including how many interviews are sent based on his district. (Hom Dep. 68:19-25, 69:22-70:2).

Kroger's own documents acknowledge that there were minimum calls and interviews to be met each day. An e-mail from team supervisor Della Freeman, labeled "revisiting standards," indicates that Recruiters need to make at least 40 outbound calls daily, and that if a recruiter scheduled less than 12 interviews, they needed to email Ms. Freeman explaining why. (*See* **Exhibit**

line factory workers may disagree as to the amount of discretion and independent judgment they utilize in "managing their workload" throughout the day.

8 to Smith Affidavit). Freeman also indicates in her e-mail that "any extracurricular that you choose to do, such as lunch and learn sessions, ARG's, classes, etc. are not a reason to cite why your interviews are low." (*Id.*). A nearly identical e-mail was sent by another team supervisor, Brittany Smith, with the same minimum requirements. (*Id.*).

CoRE Recruiters were "coached" when they did not meet or exceed their call or interview numbers. An e-mailed recap of a "coaching" against Opt-In Sara Elkins-Schumann indicates that she was coached for stopping at 15 interviews per day. (*See* **Exhibit 9** to Smith Affidavit). Her supervisor also "took time to discuss metrics, how many dials could have been made, went over phone screen report and the open req. report to show that there were additional calls that could have been made." (*Id.*) Opt-In Kelly Rutledge was coached on a monthly basis for not meeting the "quantity" aspects of her job. (Rutledge Dep. 39:14-20; 40:13-22). Opt-In Marye Ward indicated that she needed to meet her daily numbers of 18 interviews and 45 calls made "so I don't get in trouble with Doug [her supervisor]." (Ward Dep. 35:6-8).

Simply put, Kroger's main focus at CoRE was ensuring that enough calls were made and interviews were scheduled per day, further emphasizing the fact that the CoRE Recruiters were all similarly situated such that they shared the same primary job duty and could be evaluated and compared to one another using the exact same metrics.

F. Kroger's contention that certain CoRE Recruiters performed other duties (communicating with stores, training, etc.) is blatantly exaggerated and irrelevant to the primary duties at issue in this case.

Kroger makes further exaggerated attempts to claim certain CoRE Recruiters had various duties related to "communications with store hiring personnel," "sourcing," "analyzing internal processes," and conducting "training." First, *none* of the testimony Kroger cites to regarding these purported "duties" negates the fact that *all* CoRE Recruiters had the primary job duty of screening

and scheduling online job applicants. As stated above, Kroger documents indicate the Recruiter's "main duties" are related to screening and scheduling, a fact confirmed by both Kroger and Opt-In testimony. Further, Kroger documents indicate that CoRE Recruiters spent 80-90% of their time in the Kroger phone systems making and receiving inbound calls, (with the majority of the remainder of the CoRE Recruiter's time being spent preparing for and accounting for the same), clearly indicating that screening and scheduling is what CoRE Recruiters spent the vast majority of their day doing.

Second, a more thorough review of the deposition testimony cited to by Kroger on each of these alleged "duties" indicates that nothing about these tasks makes any one CoRE Recruiter "exempt" under the FLSA. Rather, at best these "duties" were minimal assignments and/or communications, which were not part of the CoRE Recruiters' primary duties and the metrics by which they were evaluated; nor did it in any way effect the interchangeability of the CoRE Recruiters.

1. Direct communications with store hiring personnel.

Kroger attempts to mislead the Court into believing that certain CoRE Recruiters were regularly communicating with stores to "discuss and continuously improve the hiring process."[10] This contention is simply false, and easily explained by clarifications in the Opt-In testimony that Kroger relies upon.

Kroger claims Opt-In Corbin Hom "routinely communicated" with stores so that they would "trust candidates" he sent, "communicate regarding the flow of candidate applications," and "discuss problems with the hiring process."[11] However, a more thorough review of Hom's testimony makes clear that he would simply e-mail local stores to inform them that their "candidate

[10] (*See* Defendant's Motion for Decertification, Doc#47, pg. 13).
[11] (*Id.*)

flow" is not that heavy," or might reach out to a store in the event a "candidate calls and claims they went to their interview but no one was there." (Hom Dep. 60:17-61:20). Hom specifically indicates he ***never*** developed suggestions or ideas to increase applicant flow, and is not aware of any other CoRE Recruiter who has done so. (*Id.* at 62:10-19).

Opt-In Kelly Rutledge, who Kroger claims had "daily" communications to discuss "similar issues" to Hom, indicates that 95% of her communications with stores were via e-mail, and were typically were requests from the store to push candidates through the system without a phone screen, or regarding a store's request to focus on certain needs in scheduling interviews (i.e., needs for a bakery clerk, cashier, etc.). (Rutledge Dep. At 27:7-18).

Contrary to Kroger's contentions, there is simply nothing about this testimony which shows that CoRE Recruiters communicated with stores to "discuss and continuously improve the hiring process." Further, even if such CoRE Recruiters did engage in such tasks, it does not take away from the fact that these class members were still required to perform their primary screening and scheduling functions.

2. "Sourcing."

Next, Kroger attempts to apply its own "sourcing" definition to certain special assignments given to Named Plaintiffs Joseph Hardesty and Derek Chipman, in order to claim that these employees engaged in "sourcing candidates" as part of their job duties. To the contrary, neither of these individuals, nor any class member, testified to engaging in "sourcing" as that term is commonly used in the recruiting industry. (*See* Hickey Dep. 81:25-82:6; Rutledge Dep. 93:9-22; Ward Dep. 13-18).[12] Recruiter "sourcing" is the ***proactive*** searching for qualified job candidates

[12] Named Plaintiff Derek Chipman testified to believing that sourcing is part of a "typical" recruiting process. However, he never testified that "sourcing" is part of the recruiting process at CoRE (contrary to Kroger's arguments). (Chipman Dep. 14:17-15-4).

for current or planned open positions; *it is not the reactive function of reviewing resumes and applications sent to the company in response to a job posting or pre-screening candidates*.[13]

These two recruiters did not proactively search for qualified candidates as part of their regular job duties—rather, they spent the vast majority of their time screening online job applicants *who already applied*, and scheduled the same for in-store interviews. Indeed, both Hardesty and Chipman indicated that this alleged "sourcing" was extra or volunteer work, to be performed when their primary work was "slow." (Hardesty Dep. 174:22-175:6; Chipman Dep. 107:11-108:13). Further, the alleged work that Kroger claims is "sourcing" was seldom and limited at best (i.e., one weekend trip to Texas, one trip to Indiana to drop off flyers, one committee meeting to submit "ideas"). (Chipman Dep. 107:11-108:13; Hardesty Dep. 174:22-175:6). Simply put, such work never took away from these two class members primary duty of screening candidates.

3. "Analyzing internal processes to improve efficiencies and change the way CoRE operates."

On its third point, Kroger claims that Hardesty, Chipman, Rutledge, Hom and Burchett all engaged in "significant" activities "designed to analyze and improve how CoRE operated."[14] Again, Kroger takes various minor special assignments provided to CoRE Recruiters by their supervisors, in an attempt to claim that they are a part of the CoRE Recruiters' primary job function. A more detailed review of deposition testimony cited by Kroger makes clear that Kroger grossly exaggerates exactly what each of these recruiters were doing in these limited assignments, and how often they might perform them:[15]

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).

[13] https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whatissourcing.aspx
[14] (*See* Defendant's Motion for Decertification, Doc#47, pg. 15).
[15] The deposition testimony cited by Kroger in the following chart is clarified by bolded bullet points further explaining the nature of the tasks under discussion.

	• **Hardesty *never actually performed duties in connection with this role related to the General Office*. (Hardesty Dep. 45:20-24).** • **The only "script" provided by Hardesty was at the direction of his team manager, Daniele Williams. He never testified as to whether this script was actually utilized. (Hardesty Dep. 47:6-10).**
Chipman	-Developed a plan for how CoRE could handle criminal history checks differently. (Chipman Dep. 123:13-125:12; Ex. 9). • **This "plan" was developed by Chipman outside of his regular work hours (i.e., outside of when he performed his regular primary duties of screening applicants and scheduling interviews). He engaged in this assignment to take initiative, in that he was interested in "moving up." (Chipman Dep. 123:17-23; 125:8-12).** • **Chipman testifies that this is just "extra" work. (*Id.* at 124:18-21).** -Proposed ideas to make it easier for candidates to navigate Kroger's website. (*Id.* at 110:17-21; 111:9; Ex. 5). • **This idea regarding the website was proposed via a Sunday e-mail to Chipman's team manager, outside of Chipman's regular work hours and duties. (*See* Ex. 5).** • **In Exhibit 5, Chipman mentions in the email that the idea may be "extraneous" to his job with Kroger.** • **It is not clear that this idea was ever passed along or implemented by Kroger.** -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). • **Chipman's team manager was "not pleased" with Chipman submitting this idea to her. Chipman testified that his manager thought he was "interfering with her authority." (Chipman Dep. 129:17-25).** • **The idea (similar to others Chipman proposed) was never implemented given Chipman's manager's opposition to the same.**
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). • **The Roundy's "rollout" occurred on January 1, 2017, *after* CoRE Recruiters' were properly and uniformly reclassified to FLSA non-exempt. (Rutledge Dep. 83:23-84:4).** • **Rutledge did not "draft" these descriptions—she took language from a job order that was very "plain stiff language" and "put it into more of a [] conversational format." (Rutledge Dep. 87:8-15).** • **Rutledge reviewed applications for these positions using the same process she did for other Kroger store positions. (Rutledge 84:5-25).**

	-Rutledge "[c]onducted 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). • **This "survey" was meant to understand whether stores were properly selecting "decline, review – declined, or consider for other positions" after interviewing an applicant in-store. This was meant to assist CoRE Recruiters as to whether or not they could consider one of those declined candidates for a position at another location. (Rutledge Dep. 112:19-113:18).** • **Rutledge indicates she spent quite a fair amount of time "outside of work," a "full weekend," working on this presentation. (*Id.* at 113:14-20).** • **The "presentation" was never shared with the hiring managers. (Rutledge Dep. 114:4-13).**
Hom	-Liked to come up with ideas to improve efficiencies (Hom Dep. 30:2-8). • **Hom merely indicated that the thing he likes best about his job is that he can "express his ideas" about making his tasks more efficient (*Id.* at 30:2-4).** -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). • **Hom indicates that "service requests" are basically instances in which local stores ask CoRE to move a candidate forward in the process, regardless of whether a CoRE Recruiter has screened the applicant. (*Id.* at 19:13-17).** • **The "system" created by Hom was essentially an Excel spreadsheet, in which Hom wrote each store number, highlighted each "service request" in green if he was successful in moving along the candidate (without an interview), or red if unsuccessful with an indication why (i.e., the store had not provided enough candidate profile information to CoRE). (*Id.* at 20:6-13).** • **The "accountability" was simply ensuring the store had provided enough candidate information to CoRE to move them through the system. (*Id.* at 19:13-20:5).** -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; Ex. 4-6). • **This weekly "analysis" concerned how many in-store interviews are scheduled by Hom, in comparison to the team as a whole, and how many positions were placed on "hold." (*Id*. at 68:19-25).** • **Both Hom and his co-workers were required to submit these weekly reports of performance at the direction of their supervisor. (*Id.* at 69:17-70:2).**

	-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). • **Hom indicated this idea was never implemented. (*Id.* at 31:6-7).**
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). • **Burchett indicates in the beginning (prior to becoming a Kroger employee) half of her time was spent on the Nashville rollout, and when she became a Kroger employee more than half was spent on "recruiting" (i.e., regular screening and scheduling outside of Nashville) (Burchett Dep. 56:2-16).** • **Burchett indicated she was working "many hours" outside of her normal recruiting duties performing rollout activities for Nashville, including weekends. (*Id.* at 52:8-53:3).** • **Rollout activities primarily included setting up new job requisitions for Nashville (a function typically reserved for hourly Recruiting Assistants ("ASM's"), along with making screening calls. (*Id.* at 53:13-54:1).** • **Burchett was "still responsible to meet daily numbers, whether it was helping out with southwest or mass hire, because [she] was also helping out with mass hire." (*Id.* at 48:5-10).**

Beyond these exaggerations, the fact remains that none of these sporadic assignments took away from Recruiters having to meet their daily numbers, nor was it part of their primary job duties, which again are to "Review applications, perform phone screens, and schedule candidates for an in-store interview."

4. Conducting "training."

Finally, Kroger claims that class members Hickey, Rutledge, Burchett and Hom all helped train new CoRE Recruiters "as part of their job duties." The "training" that Kroger references is little more than a new CoRE Recruiter sitting in and watching how a current employee does their screening and scheduling functions, and possibly allowing the new employee to perform their own phone screens while the current employee watches (i.e., job shadowing). (Burchett Dep. 74:23-

75:19; Hickey Dep; 82:8-18; 83:2-10; Rutledge Dep. 110:2-111:1; Hom Dep. 80:22-81:11; Hardesty Dep. 148:1-21). This "training" is hardly the type of job duty that would make certain CoRE Recruiters exempt while others are not. In fact, the testimony provided by class members—that new employees would sit and observe them on the phones—re-affirms that the primary job duty of *all* CoRE Recruiters was reviewing candidate applications, conducting "phone screens," and scheduling applicants for an in-store interview. The referenced training does nothing more than confirm that all CoRE Recruiters were to be trained such that they would be readily interchangeable, and correspondingly similarly situated.

II. LAW AND ARGUMENT

Kroger entirely focuses on the FLSA's administrative exemption in order to claim that the resolution of this case "will require an individualized analysis of liability and damages" as to each plaintiff, making their collective treatment untenable. *See* Defendant's Motion for Decertification, Doc#47, pg. 20. Based upon the facts set forth above, however, nothing could be further from the truth. Evidence adduced to date makes clear that *all* CoRE Recruiters were (a) affected by the same single Kroger policy decision to classify them as exempt under the FLSA, (b) subject to the same Kroger job description and training, outlining common job duties applicable to all Recruiters, (c) were entirely interchangeable (and in fact were regularly interchanged) between Kroger teams and divisions, (d) performed the same primary job duties of screening and scheduling online job applicants, and (e) shared numerous other factual similarities, including their work location, management structure, applicable Kroger policies and procedures, training and orientation, use of Kroger provided software and phone systems, and more.

Given these similarities, a determination as to the legality of Kroger's single policy decision to classify all CoRE Recruiters as FLSA exempt under the administrative exemption will

clearly apply to one CoRE Recruiter the same as it would to another. Further, the fairness and procedural impact of this case warrant certification, given that it will allow the class members to pool resources for claims which they may not be able to bring on their own, and avoid wasting of judicial resources in having to litigate 26 separate lawsuits when all could be tried as one.

A. Legal Standard

Under the FLSA, an employer generally must compensate an employee "at a rate not less than one and one-half times the regular rate at which he is employed" for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). Congress passed the FLSA with broad remedial intent to address "unfair method[s] of competition in commerce" that cause "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. *Monroe v. FTS USA, LLC*, 2017 U.S. App. LEXIS 10962 at *14 (6th Cir. 2017) citing *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir. 2015) and 29 U.S.C. § 202(a). The provisions of the statute are "remedial and humanitarian in purpose," and "must not be interpreted or applied in a narrow, grudging manner." *Id.*

To effectuate Congress's remedial purpose, the FLSA authorizes collective actions "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 USC § 216(b). *See also Monroe*, 2017 U.S. App. LEXIS 10962 at *12. Courts in the Sixth Circuit and elsewhere typically bifurcate certification of FLSA collective action cases into two stages. *Id*. At the first stage, conditional certification may be given along with judicial authorization to notify similarly situated employees of the action. *Id*. Once discovery has concluded, the district court—with more information on which to base its decision and thus under a more exacting standard—looks more closely at whether the members of the class are "similarly situated." *Id.*

The Sixth Circuit in *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009) set forth the legal standard for determining whether employees are similarly situated for purposes of an FLSA collective action. In doing so, the Court set forth three non-exhaustive factors to review: (1) "the factual and employment settings of the individual plaintiffs;" (2) "the different defenses to which the plaintiffs may be subject on an individual basis;" and (3) "the degree of fairness and procedural impact of certifying the action as a collective action." *O'Brien v. Ed Donnelly Enterprises, Inc.* 575 F.3d 567 (6th Cir. 2009). Further, the Court stated that, while not required, "it is clear that plaintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs." *Id.* at 585.

B. <u>The factual and employment settings of CoRE Recruiters.</u>

The first *O'Brien* factor, the factual and employment settings of individual plaintiffs, considers, "to the extent they are relevant to the case, the plaintiffs' job duties, geographic locations, employer supervision, and compensation." *Monroe*, 2017 U.S. App. LEXIS 10962 at *27. This factor focuses on whether the Plaintiffs are similarly situated. As previously noted, all CoRE Recruiters worked at the same location under the same management structure.

Moreover, one particularly definitive factor at this stage of the analysis is whether all members of the class were "impacted by a single decision, policy, or plan." *Noel v. Metro. Gov't of Nashville & Davidson Cnty.*, 2015 U.S. Dist. LEXIS 75715 at *11 (M.D. Tenn. 2015). The existence of this commonality may assuage concerns about plaintiffs' otherwise varied circumstances. *Id.*

1. <u>Kroger's uniform decision to classify all CoRE Recruiters as "FLSA Exempt" is compelling evidence that CoRE Recruiters are similarly situated.</u>

Here, Kroger completely omits from its motion the fact that CoRE Recruiters were uniformly impacted by a single decision, policy or plan by Kroger to classify all CoRE Recruiters as exempt from the FLSA's overtime requirements, without regard to their individual teams, store assignments, supervisors, or other circumstances. Numerous courts have found that such common policy decisions, based upon common job duties, are definitive of the similarly situated analysis. *See Pendlebury v. Starbucks Coffee Co.* 518 F. Supp.2d 1345, 1352 (S.D. Fla. 2007) citing *Nerland et al. v. Caribou Coffee Company, Inc.* 2007 U.S. Dist. LEXIS 97166,* 29 (D. Minn. 2007)("The Court finds it disingenuous for Defendant, on one hand, to collectively and generally decide that all store managers are exempt from overtime compensation without any individualized inquiry, while on the other hand, claiming that plaintiffs cannot proceed collectively to challenge the exemption."); *Judkins v. Southerncare, Inc.*, 74 F. Supp.3d 1007, 1011 (S.D. Iowa 2015)("Plaintiff correctly argues that many courts have been heavily persuaded by an employer's decision to classify an entire category of employees as exempt."). *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 184 (S.D. Ohio 2012) (applying Rule 23 analysis to reject the employers' opposition to certification, stating that "all of the purported critical differences were not enough to stop the Defendant from conducting a blanket audit in determining whether to classify all MLOs as exempt from overtime pay requirements, to classify them all as exempt from such requirements in 2006, or to reclassify them all as entitled to overtime pay in 2012.").

Similar to the above-cited cases, Kroger's uniform classification decision was based upon common job duties of CoRE Recruiters, which were set forth in a uniform job description, reviewed by CoRE's General Manager Buck Moffett, and made on a single collective basis. Such a policy decision alone is definitive evidence that CoRE Recruiters should be treated collectively for purposes of this lawsuit. Further, for Kroger to now claim that the class members must be

analyzed individually under the exemption, when it failed to engage in such an individualized analysis in 2014, is simply disingenuous.

2. Kroger's common job description and training documents indicate that CoRE Recruiters have the same job duties.

Beyond Kroger's common policy decision to classify CoRE Recruiters as exempt, Kroger-provided documents also make clear that all CoRE Recruiters have the same job duties of screening and scheduling applicants. Kroger's "corporate position profile," which formed the basis on which CoRE Recruiters' were uniformly classified as exempt, indicates upfront that "the Recruiter will *assess and screen applications*, conduct *phone screens*, prepare interview packages, and *present stores with a qualified slate of applicants*." Kroger concedes that this job profile is applicable to all CoRE Recruiters "no matter what team they may have worked for." Schiff Dep. 54:2-9. CoRE training documents also indicate that the three "main duties" of *all* Recruiters are to (1) Review Candidate's Applications; (2) Phone Screen Candidates and Schedule Interviews; and (3) Forward Candidates to Store Specific Job Requisitions. Such documents describing the common job duties of *all* CoRE Recruiters is further compelling evidence that the CoRE Recruiters are similarly situated.

Kroger cites to *Wade v. Werner Trucking Co.* 2012 U.S. Dist. LEXIS 156257 at *15 (S.D. Ohio 2012) (which in turn quotes *Schaefer v. Indiana Michigan Power Co.* 358 F.3d 394, 400 (6th Cir. 2004)) for the false implication that this Court cannot focus on general job descriptions contained in resumes, position descriptions, and evaluations in determining whether employees are similarly situated. However, Kroger misstates what these cases actually hold. The court in *Schaeffer* merely considered and rejected an *employer's* argument that the court must rely on such job descriptions and resumes, and instead held that such documents *do not preclude the employee* from arguing that his day-to-day activities differ from those described in these documents—such

actions merely raise credibility questions for the factfinder. 358 F.3d 394, 400 (6th Cir. 2004). *Ward*, in quoting *Schaeffer*, further explained that this "does not mean, however, that a company's own job descriptions are irrelevant in considering, at the initial notice stage, whether a potential putative class is similarly situated." *Id.* at *15.

The fact is, position descriptions are extremely relevant to determining whether employees are similarly situated for purposes of collective treatment. Indeed, numerous courts have utilized them in finding employees "similarly situated." *See Nerland v. Caribou Coffee Co.*, 564 F. Supp.2d 1010, 1019 (D. Minn. 2007)("The job description is competent generalized evidence of the uniform scope of duties and responsibilities of all Caribou store managers, and a factual demonstration that every Caribou store manager, including the named and opt-in plaintiffs in this FLSA action, were expected to perform these duties."); *Kelly v. Healthcare Servs. Grp., Inc.* 106 F. Supp.3d 808, 815 (E.D. Tex. 2015) ("This uniform job description together with these precise job routines are pieces of evidence that suggest uniformity and define the potential scope of the opt-in Plaintiffs' job duties."); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1262 (11th Cir. 2008)(affirming district court's decision not to decertify class, relying in part on Family's Dollar's same job description for all plaintiffs, which outlined "cookie-cutter tasks mandated by a one-size-fits-all corporate manual."). Here, Kroger's documents clearly indicate that it contemplated that ***all*** CoRE Recruiters would be performing the same job functions—screening and scheduling online job applicants. They are thus further evidence that the CoRE Recruiters are similarly situated in their factual and employment settings.

3. CoRE Recruiter testimony indicates that all CoRE Recruiters had the same primary job functions, and were regularly interchanged between teams.

Beyond the uniform classification decision and Kroger's documents containing such identical job duties, Kroger is also incorrect in claiming that the CoRE Recruiters day-to-day job

duties are "worlds apart." As set forth above, multiple class members explicitly testified that phone screening applicants and scheduling interviews was their main common job function. Chipman Dep. 83:3-6; Hardesty Dep. 174:25-175:7; Hickey Dep. 47:20-21; Rutledge 121:14-16. Further, analysis of Kroger's weekly phone record data indicates that the ***CoRE Recruiters on average spent 80-90% of their time in the "phone loop" receiving inbound and making outbound calls to candidates***. **Exhibit 5** to Smith Affidavit.[16] The majority of the balance of the CoRE Recuriters' time was spent either preparing for, or accounting for, the performance of their primary duties and their time in the "phone loop." CoRE Recruiters were regularly "coached" in the event that they did not meet their daily numbers or goals of calls made or interviews scheduled. Kroger kept weekly call logs of the exact numbers of calls made, calls received, total recruiting time, and other applicable data with respect to a CoRE Recruiter's screening and scheduling functions. *See* **Exhibit 5** to Smith Affidavit.

Further, Kroger's own management concedes that *CoRE Recruiters were entirely interchangeable between teams and divisions, and that management would in fact move recruiters around to different divisions if some areas were "more pressed than others."* Moffett Dep. 106:7-23. This was not only conceded to by Kroger, it was confirmed by nearly every class member, who all indicated they regularly assisted or supported other teams in their screening and scheduling duties.

Simply put, there is no plausible argument that CoRE Recruiters did not share the same primary job duties of screening and scheduling candidates, and that they performed such common duties on a consistent basis.

[16] As set forth in the factual background, Kroger also set forth performance standards across all teams, requiring that CoRE Recruiters meet certain goals with respect to phone calls made and interviews scheduled, typically around 40-45 calls per day, and 15-25 interviews scheduled. Multiple class members testified to, and Kroger documents indicate, that "coachings" or "performance discussions" were conducted if a Recruiter did not meet their goals.

4. Kroger's focus on various "ways" in which class members perform their common job duties is inappropriate and irrelevant.

In its Motion, Defendant completely focuses on certain minor variances as to *the ways in which* class members perform these common "screening" tasks, in order to claim that the class members are not "similarly situated." This again misses the point—the only relevant question at this stage of the analysis is whether the members of the class are sufficiently similar in the essential criteria needed to uphold or reject the exemption, thereby warranting collective treatment. *See Pendlebury v. Starbucks Coffee Co.*, 518 F. Supp.2d 1345, 1353 (S.D. Fla. 2007). As set forth above, class members all had the same primary "screening" duties of (1) reviewing an application; (2) conducting a phone screen; and (3) scheduling an applicant for an in-store interview. None of them had the discretion to make or recommend a hiring decision, or to perform any action beyond scheduling an applicant for an in-store interview. The fact that a limited number of employees may go about the performance of scheduling such an interview in different ways does not mean that they have different responsibilities. *Id.* at 1355. So long as the tasks are similar, not identical, class treatment is appropriate. *Id.* citing *Anderson*, 488 F.3d at 953.

5. *Hill v. R&L Carriers* is entirely distinguishable from the present case.

Kroger cites to *Hill v. R&L Carriers*, a Northern District of California case, claiming it is a situation "nearly identical" to the present case. A review of *Hill* shows this to be false. First, *Hill* concerns former and current "First Shift Supervisors/City Dispatchers" who worked at an employer's various terminals in different cities and states, a far cry from employees performing recruiting duties at a single call center in Blue Ash, Ohio. *Id.* at *3. Second, because of the differing sizes of the terminals where the dispatchers worked, the "dispatchers" had different duties, and exercised differing levels of discretion. *Id.* at *12, 13-16. The lead plaintiff in *Hill* relied upon an operations manual, required approval from his terminal manager in performing

many actions as a dispatcher, played a very limited role on personnel matters (hiring, firing, etc.), never met with drivers before shift start, and never provided training to drivers. *Id.* at *12. Other class members in *Hill* assumed responsibilities for terminal operations, assisted in personnel matters (interviewing driver candidates, and making or recommending hiring decisions), provided monthly trainings to new employees, and were unaware of (or rarely utilized) an operation manual for their position. *Id* at *13-16.

In stark contrast, ***all*** CoRE Recruiters worked at the same location, and performed the same tasks, worked under the same management structure, were entirely interchangeable between teams, reviewed the same online job applications, testified to using the same "Recruiting Script," asked candidates three pre-established questions, were subject to the same recruiting numbers, and spent the vast majority of their time in the phone systems making outbound and receiving inbound calls. The contention that *Hill* is in any way synonymous with the current claims is simply off-base.

6. CoRE Recruiters have innumerable other similarities in their factual and employment settings.

Finally, Kroger itself has conceded numerous ways in which the factual and employment settings of CoRE Recruiters are similar, including that:

- All Recruiters have the same "Recruiter" job title. (*See* **Exhibit 2** to Smith Affidavit).
- All Recruiters work out of one facility in Blue Ash, Ohio. (Schiff Dep. 12:4-11).
- All Recruiters are subject to the same management structure, reporting to a recruiting supervisor, who reports to a recruiting manager, who reports to the CoRE General Manager. (*See* Organizational Chart, attached as **Exhibit 3** to Smith Affidavit).
- All Recruiters are subject to the same Kroger policies and procedures, including the Kroger GO Associate Handbook. (Victoriano Dep. 32:7:12).
- All Recruiters have access to the shared drive on the CoRE computer system that permits recruiters to have access to shared documents. (Schiff Dep. 60:13-19)
- All Recruiters were provided the same PowerPoint presentations for training, including training for job application reviews, phone screening, script expectations and performing "service requests." (*Id.* at 95:5-96:7; 105:14-25; 122:14-123:7; 130:2-14; 141:17-142:7).

- All Recruiters, regardless of what team they are on, have the same provided job duties of reviewing a candidate's applications and phone screening applicants and scheduling for interviews. (*Id.* at 100:20-102:3; 103:2-9; *See also* Exhibit 12 to Schiff Dep.).
- All Recruiters, when reviewing applications, are required by Kroger to look at the candidates' information in the system, review information that is listed in their application, review the candidates' assessment results, review the candidate's availability, as well as other information in the system. (*Id.* at 103:10-22).
- All Recruiters, after they have reviewed the candidate's application, take the next step of calling the applicant for a phone screening. (*Id.* at 104:1:10).
- All Recruiters are provided an overview of script expectations and different portions of the script for directions on how to use the current script for a phone screening. (*Id.*at 129:5- 131:18).
- All Recruiters are subject to the provisions for presenting the phone script, including introduction, position details, the screening questions and the portion in declining to schedule an applicant for an in-store interview. (*Id.* at 132:18- 140:20).
- All Recruiters were subject to the directions for voicemail and in-bound call screening. (*Id.* at 140:21-141:10).
- All Recruiters were provided the Recruiting Script in Exhibit 22 of the Schiff Deposition during the time it was in effect, in order to provide an "overview of information to be shared with candidates" during screenings. (*Id.* at 160:14-20).
- All Recruiters were provided with Exhibit 31 in the Schiff deposition, which provided instructions for making notations on candidate profiles during the time those set of instructions were in use. (*Id.* at 172:2-8).
- All Recruiters who were being job shadowed by new recruiters would be given a job shadow checklist. (*Id.* at 177:1-25).
- All Recruiters in 2016 were subject to a service level agreement of 75% of applicants being hired in 9 days; 95% of applicants hired in 13 days. (*Id.* at 180:22-181:20).
- All Recruiters used the same scheduling system regarding scheduling their hours of work. (*Id.*at 203:11-14; *See also* Exhibit 42 to Schiff Dep.).
- All Recruiters have access to Quick Reference Guides (QRG's) on various topics on Kroger's shared drive—for example, moving candidates from general to specific job requisitions or reviewing the status of background checks. (*Id.* at 211:24-213:24).
- All Recruiters, after the phone screen, perform the third task of forwarding the candidate to the store, to a specific job requisition. (*Id.* at 104:11-105:3).
- All Recruiters are required to confirm identifying information for each applicant. (*Id.* at 114:1-115:6).
- All Recruiters, are required to review the application of each candidate to ascertain that no other CoRE Representative has contacted them, check on their status, make sure they meet the minimum age requirements, and ascertain if they are re-hirable or not (if applicable). (*Id.* at 115:7-116:1).
- All Recruiters, as part of the application review process set forth in Bates No.002244, must review aspects of available information regarding whether the

applicant meets minimum job requirements, has the desired work experience (as determined by the store), has been terminated or has had cash shortages, or has a criminal record. This information is available to each recruiter from a "profile" created by the applicant. (*Id.* at 116:2-121:16)

- All Recruiters were converted from FLSA exempt to FLSA non-exempt status on December 1, 2016. (*Id.* at 54:2-25).

The overwhelming evidence of similarities in the factual and employment settings of the CoRE Recruiters makes their collective treatment appropriate in this case.

C. <u>The potential defenses in this case pertain to the CoRE Recruiters as a whole</u>

The second *O'Brien* factor is whether the potential defenses pertain to the opt-in class as a whole or whether many different defenses must be raised separately with respect to each individual plaintiff. *Crawford v. Lexington-Fayette Urban County* Gov't, 2008 U.S. Dist. LEXIS 56089 at *36 (E.D. Ky. 2008). However, the Sixth Circuit has repeatedly noted that "individualized defenses alone do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation." *See Monroe*, 2017 U.S. App. LEXIS 10962 at *34, citing *O'Brien,* 575 F.3d at 584-85 (holding that employees are similarly situated if they have "claims . . . unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct.").

1. <u>Kroger alleges that the administrative exemption applies to CoRE Recruiters.</u>

The FLSA provides certain exemptions from the overtime requirements of §207, including the administrative exemption, which are "to be narrowly construed against employers in order to further Congress's goal of providing broad federal employment protection." *Wilks v. Pep Boys,* 2006 U.S. Dist. LEXIS 69537, at *32 (S.D. Ohio 2006) (citing *Fazekas v. Cleveland Clinic Found. Healthcare Ventures, Inc.*, 204 F.3d 673, 675 (6th Cir. 2000). In order to claim an exemption, an employer has the burden of proving, 'by a preponderance of the clear and affirmative evidence,' that each employee meets each of the exception's requirements." *Id.* (citing *Acs v. Detroit Edison*

Co., 444 F.3d 763, 767 (6th Cir. 2006)); *See also Keyes v. Car-X Auto Serv.*, 2009 U.S. Dist. LEXIS 108981 (S.D. Ohio 2009); citing *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501-502 (6th Cir. 2007). Courts routinely certify class and collective actions in the administrative exemption context. *See Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 185 (S.D. Ohio 2012); *Kelly v. Healthcare Servs. Grp., Inc.* 106 F. Supp.3d 808, 828 (E.D. Tex. 2015); *Judkins v. Southerncare, Inc.*, 74 F. Supp.3d 1007, 1011-12 (S.D. Iowa 2015); *Ahle v. Veracity Research Co.*, 738 F. Supp.2d 896, 923-924 (D. Minn. 2010); *Perez v. Allstate Ins. Co.*, 2014 U.S. Dist. LEXIS 130214 at *18 (E.D.N.Y. 2014); *Garcia v. Freedom Mortg. Corp.*, 790 F. Supp.2d 283 (D.N.J. 2011); *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 165-166 (S.D.N.Y.2014).

In this motion, it is unclear whether Kroger alleges that the administrative exemption affirmative defense applies to all CoRE Recruiters. However, Kroger has raised the administrative exemption as an affirmative defense in this litigation. It also uniformly applied the administrative exemption in 2014 when it classified all CoRE Recruiters as exempt. This factor strongly weighs in favor of finding the CoRE Recruiters similarly situated.

Neverthless, Kroger claims in its motion that a trier of fact "will have 'to go through an individualized appraisal' of each of the recruiter's actual job duties and responsibilities, which could vary by team, store assignments, supervisor, and the recruiter's individual circumstances." (Defendant's Motion for Decertification, pg. 19). This argument ignores the fact that **Kroger applied the administrative exemption across-the-board to every CoRE Recruiter—no matter the team, store assignments, supervisor, and individual circumstances**. If Kroger was able to apply the exemption in such a uniform fashion based upon the common job duties of CoRE Recruiters, there is no reason that a jury cannot evaluate the legality of such a decision at trial based upon similarly representative evidence.

Moreover, this argument ignores the overwhelming evidence set forth above that the CoRE Recruiters, as a group, shared innumerable factual details with respect to their job duties and day-to-day work, making a determination as to one's exempt status representative of the other. *See Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1263 (11th Cir. 2008)("Given the volume of evidence showing that the store managers were similarly situated, and the fact that Family Dollar applied the executive exemption across-the-board to every store manager—no matter the size, region, or sales volume of the store—Family Dollar has not shown clear error in the district court's finding that its defenses were not so individually tailored to each Plaintiff as to make this collective action unwarranted or unmanageable.").

2. While not necessary at this stage, evidence makes clear that the administrative exemption does not apply to any of the CoRE Recruiters' primary job duties.

While a merits determination at this stage is premature, evidence to date also makes clear that no class members' primary job duty as a CoRE Recruiter involves the exercise of "discretion and independent judgment with respect to matters of significance" as required by the administrative exemption. 29 CFR § 541.202. This is made clear by relevant Department of Labor (DOL) regulations, specifically 29 CFR § 541.203(e), which provides a critical distinction between *human resources managers* who formulate, interpret or implement employment policies, make hiring decisions or recommendations for hiring, and set the minimum standards for particular jobs/employment, versus *personnel clerks* who merely "screen" applicants for minimum qualifications and "fitness" for employment, and submit a group of qualified applicants to the human resources manager for hiring:

> Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. **However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for**

> **employment generally do not meet the duties requirements for the administrative exemption**. Such personnel clerks typically will **reject all applicants who do not meet minimum standards for the particular job or for employment by the company**. The minimum standards are usually set by the exempt human resources manager or other company officials, **and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials**. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager **who makes the hiring decision or makes recommendations for hiring** from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

29 CFR § 541.203(e)(emphasis added). This regulation, together with the evidence cited above, shows that no CoRE Recruiters, no matter what "discretion and independent judgment" they exercise in screening candidates, will fall into the category of exempt job duties contemplated in § 541.203(e). In preparing for a phone screen, CoRE Recruiters review online job applications for items such as availability, job preference, and criminal history, all in an effort to assess whether an applicant is minimally qualified for an open position. In conducting a phone screen, a CoRE Recruiter simply asks three questions, pre-established by Kroger, in an effort to determine the employee's "fitness for employment." In scheduling the applicant for an in-store interview, the CoRE Recruiter is presenting the local store with a pool of qualified applicants, from which the local store will make a hiring decision from the group.[17] Despite all of Kroger's arguments as to alleged differences among class members, even the CoRE Recruiter who exercises "complete discretion and independent judgment" with respect this screening and scheduling process still does not meet the duties requirement for the administrative exemption.

3. Kroger alleges that the "good faith" affirmative defense applies to all CoRE Recruiters.

[17] Buck Moffett concedes in testimony that the expectation of CoRE Recruiters was to send between two and three candidates for each open position. (Moffett Dep. 66:1-9).

Beyond the administrative exemption, Kroger has also alleged that the good faith defense commonly applies to a potential liquidated damages award to class members in this case. *See* Defendant's Eleventh Affirmative Defense, Doc#7, pg. 10. "If an employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]…the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of such Act." 29 U.S.C. § 260; *See also Visner v. Mich. Steel Indus.*, 2015 U.S. Dist. LEXIS 95938 at *11 (E.D. Mich 2015)("To be relieved of liability for liquidated damages, the employer has the "substantial burden" of providing to the trial court that its acts giving rise to the suit are *both* in good faith *and* reasonable."). To prove that it acted in good faith, an employer must show that it took affirmative steps to ascertain the Act's requirements, but nonetheless violated its provisions." *Martin v. Ind. Mich Power Co.*, 381 F.3d 574, 584 (6th Cir. 2004). "The employer has an affirmative duty to ascertain and meet the FLSA's requirements." *Id.*

Because this defense will either apply or not apply[18] uniformly to all CoRE Recruiters, based upon the single decision in 2014 to classify such CoRE Recruiters as exempt, this defense also favors collective treatment.

D. <u>The degree of fairness and procedural impact warrants class certification.</u>

The third factor, the degree of fairness and the procedural impact of certifying the case, also supports certification. The policy behind FLSA collective actions and Congress's remedial intent is to consolidate many small, related claims of employees for which proceeding individually would be too costly or impractical. *See Monroe*, 2017 U.S. App. LEXIS 10962 at *36, citing

[18] It is the Plaintiffs' position that Krogers' defense will fail.

Hoffman-Laroche Inc. v. Sperling, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed. 2d 480 (1989)(noting that FLSA collective actions give plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources."). Where employees allege a common, FLSA-violating policy, "[t]he judicial systems benefits by efficient resolution in one proceeding of common issues of law and fact." *Monroe*, 2017 U.S. App. LEXIS 10962 at *36.

Here, the weight of authority and the preservation of judicial resources favors collective adjudication in light of the common policy of Kroger in classifying CoRE Recruiters as exempt, and the numerous similarities in the day-to-day job duties of the CoRE Recruiters. Not only would decertification place each plaintiff back at square one without the benefit of pooled resources, but would also require this Court to repeatedly consider whether each CoRE recruiter individually was properly classified as exempt, and if not, whether the good faith defense applies to the classification decision with respect to that recruiter. "Such a result is antithetical to the policy behind collective actions under § 216(b) of the FLSA: allowing plaintiffs to vindicate their rights by efficient resolution in one proceeding of common issues of law and fact arising from the same improper practice." *Crawford*, 2008 U.S. Dist. 56089 at *44.

III. CONCLUSION

The Named and Opt-In Plaintiffs have made a sufficient showing that their claims are suitable to continue toward trial as a collective action. As such, Named Plaintiffs respectfully request that Defendants' Motion for Decertification be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served electronically through the District Court's electronic case filing system upon David K. Montgomery, Esq., Jackson Lewis P.C., PNC Center, 26th Floor, 201 East Fifth Street, Cincinnati, Ohio 45202, this 31st day of July, 2017.

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