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' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Rule 23(a)'s commonality and typicality requirements are carefully crafted to ensure that the class action mechanism is limited to the narrow circumstance for which it was intended: the rare case where the putative class members' claims can be resolved on an aggregate basis using common evidence, thus promoting judicial economy and efficiency. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 (1982) (the principal purpose of the class action procedure is "efficiency and economy of litigation") (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)). As the Supreme Court has explained: "[The putative class members'] claims must depend on a common contention….That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims **in one stroke.**" *Dukes*, 564 U.S. at 350 (emphasis added). Thus, with respect to Rule 23(a), "[w]hat matters to class certification . . . **is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.**

Courts in this District (and many others) have found that proposed classes lack commonality and/or typicality where, as here, factual differences among class members could affect the application of an exemption relevant to state overtime laws. *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529 (S.D. Ohio 2013); *Hughes v. Gulf Interstate Field Servs.*, 2015 U.S. Dist. LEXIS 88205 (S.D. Ohio July 7, 2015); *Romero v. H.B. Auto. Group, Inc.*, 2012 U.S. Dist. LEXIS 61151 at **48-50 (S.D. N.Y. May 1, 2012); *Novak v. Boeing Co.*, 2011 U.S. Dist. LEXIS 146676 at *14 (C.D. Cal. Dec. 19, 2011); *Dailey v. Groupon, Inc.*, 2014 U.S. Dist. LEXIS 119190 at **22, 28 (N.D. Ill. Aug. 27, 2014).

Here, Plaintiffs claim that class certification is appropriate is objectively inaccurate based on the testimony of potential class members. Moreover, although Plaintiffs assert that recruiters were subject to some universal policies, received similar training, and had the same job description, there is no evidence that any of these things uniformly restricted CoRE recruiters' ability to exercise discretion and independent judgment in performing their jobs. Indeed, the evidence establishes that the purported "common" policies and procedures **encouraged** recruiters to exercise discretion in selecting best-fit candidates for open positions. But whether recruiters actually exercised this discretion, and to what degree, varies from person to person. In

fact, some class members admit that they were trained to exercise discretion to select only best-fit candidates but failed to follow the training.

Plaintiffs' reliance on this Court's decision in *Swigart* is misplaced. In *Swigart*, unlike here, there was no indication that any significant differences existed that would have impacted the administrative exemption (upon which the employer relied). *Swigart* certainly does not stand for the proposition that the dispositive differences established by testimony in this case must be ignored and certification should be granted whenever employees use the same workplace tools, follow some common policies, or are classified as a group. Such a construction would be contrary to the Supreme Court's mandate that courts conduct a "rigorous analysis" into the Rule 23 requirements to ensure that Plaintiffs' claims will "prevail or fail in unison" and the long line of cases requiring a focus on the actual day to day duties performed by putative class members.

Plaintiffs admit that "a threshold issue" implicit in Rule 23 is whether they have proposed "an identifiable, unambiguous class in which they are members." *Tedrow v. Cowles*, 2007 U.S. Dist. LEXIS 67391 at *13 (S.D. Ohio Sept. 12, 2007). "[T]he touchstone of ascertainability is whether the class is objectively defined, so that it does not implicate the merits of the case or call for individualized assessments to determine class membership." *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008).

Here, Plaintiffs' class definition includes all CoRE recruiters who "worked in excess of forty (40) hours during any given workweek." (Dec. 55 at 28) But whether a recruiter worked more than 40 hours during any given workweek is part of the merits of Plaintiffs' claims. If an employee "worked less than 40 hours, that employee would not be entitled to overtime pay and would not have proved an FLSA violation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044 (2016). As a result, the class definition is flawed and certification would be improper.

The flawed class definition also affects numerosity because it is unclear how many recruiters it covers.

The adequacy requirement "tends to merge with typicality and commonality, each of which 'serve as guideposts for determining' whether the class action is appropriate." *Colley v. P&G*, 2016 U.S. Dist. LEXIS 137725 at *30 (S.D. Ohio Oct. 4, 2016). Named Plaintiffs Hardesty, Hickey, and Chipman are all former employees of Kroger, and their on-the-job experiences are completely different from a significant portion of the class they seek to represent. Moreover, lead plaintiff Joseph Hardesty has a conflict with the class because he has a separate pending lawsuit against Kroger challenging his termination. *Levias v. Pac. Mar. Ass'n*, 2010 U.S. Dist. LEXIS 11495 at **16-17 (W.D. Wash. Jan. 25, 2010).

Rule 23(b)(3)'s predominance requirement—which is "far more demanding" than even Rule 23(a)'s commonality and typicality prerequisites—obligates a party seeking class certification to demonstrate that the parties' dispute can best be resolved on an aggregate basis. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) "[A] plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole. . . predominate over those issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007). Simply put, the claims of a class meeting the predominance requirement "will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 858 (6th Cir. 2013).

Here, Plaintiffs have not met their burden to show that common questions predominate over individual ones. In fact, the evidence establishes that answers to the central question identified by Plaintiffs – whether CoRE recruiters were properly classified as exempt pursuant to the administrative exemption – can only be addressed through individualized proof.

To support their predominance argument, Plaintiffs again cite Kroger's uniform decision to classify CoRE recruiters as exempt, the CoRE recruiter job description, and vague "policies and procedures" allegedly utilized by recruiters. But none of this "evidence" relates to the key issue presented - whether the potential class members were properly classified as exempt. Moreover, time and time again courts addressing similar evidence in the context of misclassification cases have determined that alleged common classification decisions, job descriptions, and policies do not predominate over individual inquiries relevant to the administrative exemption when potential class members testify to variations in job duties and discretion. *Braun v. Safeco Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 184123 (C.D. Cal. Nov. 7, 2014); *Patel v. Nike Retail Servs.*, 2016 U.S. Dist. LEXIS 45588 at *29 (N.D. Cal. March 29, 2016); *Dailey*, 2014 U.S. Dist. LEXIS 113190 at **15-22; *In re Morgan Stanley Smith Barney LLC Wage & Hour Litigation*, 2016 U.S. Dist. LEXIS 48648 at *17 (D. N.J. April 11, 2016); *Zackaria v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 67048 at *45 (C.D. Cal. May 18, 2015).

The cases cited by Plaintiffs do not change this analysis. *Swigart* and *Laichev* are distinguishable from this case, and the court in *Hendricks* actually refused to certify a proposed class where individual differences would affect the relevant exemption analysis. Finally, the Sixth Circuit's decision in *Glazer* actually supports Defendants' position.

"The prevalence of individual questions weighs against a finding of superiority." *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 486 (S.D. Ohio 2001) (citing *In re American Medical*

Sys., 75 F.3d 1069, 1085 (6th Cir. 1996)). A single litigation addressing every difference in recruiters' job duties and the extent recruiters exercised discretion and independent judgment would present a significant burden on the Court. This is especially true where, as here, Plaintiffs have provided no trial plan or method to determine liability or award class-wide damages, as required by *Comcast Corp. v. Behrend*, 133 S. Ct. 1433 (2013). The anemic response rate to Plaintiffs' FLSA collective action also constitutes compelling evidence that the superiority requirement has not been met. *McDonald v. Ricardo's on the Beach, Inc.*, 2013 WL 228334, at *5-9 (C.D. Cal. Jan. 22, 2013).

TABLE OF AUTHORITIES

Cases

I. Introduction

To succeed on their motion for class certification, named Plaintiffs must establish (among other things) that their common contention in this lawsuit – that recruiters employed by Defendant Kroger G.O., LLC ("Kroger" or the "Company") were misclassified as exempt – is capable of being resolved "in one stroke" and "will prevail or fail in unison." Accordingly, the adjudication of Plaintiffs' common contention cannot, as a matter of law, depend on "the individual circumstances of individual class members."

As the Court is aware, Kroger has already presented polar opposite testimony from named and opt-in Plaintiffs regarding facts relevant to whether they are covered by the administrative exemption in its motion for decertification. Although this testimony, by itself, makes a single adjudication of Plaintiffs' overtime claims impossible and mandates that the collective action be decertified, it is only the tip of the iceberg.

The testimony of members of Plaintiff's entire proposed class establishes even more night and day differences related to key issues that go to the very heart of Plaintiffs' claim. Potential class members vehemently disagree about the job duties they performed, the amount of discretion and independent judgment they exercised, and the overall truth of Plaintiffs' various allegations. For example, some recruiters primarily evaluated candidates for in-store positions by reviewing application materials and conducting telephone interviews. Others were almost never on the telephone and instead trained employees, developed analytical tools to evaluate or assist the recruiting process, or designed and implemented "completely different" comprehensive recruiting strategies for hiring management and office employees. Some recruiters say they exercised **no** discretion and independent judgment in their jobs and simply passed along any candidates who did not cuss at them. Others have testified that they exercised **full** discretion and independent judgment to select only "best-fit" candidates for openings.

Federal courts have routinely denied class certification where, as here, potential class members testify to stark differences that have a direct impact on the application of the administrative exemption. Where such differences exist, a misclassification claim will not "prevail or fail in unison," as required for class certification under Fed. R. Civ. P. 23, due to the individual inquiries that must be performed to evaluate liability. To prove this point, the Court need look no further than a potential class trial in this case, which would include (1) testimony from some recruiters who say they robotically selected every candidate for open positions so long as the candidates did not cuss at them; (2) testimony from other recruiters who say they used complete discretion and independent judgment in closely examining application materials and conducting in-depth interviews to select only best-fit candidates for open positions; (3) testimony from still other recruiters who say they exercised a level of discretion and independent judgment between the two extremes; and (4) testimony from another set of recruiters who say that they performed different job duties altogether. A single trial would simply be untenable. There is no set of facts common to all potential class members that would resolve Plaintiffs' common contention in one stroke. Instead, the trier of fact would be required to analyze the circumstances of each recruiter to determine Kroger's liability on an individual basis, making class certification inappropriate as a matter of law.

Notably, Plaintiffs generally do not seek class certification based on the job duties potential class members actually performed, which is the analysis required by the Sixth Circuit in cases applying the administrative exemption. Rather, they primarily rely on Kroger's decision to classify recruiters as exempt, the fact that a single job description applies to recruiters, and the mere existence of some "common policies and procedures." Plaintiffs' argument suffers from three fatal flaws. First, the alleged "common" evidence they rely on is of little or no relevance to the key issue in the case – whether they were properly classified as exempt. Indeed, Plaintiffs fail to

indicate how the policies they reference were uniformly implemented to limit recruiters' ability to exercise discretion and independent judgment. Second, with respect to the characteristics that are determinative here, testimony from potential class members establish vast differences between recruiters, as outlined above. Most notably, some named and opt-in Plaintiffs swore that they completely disregarded Kroger policy to exercise discretion and recruit "best fit" candidates (by selecting every candidate who did not curse at them), while others say they followed Kroger's policy, exercised full discretion, and were selective with respect to candidates they chose. This testimony introduces even *more* variation that is incompatible with class treatment. Third, Plaintiffs completely ignore that federal courts have routinely determined that their alleged "common facts" are insufficient to support class certification where, as here, actual testimony from potential class members establish meaningful differences that could affect the relevant exemption analysis.

The distinguishable cases upon which Plaintiffs rely do not compel a different result. For example, in *Swigart v. Fifth Third Bank*, 288 F.R.D. 177 (S.D. Ohio 2012), there was no indication that any significant differences existed that would have impacted the application of the administrative exemption. The employer instead cited differences with respect to some marginal characteristics that did not implicate the employees' exempt status and are nothing like the polar opposite testimony from recruiters in this case regarding their job duties and the extent they exercised discretion and independent judgment. *Swigart* and the other cases upon which Plaintiffs rely do not stand for the proposition that dispositive differences relevant to the exempt status of class members must be ignored and certification granted whenever employees use the same workplace tools, follow some common policies, or are classified as a group. Such a construction would be contrary to the Supreme Court's mandate that courts conduct a "rigorous analysis" into the Rule 23 requirements to ensure that Plaintiffs' claims will "prevail or fail in unison" and the

long line of cases requiring a focus on the actual day to day duties performed by putative class members.

This case is the antithesis of a class action. The resolution of Plaintiffs' common contention in this lawsuit will depend on an individualized analysis of each class members' duties and experiences (with pertinent evidence generally coming via oral testimony). As a result, Plaintiffs fail to meet any of the requirements of Rule 23 – the failure of any one of which precludes certification.

II. Statement of Facts

A. Kroger Establishes CoRE To Recruit In-Store Positions.

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], ¶ 1) As Kroger's footprint continued to expand, the Company began developing a different recruiting model. (*Id.*, ¶ 2) 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. (*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 across the country, developing

[1] The Declaration of Donald "Buck" Moffett was previously filed at Doc. 47-1.

[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.*)

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) Members of Plaintiffs' proposed class, however, have testified to stark differences regarding whether they had these duties and the amount of discretion and independent judgment they exercised – differences that foreclose class certification as a matter of law.

B. Named And Opt-In Plaintiffs Provide Contradictory – And In Some Cases Polar Opposite – Testimony Regarding Their Job Duties And The Key Factors Related To The Administrative Exemption; Some Plaintiffs Admit That Kroger Trained Them To Use Discretion To Find Best-Fit Candidates But Say They Did Not Follow The Training.

In an effort to support their misclassification claim, named Plaintiffs have alleged 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; Doc. 55 at 21) Actual testimony, however, establishes that nothing could be further from the truth.

As outlined in Kroger's Motion for Decertification (Doc. 47), some named and opt-in Plaintiffs provided a narrow description of their job duties and stated that they exercised no discretion and independent judgment in recommending candidates for positions. But other named and opt-in Plaintiffs testified that they performed significant exempt job duties and admitted that they exercised full discretion and independent judgment in selecting and evaluating candidates for vital customer service roles. Notably, Plaintiffs' motion for class certification ignores the testimony of Corbin Hom – a member of the collective whose testimony completely contradicts Plaintiffs' theory of the case. Although this strategic decision is understandable, it highlights the clear differences even among those who have opted into this lawsuit.

Plaintiffs' motion also ignores that several opt-in Plaintiffs admitted they were trained to use discretion and judgment to find best-fit candidates for available positions. (*See, e.g.*, Deposition of Matthew Taske ("Taske Dep.") 27:25-28:3; 33:18-22; 51:16-52:15; 53:22-54:20;

Deposition of Marye Ward ("Ward Dep.") 49:14-50:24); Deposition of Kelly Rutledge ("Rutledge Dep.") 21:9-14; 42:4-10; 46:6-18) And, indeed, they were. (Moffett Dep. Ex. 9; Deposition of Rana Tavalali-Schiff ("Schiff Dep."), Doc. 40, Exhibit 11) They simply failed to follow the training at various times during their employment in order to work more quickly. (*Id.*)

The differences in the testimony of named and opt-in Plaintiffs involve several areas that are critical to an analysis of the administrative exemption. Rather than repeating these key facts here, however, Kroger will incorporate them by reference. (*See* Doc. 47, pp. 8-17)

C. Plaintiffs Claim That Class Certification Is Appropriate Because All CoRE Recruiters Performed The Same Duties In The Same Manner, But Nothing Could Be Further From The Truth; Potential Class Members Testified That They Used Complete Discretion And Independent Judgment And Oppose Plaintiffs' Lawsuit.

The testimony of named and opt-in Plaintiffs establishes significant variation related to the key issues at the heart of the administrative exemption (and Kroger's potential liability to Plaintiffs). Although this clear variation, by itself, makes class certification inappropriate, there is much more. Indeed, many potential class members vehemently disagree with Plaintiffs' characterization of their job duties and have testified to exercising **complete** discretion and independent judgment in selecting best-fit candidates for open positions and in otherwise performing their responsibilities as a recruiter, as follows.

1. Plaintiffs And Some Potential Class Members Perform Completely Different Job Duties.

Plaintiffs' motion for class certification fails at even its most basic level, as a significant number of potential class members regularly performed jobs that were completely different from the work Plaintiffs performed. For example, recruiters Aretha O'Aku and Laurie White spent substantial time recruiting for Kroger General Office ("G.O"), rather than in-store, positions. It is undisputed that G.O. recruiting "was a whole different type of recruiting from what CoRE does

to support the stores." (Declaration of Laurie White ("White Dec.")[3], ¶ 7; Deposition of Joseph Hardesty ("Hardesty Dep.") 43:2-44:23) When performing G.O. recruiting, O'Aku and White did not even perform telephone interviews. They instead "reviewed resumes candidates had submitted and, based on what the resume said, assessed fit for a given position we were looking to fill." (*Id.*) Critically, O'Aku and White were given the discretion to design and implement the G.O. recruiting process. For example, they "spent several months developing a phone script" that O'Aku later used to call candidates after White was no longer part of the project. (*Id.*, ¶¶ 6, 9) White spent all of her time for a two month period on G.O. recruiting. (*Id.*, ¶ 10) O'Aku's entire job consisted of G.O. recruiting for nearly a year. (*Id.*) After White stopped performing G.O. recruiting, she began recruiting for pharmacy positions, which was also a very different kind of recruiting. (*Id.*, ¶¶ 16-17) Notably, although White was a colleague of Hardesty and Chipman on the mass hire team, she (unlike Hardesty and Chipman) was never assigned a mass hire store to support. (White Dec., ¶ 15)

Since 2016, recruiter Shawn Scott's work "exclusively" focused on recruiting for management positions. (Declaration of Shawn Scott ("Scott Dec.")[4], ¶ 8) Scott collaborated with another recruiter to develop "a completely different process" for recruiting Co-Managers (the second-highest position within a store). (*Id.*, ¶ 9) They created a multi-step process, which included: (1) closely "scrutinizing a candidate's application to decide who was worth calling" (based on "quality of the candidate's work experience, whether he or she appeared to be a job hopper, why he or she left prior roles, etc."); (2) an initial 20-30 minute phone screen (for which Scott and his colleague created the script) focusing on assessing a candidate's motivational fit for

[3] The Declaration of Laurie White is attached hereto at Exhibit A.
[4] The Declaration of Shawn Scott is attached hereto at Exhibit B. Due to an inadvertent formatting issue, Scott's declaration contains two paragraphs labeled "6" and no paragraph labeled "10".

the position; (3) a second phone screen (lasting 45 minutes), for candidates the recruiters decided to move forward in the hiring process, during which recruiters subjectively evaluated candidates' work experiences; and (4) a final determination by the recruiters about whether to send the candidate to a final interview panel with the hiring manager. (*Id.*, ¶¶ 12-17)

Potential class member Briana Whitlow estimates that she spent **85 percent** of her time as a CoRE recruiter after August 2015 developing and administering training programs for other recruiters, recruiting administrators, and even store human resources personnel. (Whitlow Dep. 65:20-74:17) At the time Whitlow began training on a nearly full-time basis, she no longer regularly performed traditional recruiting duties, and the stores she supported were dispersed to co-workers. (*Id.* 76:3-5)

Recruiters Eric Shrider, Katelyn Davis, and Erica Brown performed duties related to reporting and other special projects during significant portions of the relevant class period. Although Shrider was classified as a recruiter, he "unofficially worked in a team lead capacity" by analyzing various reports to "see store needs and applicant activity" and "use[d] that information to put together an action plan for the whole Smith's team to attack the work during the next day." (Declaration of Eric Shrider ("Shrider Dec.")[5], ¶ 5) Shrider even developed his own reporting tools and had "special access" to Kroger's system to facilitate his research activities. (*Id.*, ¶ 6)

As discussed in Section II.C.4., *infra*, Davis similarly spent significant time developing reporting tools to analyze different recruiting metrics that have been adopted and implemented by CoRE management. (Declaration of Katelyn Davis ("Davis Dec.")[6], ¶¶ 4-5) She also worked to develop a comprehensive recruiting strategy for Kroger manufacturing facilities. (*Id.*, ¶ 6) Shrider and Brown, on the other hand, spent considerable time creating a recruiting process for a new

[5] The Declaration of Eric Shrider is attached hereto at Exhibit C.
[6] The Declaration of Katelyn Davis is attached hereto at Exhibit D.

Kroger concept store in the Pacific Northwest. (Shrider Dec., ¶ 15; Declaration of Erica Brown ("Brown Dec.")[7], ¶ 13) They "developed a start-to-finish recruiting strategy and presented it to the project's board" and implemented the strategy once it was accepted. (Shrider Dec., ¶ 15)

These facts establish that the recruiters included in Plaintiffs' proposed class performed widely varying job duties, making class certification inappropriate.

2. Potential Class Members Give Polar Opposite Testimony Regarding The Discretion And Independent Judgment They Exercised In Selecting And Evaluating Candidates.

Plaintiffs claim that class certification is appropriate because all CoRE recruiters selected and evaluated candidates for in-store positions using no discretion and independent judgment. According to Plaintiffs, recruiters merely "review an applicant's online job application, including their availability, whether they met minimum age requirements, and positions to which they had applied," call all applicants who meet the minimum qualifications, and "send along candidates as long as they provided some minimal answer, and were not rude, or did not swear on the phone." (Doc. 55 at 21) Although this assertion is supported by some members of the proposed class, it is directly contradicted by others whom Plaintiffs attempt to join in this lawsuit.

According to some potential class members, minimum qualifications were only the starting point. (Brown Dec., ¶ 9 ("I was doing much more than just screening candidates for minimal qualifications.")) For these recruiters, the main focus was exercising discretion and independent judgment "in the important work of hiring Kroger's workforce." (*Id.*, ¶ 14) These potential class members sent – at most – only two candidates for every open position, so their decisions about which candidates to send the stores significantly impacted who was ultimately hired. (Hom Dep. 72:20-73:1; Deposition of Buck Moffett ("Moffett Dep."), Doc. 46, Exhibit 9)

[7] The Declaration of Erica Brown is attached hereto at Exhibit E.

In contrast to Plaintiffs' factual representations, some potential class members testified that they carried out their important work by closely examining applications to find best-fit candidates to contact for open positions, using their independent judgment to determine whether to select or reject a candidate based on the candidate's performance during a telephone interview, and managing their own workloads.

a. Some potential class members exercised complete discretion and independent judgment in evaluating applications to select candidates for telephone interviews, while others did not.

While some CoRE recruiters testified that they called every applicant for every open position, other recruiters included in Plaintiffs' proposed class say they exercised full discretion and independent judgment in selecting applicants to contact for interviews. For example, recruiter Aiden Keenan began her recruiting process by evaluating her stores' needs and looking at applications to determine candidate qualifications. (Declaration of Aidan Keenan ("Kennan Dec.")[8], ¶ 7) Because she was "always looking for best-fit candidates to call," she used her professional judgment to assess "the applicant's previous work experience, volunteer experience, assessment score, etc. to judge which applications are the best." (*Id.*) Keenan contacted only those best-fit candidates "and not the others." And she "certainly [did not] need anyone's input or approval to decide which qualified applicants to contact and which not to." (*Id.*)

Recruiter Erica Brown similarly testified that recruiters were trained that they had ownership of the process of evaluating applications and were empowered to make independent decisions regarding who to select for interviews. (Brown Dec., ¶ 4; *see also* Schiff Dep. Ex. 11) Brown exercised her independent decision-making authority to rank applicants based on "important things" like relevant work history. (*Id.*) Based on her "best judgment," Brown decided

[8] The Declaration of Aidan Keenan is attached hereto at Exhibit F.

not to contact applicants "all the time" for a "large variety of reasons" after evaluating their application materials. (*Id.*)

After ranking and reviewing his store's needs, recruiter Eric Shrider evaluated which applicants to contact for telephone interviews based on factors he developed as a recruiting professional. (Shrider Dec., ¶¶ 8-9) According to Shrider, applicant selection was a "judgment call" based on his experience, intuition, and judgment:

> Sure, there were some basic requirements that an applicant had to satisfy (for example, an applicant has to be available overnight for an overnight position), but I usually would end up with quite a few more applicants who met the minimum requirements than I actually needed to call.
>
> This meant that I would look at other, more subjective factors to determine which applicants to call. It varies by recruiter, but I really put a priority on a candidate's prior work experience and how long they stayed at their past employers. I also really liked to see prior military experience or experience doing volunteer work or something like that….Kroger never told me that these were good things to look for on an application. Instead, they were things I developed a sense for over time, based on my experience, intuition and judgment.

(*Id.*)

Potential class members Courtney Strosnider, Scott, and Bailey Kearns also testified that they exercised complete discretion and independent judgment in evaluating applications and selecting candidates for telephone interviews based on factors like the nature and quality of candidates' relevant work experience, interests, availability, criminal history, and volunteer work. (Declaration of Courtney Strosnider ("Strosnider Dec.")[9], ¶ 3 (ranked applicants before deciding which applicants to contact; decided not to contact 20 to 40 applicants per day); Scott Dec., ¶ 4;

[9] The Declaration of Courtney Strosnider is attached hereto at Exhibit G.

Declaration of Bailey Kearns ("Kearns Dec.")[10], ¶ 3 (recruiting process starts with "selecting the most promising applications from a store's pool of online applicants"))[11]

b. Some potential class members exercised complete discretion and independent judgment in evaluating candidates during telephone interviews, while others did not.

Testimony from some potential class members also directly contradicts Plaintiffs' assertion that recruiters' job duties consisted of nothing more than passing along any candidate who provided minimal responses to interview questions or did not cuss on the telephone. (Doc. 55 at 21) Many recruiters testified that, although Kroger did provide an interview script containing broad, open-ended questions, the document was meant only as a guide and they routinely went "off-script" to ask questions they felt were important based on the discussion they had with the candidate. (Brown Dec., ¶ 5 (script was a "tool" and regularly tweaked questions "to better suit the candidate"); Strosnider Dec., ¶ 4 (went away from script as she became more comfortable in her role to go "with the flow of the conversation" with the candidate); Scott Dec., ¶ 6[1] ("Kroger suggested the questions to ask, but I could and did choose to ask additional, prodding questions when I decided they would be helpful to get more details from the candidate."); Keenan Dec., ¶ 8 ("Kroger suggested which questions to ask, but I could also choose to ask additional questions to learn more about the candidate."); Davis Dec., ¶ 8 ("I asked probing follow-up questions (that didn't appear on any script) when I determined it would be necessary or helpful in assessing a candidate."))

Some potential class members also testified that they used complete discretion and independent judgment to evaluate candidates based on how the candidates presented themselves

[10] The Declaration of Bailey Kearns is attached hereto at Exhibit H.
[11] Some potential class members testified that they considered applications for openings at other, nearby stores in their discretion. (*See, e.g.*, Scott Dec., ¶ 5)

and responded to broad, open-ended questions during the telephone interview. (Keenan Dec., ¶¶ 8-9; Kearns Dec., ¶¶ 4-5; Brown Dec., ¶¶ 5-8; Davis Dec., ¶¶ 8, 11-12; White Dec., ¶¶ 12-13; Scott Dec., ¶¶ 5-6[1]; Strosnider Dec., ¶ 6) They looked for a variety of attributes during candidate interviews, which varied by recruiter, including (1) whether the candidate was outgoing; (2) whether the candidate seemed excited to work for Kroger; (3) whether the candidate could give great examples of customer service (in prior work history or otherwise); (4) whether the candidate exhibited a positive attitude; (5) whether the candidate was friendly; (6) the substance of the candidate's responses to open-ended screening questions; (7) whether the candidate would provide customers with a great experience; (8) whether the candidate had past accomplishments; and (9) whether the candidate was someone the recruiter would want to work with. (*Id.*) These potential class members regularly declined applicants on a daily basis at the telephone interview stage. (Keenan Dec., ¶ 9; Kearns Dec., ¶ 5; Scott Dec., ¶ 6[2]; Strosnider Dec., ¶ 7; Brown Dec., ¶ 8; Shrider Dec., ¶ 11)

Critically, Kroger did not provide criteria by which candidates were evaluated. Instead, the judgment of whether to select a candidate for an in-store interview or end the candidate's employment prospects with Kroger was left to the sole discretion of the recruiter. (*Id.*; *see also* Brown Dec., ¶ 6 ("[W]e were empowered as salaried professionals to use our best judgment in assessing candidates' answers relative to a store's particular needs.")))

c. Some Potential class members managed their own workloads, while others did not.

Although some named and opt-in Plaintiffs testified that they exercised no discretion and independent judgment in managing their workload during the relevant class period (*see, e.g.*, Hickey Dep. 85:19-86:3; Taske Dep. 69:11-22), many potential class members disagree. On a daily basis, recruiter Eric Shrider ranked and reviewed the needs and applicant activity of his 27

stores in the Smith's Division. (Shrider Dec., ¶ 7) Using this data, Shrider used his judgment "to decide what stores to work on and how in any given workday." (*Id.*)

Recruiter Shawn Scott's supervisor on the Michigan team told him he could manage his workload however he saw fit. (Scott Dec., ¶ 3) Scott's supervisor took "a very hands-off approach" and told Scott, "Your district is your district. You own it." (*Id.*) Using this flexibility, Scott analyzed the needs, applicant flow, and interview availability for his stores to "decide which stores to work on, how much time and effort to spend where, and generally how to manage my day." (*Id.*)

As a floater on the Fred Meyer team, recruiter Aidan Keenan similarly used her discretion to assess where the greatest needs were on her team and where she should focus her attention. (Keenan Dec., ¶ 3)

3. The Experience Of Potential Class Members Varies With Respect To Working Closely With Store Hiring Personnel To Discuss And Continuously Improve The Hiring Process And Developing "Sourcing" Strategies To Improve Applicant Flow At Their Stores.

The testimony of potential class members reflects additional variation regarding other duties related to the selection and evaluation of candidates for Kroger positions, including the extent to which CoRE recruiters exercised discretion in communicating directly with store personnel regarding the hiring process and engaging in sourcing activities to generate applicants. Although some potential class members failed to reference any direct communications with stores, others testified to having "frequent communication" with store hiring representatives and human resources personnel to get feedback on candidates and otherwise discuss the hiring process. (*See* Scott Dec., ¶ 19) Potential class member Davis identified direct store communication as an "important aspect of the job" and testified that she and other recruiters talked with the stores to better understand needs and receive feedback on candidates. (Davis Dec., ¶ 9) Echoing the

testimony of opt-in Plaintiff Corbin Hom, Davis stated that "[t]his communication also helps encourage and develop a sense of partnership with the divisions" and enhance the candidate experience. (*Id.*; Hom Dep. 60:4-23; 61:9-23)

The same variation appears with respect to testimony from potential class members regarding "sourcing" – or generating candidates to apply for store positions – which some, but not all, Plaintiffs admit is a part of the recruiting process at CoRE. (Chipman Dep. 15:2-11; Hickey Dep. 112:8-16) Some potential class members engaged in sourcing work as CoRE recruiters, while others did not. For example, some recruiters were in close communication with their stores to brainstorm ideas to source applicants, especially when a store's applicant flow was low. (Keenan Dec., ¶ 6; Brown Dec., ¶ 12) These recruiters had "a number of opportunities to develop sourcing information" for their stores. (*see, e.g.*, Brown Dec., ¶ 12) Examples of these opportunities included identifying and researching organizations their stores could partner with to generate more applications. (*Id.*) Other recruiters, however, testified to engaging in limited or no sourcing activities.

The variation in potential class members' testimony regarding direct communication with stores and sourcing is consistent with the differences established in the testimony of named and opt-in Plaintiffs. These differences underscore the individualized assessments that would need to be conducted to resolve Plaintiffs' claims.

4. Potential Class Members Have Significant And Varying Job Duties Related To Analyzing Internal Processes To Improve Efficiencies And Change The Way CoRE Operates.

Potential class members also testified to varying job duties related to analyzing internal CoRE processes to improve the recruiting function. Some recruiters have developed new processes that have literally changed the way CoRE operates. For example, recruiter Courtney Shanks researched ways to improve the rate at which job candidates returned calls to complete

telephone interviews. (Hom Dep. 75:3-76:15) She concluded that call-back rates would improve if recruiters first sent candidates an e-mail stating that Kroger would like to proceed with their application. (*Id.*) Shanks developed and led an "e-mail pilot program" consisting of five recruiters to test her hypothesis and reported the results to management. (*Id.* at 76:24-78-23) The project was a success, and Kroger implemented Shanks's e-mail program. (*Id.* at 79:16-80:4)

Recruiter Katelyn Davis "envisioned and developed an 'efficiency reporting' tool that has helped CoRE better assess the quality of [its] recruiting efforts." (Davis Dec., ¶5) Davis identified the need for a tool that assessed a broad spectrum of recruiter performance measurements, including "how much time recruiters spent on the phones, how many interviews they scheduled, and how many of those candidates were hired by the stores," and Kroger gave her "full discretion to develop the report from scratch." (*Id.*) As referenced above, Davis spent so much time on projects like the efficiency reporting tool that she spent less time recruiting than others at CoRE. (*Id.*, ¶ 4)

Other potential class members similarly testified that they engaged in significant activities designed to analyze and improve how CoRE operated, including:

- Aidan Keenan was a member of CoRE's R&D Committee, which developed a better application process for Kroger compared to its competitors. (Keenan Dec., ¶ 12)

- Bailey Kearns and Eric Shrider represented their respective teams in a realignment process that "changed a number of recruiting practices in a number of different teams." Kearns also was part of a committee to analyze team metrics. (Kearns Dec., ¶ 8; Shrider Dec., ¶ 14)

- Erica Brown testified that, when her division first went live, recruiters "were very much involved in making…improvements and figuring out the best practice." For example, Brown worked with her colleagues to develop a better approach to rank and review candidates recruiters considered for phone screens. (Brown Dec., ¶ 3)

- Courtney Strosnider created a "blue sheet" for the mass hire team which provided various data regarding the hiring process at the store level. Recruiters on the mass

hire team regularly utilized Strosnider's "blue sheet" after its creation. (Strosnider Dec., ¶ 8)

These CoRE-related projects, the nature and scope of which varied recruiter by recruiter, illustrate yet another area relevant to the administrative exemption analysis that will have to be analyzed on an individual basis.

5. Many Potential Class Members Oppose Plaintiffs' Lawsuit.

It is critical to note that, in addition to directly contradicting Plaintiffs' characterization of CoRE recruiters' job duties and the extent to which recruiters exercised discretion and independent judgment, some potential class members expressly oppose this lawsuit. Potential class member White received the Court's opt-in notice but did not return a consent form because the lawsuit "isn't something [White] believe[s] in or want[s] to be part of." (White Dec., ¶ 23) Recruiter Shawn Scott similarly received the notice from Plaintiffs and "chose not to participate in their lawsuit because I don't agree with it." (Scott Dec., ¶ 20) Indeed, nearly 85% of putative FLSA collective action members decided against joining this lawsuit.

Plaintiffs approached potential class members Deni Arce, Carly Walz, Claire McMahon, Ellen Martin, Cindy Schwartz, and Drew Cribbet about joining the lawsuit, but they were not interested. (Hardesty Dep. 120:16-121:6, 125:4-126:10; Deposition of Derek Chipman ("Chipman Dep.") 63:13-14, 63:20-70:1) Additional potential class members oppose this lawsuit based on the discretion and independent judgment they exercised to complete their job duties. (Keenan Dec., ¶ 14; Kearns Dec., ¶ 9; Davis Dec., ¶¶ 11-12; Shrider Dec., ¶ 16; Strosnider Dec., ¶ 11)

The many differences among members of Plaintiffs' proposed class – including individuals' perceptions of this lawsuit – speak volumes and mandate against class certification.

D. Kroger Reclassifies Recruiters As Non-Exempt Employees Due To The New Department Of Labor Proposed Revisions To The White-Collar Exemption Salary Requirement.

On December 1, 2016, CoRE recruiters were reclassified as non-exempt employees. (Declaration of Theresa Monti ("Monti Dec.")[12], ¶ 1) Kroger made this decision, and announced it to employees, in November 2016 based on the Department of Labor's proposed revisions to the FLSA overtime regulations, which required that employees be paid at least $47,476 per year to be eligible for the administrative exemption. (*Id.*, ¶ 2) The Company chose to reclassify its recruiters rather than increase the salaries of all affected employees to meet the new requirement. (*Id.*, ¶ 3) There was no other reason for the reclassification (*Id.*).[13]

III. Legal Argument

The class action procedure is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). *See also Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (class actions should "not be approved lightly"). "In order to justify a departure from that rule, 'a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348-49 (2011) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). To ensure that a claim is appropriate for class-wide resolution, Rule 23 contains specific pre-requisites that a party must satisfy before a class action can be certified.

[12] The Declaration of Theresa Monti is attached hereto at Exhibit I.

[13] Opt-in Plaintiffs generally admit that no reason other than the new salary level were given for the reclassification. (Hom Dep. 12:1-9; Ward Dep. 18:15-19:24) Opt-in Plaintiffs Rutledge and Taske testified that a manager at CoRE referred to "rules and responsibilities" during a meeting about the reclassification, but admitted that the reference either related to the new salary requirement (Rutledge Dep. 141:16-142:3) or could have referred to Kroger making a case-by-case determination about which Level 4 associates (which included but was not limited to recruiters) would be reclassified. (Taske Dep. 16:12-20:15) No member of management indicated that CoRE recruiters were being reclassified because their job duties did not meet the administrative exemption's duties test. (*Id.* at 20:4-7)

First, Rule 23(a) requires that the moving party demonstrate that: (1) the class is so numerous that joinder of all members is impracticable (the "numerosity" element); (2) there are questions of law or fact common to the class (the "commonality" element); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (the "typicality" element); and (4) the representative parties will fairly and adequately protect the interests of the class (the "adequate representative" element). See Fed. R. Civ. P. 23(a)(1)-(4). The party seeking class certification must demonstrate that all of these threshold elements are satisfied, and the failure to prove even one precludes class certification. *See Davis v. Cintas Corp.*, 717 F.3d 476, 483 (6th Cir. 2013) (if a plaintiff does not satisfy each of the requirements of Rule 23(a), "her class claim fails at the threshold").

If the moving party is able to establish that the requirements of Rule 23(a) are met, it must then overcome the more significant hurdle of satisfying the requirements of Rule 23(b)(1), (b)(2), or (b)(3). *See* Fed R. Civ. P. 23(b). Here, Plaintiffs seek certification pursuant to Rule 23(b)(3), which requires the moving party to show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

At all times, the party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. In other words, the moving party must offer proof demonstrating that each condition has been met. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 560 (6th Cir. 2007) ("It is the plaintiff's burden 'to establish his right' to class certification.").

Critically, determining whether a party has satisfied the heavy burden of demonstrating its compliance with Rule 23 requires the Court to engage in a "rigorous analysis." *Davis,* 717 F.3d at 484 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364 (1982)). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Dukes,* 564 U.S. at 351. "Thus, in the class-certification context, courts are permitted to 'probe behind the pleadings,' and 'touch[] aspects of the merits.'" *Davis*, 717 F.3d at 484 (internal citations omitted).

A. Plaintiffs Cannot Satisfy Any Of The Requirements Of Rule 23(a).

1. Plaintiffs Cannot Satisfy Their Heavy Burden Of Establishing That Class Certification Is Appropriate Where Resolving Their Claims Will Require A Close Examination Of Facts Particular To Each Class Member (Commonality And Typicality).

Rule 23(a)'s commonality and typicality requirements (and, to an even greater extent, Rule 23(b)(3)'s predominance and superiority requirements, which are discussed below) are carefully crafted to ensure that the class action mechanism is limited to the narrow circumstance for which it was intended: the rare case where the putative class members' claims can be resolved on an aggregate basis using common evidence, thus promoting judicial economy and efficiency. *See Falcon,* 457 U.S. at 159 (the principal purpose of the class action procedure is "efficiency and economy of litigation") (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

The commonality requirement of Rule 23(a)(2), for instance, requires the moving party to not just recite common questions, but to "demonstrate that the class members 'have suffered the same injury.'" *Dukes,* 564 U.S. at 350 (partially quoting *Falcon,* 457 U.S. at 157). *See also In re American Medical Sys.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (finding that individual proofs, which "vary from plaintiff to plaintiff," do not satisfy Rule 23(a) and that the failure to recognize the proofs' individualized nature "highlight[ed] the error of the district judge" in certifying the class).

As the Supreme Court has explained: "[The putative class members'] claims must depend on a common contention….That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims **in one stroke.**" *Dukes*, 564 U.S. at 350 (emphasis added). Thus, with respect to Rule 23(a), "[w]hat matters to class certification . . . **is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.** Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* at 350, n. 6 (emphasis added). Rule 23(a)(3)'s typicality requirement similarly demands continuity among the putative class members' claims. *See, e.g., Sprague v. GMC*, 133 F.3d 388, 399 (6th Cir. 1998) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.").

Here, Plaintiffs claim that class certification is appropriate because all CoRE recruiters performed the same job duties in the same manner during the relevant class period. This argument is objectively inaccurate based on the testimony of potential class members – testimony that raises significant and irreconcilable differences regarding issues vital to the application of the administrative exemption to Plaintiffs' claims.[14] *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 even though they lacked final hiring authority where "they had authority to assess candidates and whether to present certain candidates to the client" and focused "to make the

[14] As the Court is aware "[t]o qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.201(a). Additionally, "an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.202(a). Notably, the Ohio Wage Act "expressly incorporates the standards and principles found in the FLSA." *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 501 (6th Cir. 2007).

determination whether a candidate would be the best 'fit' for a position and client"). Moreover, although Plaintiffs assert that recruiters were subject to some universal policies, received similar training, and had the same job description, there is no evidence that any of these things restricted CoRE recruiters' ability to exercise discretion and independent judgment in performing their jobs. Indeed, the evidence establishes that the purported "common" policies and procedures **encouraged** recruiters to exercise complete discretion in selecting best-fit candidates for open positions. But whether recruiters actually exercised this discretion, and to what degree, varies from person to person. Under these circumstances, courts have repeatedly refused to certify class actions, as outlined below.

a. Commonality and typicality cannot be established where, as here, differences among class members go to the heart of the administrative exemption analysis.

Courts in this District (and many others) have found that proposed classes lack commonality and/or typicality where, as here, factual differences among class members could affect the application of an exemption relevant to state overtime laws. In *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529 (S.D. Ohio 2013), a portion of which was cited by Plaintiffs in their motion for class certification, the court refused to certify a class of Logistics Account Executives ("LAEs") – despite the presence of a common job description and similar training and performance goals – because the record showed that the determination of whether the LAEs were exempt from receiving overtime compensation "may vary from one LAE to the next." *Id.* at 541.[15]

[15] As Plaintiffs note, the court in *Hendricks* did certify a class of LAE trainees. But the evidence showed that these trainees were provided with "a Daily Responsibilities schedule that describes in minute detail the daily duties and responsibilities of the job" and testimony from proposed class members established no differences that would be relevant to the exemption analysis. *Id.* at 539-540.

Important to the court's analysis was evidence showing differences in how LAEs "spend their time in relation to the exemptions at issue" and "how and when they exercise discretion in carrying out their duties." *Id.* For example, one potential class member testified that he had "substantial freedom in exercising discretion and receive[d] very little interference or supervision from management," while another testified that he merely "exercised some discretion but only within the guidelines and restrictions established by TQL." *Id.* (internal quotation marks omitted). Based on the evidence presented, the court determined that "the day-to-day duties and responsibilities of LAEs appear to differ in ways that may be relevant to the administrative and executive exemption." *Id.* The plaintiff could not establish commonality, so class certification was improper.[16]

Notably, multiple courts – both within and outside of the Sixth Circuit – have reached similar conclusions. *See, Hughes v. Gulf Interstate Field Servs.*, 2015 U.S. Dist. LEXIS 88205 (S.D. Ohio July 7, 2015) ("The applicability of each of these exemptions involve fact-specific inquiries regarding an employee's specific job duties…; the independent judgment exercised in the performance of said duties, the percentage of time devoted to each duty; and the supervisory capacity, if any, of each employee. While Plaintiffs' employee affidavits touch on the answers to some of these questions as they pertain to the individual affiants, Plaintiffs have not satisfied their burden of demonstrating that all individuals in the proposed class would have common answers, such that a determination of whether these exemptions apply is capable of classwide resolution."); *Romero v. H.B. Auto. Group, Inc.*, 2012 U.S. Dist. LEXIS 61151 at **48-51 (S.D. N.Y. May 1, 2012) (plaintiffs did not establish commonality because of "individualized examinations" required

[16] The plaintiff in *Hendricks* significantly narrowed his proposed LAE class to the short time period between when the LAE was first promoted to the position and when the LAE first declared a commission. During this time, the court concluded that brand new LAEs generally exercised **the same level** of discretion and independent judgment in performing their job duties. Here, of course, the evidence shows exactly the opposite, making class certification inappropriate.

to adjudicate exemption issue); *Novak v. Boeing Co.*, 2011 U.S. Dist. LEXIS 146676 at *14 (C.D. Cal. Dec. 19, 2011) (denying class certification based on lack of commonality where "[i]t is clear from the statements of these workers that they perform different amounts of exempt and non-exempt duties, have different levels of supervision, employ different amounts of independent judgment and discretion, work in different teams and environments, and have vastly different educational backgrounds"); *Dailey v. Groupon, Inc.*, 2014 U.S. Dist. LEXIS 119190 at **22, 28 (N.D. Ill. Aug. 27, 2014) ("Plaintiffs will not be able to establish 'in one stroke' whether the administrative exemption covers its Account Reps" based on "variations in how much time Account Reps spend on a particular duty" and "variations in how much 'discretion and independent judgment' Account Reps can exercise").

The evidence submitted in this case similarly establishes a lack of commonality. Plaintiffs admit that the common questions driving this litigation are "[w]hether Kroger has misclassified its CoRE Recruiters as exempt" and, relatedly, "whether CoRE Recruiters' primary duties meet the administrative exemption." (Doc. 55 at 33) They claim that class certification is appropriate because all CoRE recruiters evaluate and select candidates for in-store positions and do so using no discretion or independent judgment. (Doc. 55 at 21) A simple comparison of the testimony of potential class members proves nothing could be further from the truth. Indeed, the evidence shows that Plaintiffs' "common questions" are not "capable of classwide resolution" because they cannot be resolved "in one stroke." *See Dukes*, 564 U.S. at 350.

As outlined above, potential class members performed different job duties and exercised widely varying amounts of discretion and independent judgment in performing those duties during the relevant class period. With respect to job duties, some class members primarily reviewed applications and conducted telephone interviews to select applicants for final, in-store interviews. Others seldom, if ever, performed these duties, at least for significant periods of time. O'Aku and

White spent months developing and implementing a "whole different type of recruiting" for G.O. employees. Scott and his colleague developed and implemented yet another "completely different process" for recruiting exempt store managers. Whitlow spent the vast majority of her time training employees inside and outside CoRE using materials she created. Davis, Shrider, and Brown developed and implemented internal reporting processes, created comprehensive recruiting strategies for new business units, and completed other special projects. Moreover, various potential class members (including some named and opt-in Plaintiffs) disagree about whether and the extent to which their job duties entailed directly communicating with stores regarding the hiring process, engaging in sourcing activities, and analyzing internal processes to improve CoRE.

Even if potential class members could agree on what their job duties were, which they cannot, they still vehemently disagree about the extent they used discretion and independent judgment in performing those duties. Some potential class members said they exercised full discretion and independent judgment in reviewing applications to determine who they would interview for openings. Others said they exercised none and simply called every applicant for every job. Some potential class members testified that the script provided by Kroger for telephone interviews was meant only as a guide and they often went away from the script in their conversations with candidates. Others testified that they robotically followed the script for every interview. Some class members stated that they exercised full discretion and independent judgment in determining who was a best-fit candidate for a particular position and store after completing interviews. Others stated that they exercised almost no discretion and referred every candidate for a position who did not cuss.

These "black and white" dichotomies are stark and mandate against class certification. But it is equally important that within each of these "black and white" examples are shades of grey where Plaintiffs and other proposed class members admit to exercising varying levels of discretion.

Simply put, it is not possible for the application of the administrative exemption to be resolved with respect to Plaintiffs' proposed class "in one stroke." (Compare, for example, the testimony of Marye Ward and Shawn Scott.) As a result, Plaintiffs cannot establish commonality or typicality.[17]

b. Plaintiffs' reliance on common job descriptions, training, and classification is misplaced. The Court must analyze class members' *actual* day-to-day job duties, and there is no evidence of specific, closely prescribed procedures that would necessarily eliminate the need for CoRE recruiters to exercise independent judgment and discretion in performing their jobs.

Perhaps recognizing the critical differences in the actual experiences of potential class members outlined above, Plaintiffs do not feature this evidence to support their argument that they have satisfied the commonality and typicality requirements of Rule 23. They instead cite (1) Kroger's decision to classify all CoRE recruiters as except; (2) the fact that recruiters have a single job description; and (3) Kroger's decision to reclassify all CoRE recruiters as non-exempt in light of the new DOL overtime rules. (Doc. 55 at 32-34) This evidence is insufficient to support class certification in light of the clear differences among potential class members.

Courts within the Sixth Circuit has repeatedly held that job descriptions "are not entitled to any special weight" in determining whether employees have been misclassified by their employer. *See, e.g., Johnston v. Robert Bosch Tool Corp.*, 2008 U.S. Dist. LEXIS 80053 at *74 (W.D. Ky. Oct. 6, 2008) (citing *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 689-90 (6th Cir. 2001) ("When titles and vague job descriptions are not born out by more specific evidence, they are not entitled to any special weight."). The fact that Kroger had a single job description for CoRE

[17] The concepts "of commonality and typicality 'tend to merge' in practice because both of them 'serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 853 (6th Cir. 2013) (citing *Dukes*, 131 S. Ct. at 2551 n.5).

recruiters, therefore, does not affect whether Plaintiffs' claims can be resolved "in one stroke." "Indeed, if a uniform job description was sufficient, every business in corporate America would be subject to automatic certification of a nationwide [class] action on the basis of the personal experiences of a single misclassified employee." *Neitzke v. NZR Retail of Toledo, Inc.*, 2015 U.S. Dist. LEXIS 168224 at **6-7 (N.D. Ohio Dec. 16, 2015) (quoting *Costello v. Kohl's Illinois, Inc.*, 2014 U.S. Dist. LEXIS 124376 (S.D.N.Y. 2014)). Notably, the court in *Hendricks* rejected plaintiffs' motion to certify a class of LAEs despite the fact that a single job description applied to the position. *See* 292 F.R.D. at 535.

The same is true with respect to uniform classification decisions. *See Novak*, 2011 U.S. Dist. LEXIS 146676 at **16-17 ("[A] policy of classifying a particular group of workers as exempt is insufficient to establish commonality for an issue of misclassification 'because the policy may have accurately classified some employees and misclassified others.'") (quoting *Marlo v. UPS, Inc.*, 639 F.3d 942, 948 (9th Cir. 2011)); *Hendricks*, 292 F.R.D. at 538 (denying class certification for LEAs despite uniform classification decision). Moreover, Kroger's decision to reclassify CoRE recruiters beginning December 1, 2016 was the result of the DOL's announced revisions to the salary requirement for exempt employees. It had nothing to do with recruiters' job duties or whether recruiters had properly been classified as exempt, so this fact does nothing to support Plaintiffs' motion. Nevertheless, reclassification decisions do not provide "the common thread" required for class or collective treatment. *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 221 (D. Conn. 2003).

In support of their general evidence of commonality, Plaintiffs cite *Swigart v. Fifth Third Bank*, 288 F.R.D. 177 (S.D. Ohio 2012) and *Laichev v. JBM, Inc.*, 269 F.R.D. 633 (S.D. Ohio 2008). Both cases either pre-date and/or fail to cite *Dukes* and the Supreme Court's mandate that federal courts conduct a "rigorous analysis" of the commonality and typicality requirements to

ensure that common issues can be resolved "in one stroke." After these rulings, federal courts (including this one) have repeatedly refused to certify class actions based on differences relevant to the administrative exemption, as outlined above.

The cases are also factually distinguishable. In *Swigart*, there was no indication that any significant differences existed that would have impacted the administrative exemption (upon which the employer relied). Instead, the employer cited differences with respect to some marginal characteristics like "whether MLOs worked from home or in an office, whether or not they were issued laptops or PDAs, whether they generated business externally or from within the company, or in the types of products they sold." 288 F.R.D. at 184. These "differences" do not implicate the administrative exemption and are nothing like to polar opposite testimony from recruiters in this case regarding their job duties and the extent they exercised discretion and independent judgment. *Swigart* certainly does not stand for the proposition that the dispositive differences established by testimony in this case must be ignored and certification should be granted whenever employees use the same workplace tools, follow some common policies, or are classified as a group. Such a construction would be contrary to the Supreme Court's mandate that courts conduct a "rigorous analysis" into the Rule 23 requirements to ensure that Plaintiffs' claims will "prevail or fail in unison" and the long line of cases requiring a focus on the actual day to day duties performed by putative class members.

Laichev is not a misclassification case and the differences referenced by the employer in opposing class certification related only to damages. 269 F.R.D. at 640. Accordingly, the *Laichev* decision has no bearing on the issues presented here.

Plaintiffs have failed to meet their burden to show that their "common contention" is capable of classwide resolution. Although they have raised "common questions," the above facts establish that a class-wide proceeding would **not** "generate common *answers* apt to drive the

resolution of the litigation." *Dukes*, 564 U.S. at 350, n.6 (emphasis in original). Plaintiffs' motion for class certification must therefore be denied.

2. The Proposed Class Definition Is Flawed And, As A Result, Plaintiffs Have Not Met Their Burden To Show That The Class Is So Numerous That Joinder Is Impracticable.

Putting aside the clear differences outlined above, Plaintiffs also cannot meet the other requirements for maintaining a class action under Rule 23(a).

a. Plaintiffs' class definition begs the very legal question at issue in this case.

Plaintiffs admit that "a threshold issue" implicit in Rule 23 is whether they have proposed "an identifiable, unambiguous class in which they are members." *Tedrow v. Cowles*, 2007 U.S. Dist. LEXIS 67391 at *13-14 (S.D. Ohio Sept. 12, 2007). "[T]he touchstone of ascertainability is whether the class is objectively defined, so that it does not implicate the merits of the case or call for individualized assessments to determine class membership." *Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008). Simply put, class membership cannot "require a mini-hearing on the merits of each case." *Brecher v. Republic of Argentina*, 802 F.3d 303, 304 (2d Cir. 2015) (quotation omitted).

Here, Plaintiffs' class definition includes all CoRE recruiters who "worked in excess of forty (40) hours during any given workweek." (Dec. 55 at 28) But whether a recruiter worked more than 40 hours during any given workweek is part of the merits of Plaintiffs' claims. If an employee "worked less than 40 hours, that employee would not be entitled to overtime pay and would not have proved an FLSA violation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1044 (2016).

Indeed, Kroger's phone records, which according to many proposed class members tracked all of the time they worked at CoRE, show that the vast majority of recruiters worked less than 40

hours per week – especially when time the recruiters spent at lunch (which would not be compensable) is deducted from the recruiters' total "staffed time." (Smith Aff., Doc. 55-1, Exhibit 8; Hom Dep. 101:2-8; Keenan Dec., ¶ 13) Opt-in Plaintiff Corbin Hom also specifically testified that he never worked more than 40 hours, except for a single eight-week period during his employment. (Hom Dep. 95:15-96:4)

To the extent any recruiter challenges the accuracy of Kroger's records, or there is a question regarding whether a recruiter worked for more than 40 hours in a week, the Court would need to conduct "mini-hearings" to determine if untracked work not only pushed the recruiter beyond 40 hours, but also whether such time was de minimis or offset by time the recruiter spent engaging in personal business. As a result, the class definition is flawed and certification would be improper.

b. The flawed class definition affects numerosity.

Plaintiffs speculate that the proposed class contains at least 180 members. (Doc. 55 at 30) But their class is made up of only those recruiters who worked more than 40 hours per week. The same flaws in Plaintiffs' class definition discussed above defeat a finding of numerosity, as it is impossible to tell how many members the proposed class might contain until the merits of each recruiter's potential claim is evaluated. Based on the record before the Court, it appears that fewer than 30 people are interested in pursuing claims. This Court could permit joinder of the claims of those Plaintiffs without certifying a class. *See, Bartleson v. Winnebago Indus., Inc.*, 219 F.R.D. 629, 639 (N.D. Ia. 2003) (Rule 23 certification of state overtime claim denied where practicability of joinder shown by the fact that only 21 people opted into parallel FLSA collective action); *Thiebes v. Wal-Mart Stores, Inc.*, 2002 U.S. Dist. LEXIS 664, **7-8 (D. Ore. Jan. 9, 2002) (low opt-in rate counseled against finding that joinder was impracticable).

3. Named Plaintiffs – Who Are All Former Employees Of Kroger – Are Not Adequate Class Representatives.

The adequacy requirement "tends to merge with typicality and commonality, each of which 'serve as guideposts for determining' whether the class action is appropriate." *Colley v. P&G*, 2016 U.S. Dist. LEXIS 137725 at *30 (S.D. Ohio Oct. 4, 2016). Named Plaintiffs Hardesty, Hickey, and Chipman are all former employees of Kroger, and their on-the-job experiences are completely different than a significant portion of the class they seek to represent (including how they characterize their job duties and the manner in which those duties were performed). Named Plaintiffs' testimony about how they performed their jobs is completely and admittedly at odds with Kroger's training and the testimony of other class members. As a result, named Plaintiffs are not adequate representatives and their request for class certification should be denied.

Moreover, as the Court is aware, lead plaintiff Joseph Hardesty has a separate pending lawsuit against Kroger challenging his termination. *Hardesty v. The Kroger Co, et al.*, 1:16-cv-00367-TSB. Individual lawsuits involving proposed class representatives "potentially create a conflict with the putative class." *Levias v. Pac. Mar. Ass'n*, 2010 U.S. Dist. LEXIS 11495 at **16-17 (W.D. Wash. Jan. 25, 2010) (citing *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 678-79 (N.D. Ohio 1995)).

Although the failure to meet any one of the Rule 23(a) requirements is fatal to Plaintiffs' motion for class certification, Plaintiffs cannot meet **any** of the requirements for the reasons outlined above.

B. Plaintiffs Cannot Satisfy The Requirements Of Rule 23(b)(3).

1. Plaintiffs Cannot Establish That Common Questions Predominate Over The Individual Inquiries Associated With The Application Of The Administrative Exemption To Potential Class Members.

Rule 23(b)(3)'s predominance requirement—which is "far more demanding" than even Rule 23(a)'s commonality and typicality prerequisites—obligates a party seeking class certification to demonstrate that the parties' dispute can best be resolved on an aggregate basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-624 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."). "[A] plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole. . . predominate over those issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007).

"At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010). *See also Gawry v. Countrywide Home Loans*, 640 F. Supp. 2d 947, 951 (N.D. Ohio 2009) ("A claim will satisfy the predominance requirement for class certification where common evidence exists that proves or disproves an element on a simultaneous, class-wide basis, thus obviating examination of each class member's individualized position."). Predominance is not met where liability will "depend on individualized evidence and will vary widely among different members of the class."[18] *Ball v. Union Carbide Corp.*, 212 F.R.D. 380, 391 (E.D. Tenn. Sept. 17, 2002).

[18] In light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), the Court additionally cannot certify a class with respect to damages.

Simply put, the claims of a class meeting the predominance requirement "will prevail or fail in unison. **In no event will the individual circumstances of particular class members bear on the inquiry.**" *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 858 (6th Cir. 2013) (emphasis added).

Here, Plaintiffs have not met their burden to show that common questions predominate over individual ones. In fact, the evidence establishes that answers to the central question identified by Plaintiffs – whether CoRE recruiters were properly classified as exempt pursuant to the administrative exemption – can only be addressed through individualized proof based on the testimony of potential class members, as outlined above. There can be no dispute that potential class members performed different job duties and exercised widely varying amounts of discretion and independent judgment in doing so. As a result, their claims will not "prevail or fail in unison," as is required under Sixth Circuit precedent.

To support their predominance argument, Plaintiffs again cite Kroger's uniform decision to classify CoRE recruiters as exempt, the CoRE recruiter job description, and vague "policies and procedures" allegedly utilized by recruiters. (Doc. 55 at 38) This evidence is not even sufficient to establish commonality, as outlined above. Moreover, time and time again courts addressing similar evidence in the context of misclassification cases have determined that alleged common classification decisions, job descriptions, and policies do not predominate over individual inquiries relevant to the administrative exemption when potential class members testify to variations in job duties and discretion.

In *Braun v. Safeco Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 184123 (C.D. Cal. Nov. 7, 2014), the court ruled that "[c]ommon proof of whether the class members customarily and regularly exercise discretion and independent judgment…appear[ed] unfeasible" because the evidence reflected "material differences" in the way insurance claims processors performed their job duties. For example, "[w]ith respect to the common task of claims investigation, some

employees exercised discretion in discharging this duty, while others appear to have followed orders set by Defendants." *Id.* at *28. Potential class members also exercised varying degrees of discretion in making liability determinations and negotiating settlements. *Id.*

The *Braun* plaintiffs attempted to save their class certification motion by asserting that "common policies and procedures" predominated. The court rejected plaintiffs' argument because the common facts they cited did not significantly "inform the administrative exemption analysis":

> To the extent Plaintiffs argue that Defendants' policies and procedures are sufficient to establish predominance, this argument fails for two reasons. First, the common policies and procedures establish only broad guidelines for class members' general duties that do not demonstrate the exemption issue is capable of class-wide proof.…This evidence suggests that Defendants' policies and procedures vested class members with some level of discretion. But critically, it does not establish the degree to which individual class members actually exercised discretion when handling claims. It also suggests that an employee's discretion varies depending on his or her department.
>
> Second, **Plaintiffs have not adequately explained how these common policies and procedures inform the administrative exemption analysis.** Even assuming the policies applied equally to all members of the Misclassification Subclass, the fact that Defendants expect these members to follow certain procedures or perform certain tasks does not establish whether the members actually are primarily engaged in exempt activities during the course of the workweek, or whether they customarily and regularly exercise discretion and independent judgment.

Id. at **32-34 (emphasis added). *See also Patel v. Nike Retail Servs.*, 2016 U.S. Dist. LEXIS 45588 at *29 (N.D. Cal. March 29, 2016) (no predominance where testimony revealed "varying evidence of the extent to which AHCs exercise discretion *in practice*" despite evidence of blanket exemption policy and standardized job description, training materials, and other policies; holding that "where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, **the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class**

setting") (citations omitted; emphasis added); *Dailey*, 2014 U.S. Dist. LEXIS 119190 at **15-22 (rejecting predominance claim based on "uniform classification," "uniform training," common job description, and established performance criteria where evidence established variations "in how much time Account Reps spend on a particular duty" and "how much discretion and independent judgment Account Reps can exercise": "[E]ven if two Account Reps had the same primary job duty, one Account Rep might be exempt if she could exercise discretion and independent judgment when performing that duty, whereas the other might be non-exempt because she did not have that kind of leeway"); *In re Morgan Stanley Smith Barney LLC Wage & Hour Litigation*, 2016 U.S. Dist. LEXIS 48648 at *17 (D. N.J. April 11, 2016) ("As a threshold matter, however, the relevant question is not solely focused on the substance of MSSB policies. Rather, the Court must consider the actual work performed by the proposed class members."); *Zackaria v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 67048 at *24, 45 (C.D. Cal. May 18, 2015) (class certification inappropriate despite common misclassification decision, job title and "roughly similar job responsibilities" because "the evidence indicates that a California APCs' work experiences are not completely uniform" and exemption issue could not be resolved with common proof).

Here, Plaintiffs – just like the litigants referenced above – attempt to support their predominance argument with vague references to alleged common policies and procedures without explaining how these policies and procedures "inform the administrative exemption analysis" (much less **uniformly** inform the analysis, as required to maintain a class). For example, Plaintiffs assert that recruiters used the same knowledge management system, applicant tracking system, and recruiting script. (Doc. 55 at 19) They also say that recruiters were all "subject to the same General Office (GO) Employee Handbook" (all Kroger associates were) and job description. (*Id.*) But none of this "evidence" relates to the key issue presented – whether the potential class members were properly classified as exempt.

Indeed, many potential class members have confirmed that – despite Plaintiffs' allegations – Kroger trained recruiters to use discretion and independent judgment. (*See, supra,* Sections II.B. and II.C.2.) Several opt-in Plaintiffs even admitted that they were trained to find best-fit candidates for available positions. (Taske Dep. 27:25-28:3; 33:18-22; 51:16-52:15; 53:22-54:20; Ward Dep. 49:14-50:24; Rutledge Dep. 21:9-14; 42:4-10; 46:6-18; Moffett Dep. Ex. 9; Schiff Dep. Ex. 11). They simply say they failed to follow the training at various times during their employment because of the performance goals established by Kroger. (*Id.*) But others testified that the relevant goals either did not apply to them or that they were still able to use complete discretion and independent judgment notwithstanding the goals. (Keenan Dec., ¶¶ 8-9; Kearns Dec., ¶¶ 4-5; Brown Dec., ¶¶ 5-8; Davis Dec., ¶¶ 8, 11-12; White Dec., ¶¶ 12-13; Scott Dec., ¶¶3, 6[1-2]-7; Strosnider Dec., ¶ 9) It is not surprising that a business has goals for its employees, and the mere presence of such goals does not impact the individualized considerations relevant to the administrative exemption in this case.[19] (See cases cited in Section III.B.1., *supra*) As exempt professionals, CoRE recruiters were given the discretion to manage their work to meet their goals while finding best-fit candidates for positions. Some class members say they absolutely were able to do this. Others claim they were not. This testimony only introduced *more* variation, which mandates against class treatment.[20]

[19] Plaintiffs reference a handful of "coachings" recruiters received when they consistently failed to meet their goals. But these coaching opportunities focused on understanding what the recruiters' "roadblocks were and how productivity could be increased in the future." (Strosnider Dec., ¶ 9) Plaintiffs cite to no occasions where a recruiter was terminated for failing to meet their goals. As a recruiting supervisor, Strosnider emphasized "that the most important part of [the recruiting] job was finding quality candidates for Kroger positions." (*Id.*) *See also,* Smith Aff., Doc. 55-1, Exhibits 10-11 (emphasizing that quality – not quantity – of candidates is "our focus").

[20] Similarly, although three potential class members allege that they were "directed by management to schedule interviews if applicants provided…minimal answers" during the telephone interview (Doc. 55 at 21), others testified to no such direction. And, once again, many potential class members have testified that they did the exact opposite. See, *supra*, Section II.C.

At the end of the day, it is undisputed that many potential class members exercised full discretion and independent judgment in recruiting for Kroger notwithstanding any "common policies" that existed, establishing that class certification is inappropriate. (See, *supra*, Section II.C)

The cases cited by Plaintiffs do not change this analysis. *Swigart* and *Laichev* are distinguishable from this case for the reasons outlined above, and the court in *Hendricks* actually refused to certify a proposed class where individual differences would affect the relevant exemption analysis. Finally, the Sixth Circuit's decision in *Glazer* actually supports Defendants' position. In that case, the liability issues common to the class – whether an alleged design defect proximately caused mold to grow in Whirlpool machines and whether the company adequately warned consumers about the issue – could be determined on common evidence because the same alleged defect and failure to warn applied to the entire class. 722 F.3d at 859. According to the court, "evidence will either prove or disprove as to all class members whether the alleged design defects caused the collection of biofilm, promoting mold growth, and whether Whirlpool failed to warn consumers adequately of the propensity for mold growth in the Duets." *Id.* The same is not true here, where the dramatic differences among CoRE recruiters go to the very heart of Plaintiffs' misclassification claim. In this case, common evidence simply cannot be used to "prove or disprove" Plaintiffs' misclassification claim "as to all class members."

The evidence before the Court establishes that "the individual circumstances of particular class members" will "bear on the inquiry" of whether they were misclassified by Kroger. As a result, Plaintiffs' claim will not "prevail or fail in unison." Plaintiffs' motion for class certification should be denied.

2. Class Certification Is Not The Superior Method For Resolving This Dispute.

Plaintiffs' argument that a class action is superior to other methods of adjudication is meritless. "The prevalence of individual questions weighs against a finding of superiority." *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 486 (S.D. Ohio 2001) (citing *In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996)). A single litigation addressing every difference in recruiters' job duties and the extent recruiters exercised discretion and independent judgment would present a significant burden on the Court. This is especially true where, as here, Plaintiffs have provided no trial plan or other method to determine liability or award classwide damages, as required by *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 at 1433 (2013). Aside from a few conclusory and unsupported statements, Plaintiffs have not offered *any* evidence concerning how the Court possibly could manage the case if it was certified as a class action. In contrast, individual actions for those potential class members who feel they were misclassified are relatively simple to litigate. Wage and hour claims also contain fee shifting provisions, making the issue of "small individual damages," which Plaintiffs raise in their motion, irrelevant.

Moreover, in arguing that the class action mechanism is superior, Plaintiffs ignore the anemic response rate to their FLSA collective action, which was conditionally certified many months ago. The low response rate to the robust FLSA notice and Plaintiffs' aggressive efforts to contact former colleagues to join the case – nearly 85% of putative FLSA collective action members have no interest in participating in this lawsuit – demonstrates hostility toward the litigation. Indeed, many potential class members specifically oppose the lawsuit and disagree with Plaintiffs' allegations. (*See*, *supra*, Section II.C.5.) This is compelling evidence that the

superiority requirement has not been met.[21] See *McDonald v. Ricardo's on the Beach, Inc.*, 2013 WL 228334, at *5-9 (C.D. Cal. Jan. 22, 2013) (superiority requirement not met where there was evidence that more than 60% of the putative class would rather not participate in the lawsuit); *Garcia v. Freedom Mortgage Corp.*, 2011 U.S. Dist. LEXIS 156639 at *10 (D.N.J. 2011) (superiority requirement not met where low percentage of putative class members opted into two parallel FLSA collective classes (less than 44% and less than 17%, respectively), making it "clear that a large number of such putative class members have an interest in the individual control of the prosecution of their FLSA claims" and thus, also their state claims arising from the same set of operative facts).

Accordingly, a class action is not the superior method of resolving this litigation, and class certification must be denied.

[21] As the Court is aware, Defendants have filed a motion to decertify Plaintiffs' collective action on the ground that named and opt-in Plaintiffs are not sufficiently similarly situated. Although Defendants' motion to decertify should be granted for the reasons stated therein, to the extent the Court permits Plaintiffs' collective action to continue, it would also constitute a superior method to adjudicate Plaintiffs' claims, relative to a class action, for the reasons outlined above.

IV. Conclusion

Plaintiffs and potential class members have testified to stark differences regarding their job duties and the extent to which they exercised discretion and independent judgment as recruiters at CoRE. These differences directly impact the application of the administrative exemption and make class certification inappropriate as a matter of law. For these reasons, Defendants respectfully request that Plaintiffs' motion for class certification be denied.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on this 2nd day of August, 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

4847-8607-5468, v. 1

EXHIBIT A

DECLARATION OF LAURIE WHITE

I, Laurie White, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I started working for Kroger in 1995 and worked for about ten years in a number of different corporate positions, including HR, at Kroger's general office ("G.O.") downtown, in Blue Ash, and in the Tri-County area. I was a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash from March 2015 to December 1, 2016, which is the time period this declaration covers.

2. I was on the Mass Hire team within the CoRE. On the Mass Hire team, we handled a lot of special recruiting projects. As its name suggests, Mass Hire handled mass hiring needs when a store is opening, being remodeled, or something like that. During my time on the team, however, I worked on the G.O. project, temporarily filled a spot on the Central Division team for about 1 $^1/_2$ to 2 months, and handled pharmacy recruiting across the divisions. All of these roles were really different from one another.

3. As part of the G.O. project, I worked on recruiting for any number of hourly positions at the G.O. downtown. This included (but was not limited to) recruiting to fill a number of hourly internships. This project was different from other recruiting work at the CoRE in that I did not conduct phone screens on the G.O. project at that time. Rather, I would review resumes submitted by applicants to determine which ones met a variety of detailed job-specific requirements. If the resume met the requirements, I would pass it along to the manager. If it did not, I would decline the applicant. I would not call the candidate unless there was important information missing from the application or unless the candidate contacted us because she was having difficulty uploading a resume or something like that.

4. The G.O. initiative first got underway in about April of 2015, and I was part of it until May or June of 2015, when I temporarily moved over to work as a recruiter on the Central Division.

5. When G.O. recruiting was first getting started, in the April 2015 timeframe, I got together with two other recruiters — Joe Hardesty and Aretha O'Aku — to put together a plan for what G.O. recruiting would look like. I believe we had one or two meetings, and during those meetings we figured out how G.O. recruiting would work.

6. We also spent several months developing a phone script to use as part of G.O. recruiting. Aretha worked on the phone script, and I reviewed it. I don't recall Joe being involved in creating the G.O. phone script.

7. G.O. recruiting was a whole different type of recruiting from what CoRE did to support the stores. Rather than screening candidates on the phone, we reviewed resumes candidates had submitted and, based on what the resume said, assessed

fit for a given position we were looking to fill. If the candidate appeared to be a good fit, we would forward the resume to the hiring manager at the G.O. for that particular position.

8. The positions we filled were very different from store positions. They were mostly intern positions at the G.0., and they represented a wide array of Kroger's different businesses (including manufacturing, etc.).

9. As I mentioned previously, we created a phone script for use in G.O. recruiting, but we weren't on the phones as part of this work. After I was no longer part of G.O. recruiting, however, I know that Aretha eventually started calling some G.O. candidates and screening them by phone, in addition to reviewing their resumes. I know this because Aretha and I remained part of the Mass Hire team the entire time, and I would sometimes hear her on the phones with G.O. candidates.

10. Although the G.O. team was initially Joe, Aretha and myself, there was only a need for two recruiters by the time we actually started recruiting for G.O. positions. For this reason, Joe was not part of the G.O. initiative by the time it launched. He never reviewed a resume for a G.O. position, to my knowledge. During the approximately two months I was part of the project (roughly from April until May or June of 2015), G.O. recruiting was my entire job. I spent all of my time on it during this time. Aretha spent all of her time on it too, and she was mostly if not entirely engaged in G.O. recruiting work at least until early 2016, when she started taking calls from the Mass Hire loop in additional to all of her other responsibilities. But, even then, Aretha has continued recruiting for G.O. to this day, and she will continue until the very end of this effort in a few weeks.

11. By contrast, I spent a lot of time on the phone during my 1 $^{1}/_{2}$ to 2 months covering in the Central Division. During that time, I would first review applications to determine fit. I would look for certain minimal qualifications, including but not limited to confirming that the applicant is not a current or former Kroger employee, is available at the times needed for the job, and has a high school education. I would only need to contact 2-3 candidates for a single need, so if there were more qualified applicants than I needed to contact, I would use their time of interview availability to determine which ones I called. If it was morning, for example, I would call the qualified applicants who were available in the morning. Then, I may not need to call any afternoon candidates for that position, if I sent the store a couple of candidates I had interviewed in the morning.

12. When I decided to conduct a phone screen, I would ask a number of open-ended questions Kroger suggested we use. For example, I would ask what the candidate would do to show friendly customer service, and I would also ask for the candidate to describe a work or academic accomplishment. How they answered these sorts of questions determined whether I moved them forward or not. I've never seen any sort of answer key or other guidance from Kroger regarding how to assess candidates' answers to these questions. Rather, it was left to our discretion to assess a candidate's answers using our best judgment. When a candidate was explaining friendly customer service, for example, I would look to see if the candidate would take initiative to help the customer. I also didn't want

to pass someone along who couldn't describe an achievement. However, these are all judgment calls that I made during the phone screen, and there is no recipe or formula. If the phone screen demonstrated a candidate's fit in my judgment, I would proceed to schedule them for an in-person interview at the store.

13. I definitely turned down candidates with regularity after a bad phone screen, and I did so without needing to get the approval of a supervisor or anyone else. However, I noticed that different recruiters have different standards for passing candidates on to the store. For example, I was often forgiving if it was a young kid's first interview, whereas some other recruiters were not. I also noticed that what a candidate says and how they say it could disqualify a candidate in one recruiter's eyes, but the same thing would not be disqualifying to another recruiter. I certainly heard other recruiters near me turn down candidates a lot more often than I did. It just varied by recruiter.

14. I also noticed that a lot of Mass Hiring work done by others on my team differed from my work in that there could be a single job requisition that the recruiter needed to send dozens of candidates to fill, given a store's mass hiring needs. This made for a different situation, because it could mean that the recruiter was less choosy — depending on the size of the applicant pool and the extent of the store's need. It all really just depended on the situation.

15. Even though I have been on the Mass Hire team for more than two years, I have never had a mass hire store (such a new or relocated store with 100 or more needs). I know that Joe Hardesty and Derek Chipman both had mass hire stores during their time on the Mass Hire team, but my experience has been completely different from theirs. Mass Hire is really about different kinds of specialty recruiting, and mass hire stores are just one part of that.

16. Another project of mine on the Mass Hiring team was to interview candidates for pharmacy positions across all the divisions. I worked with two other recruiters to fill hourly pharmacy positions (such as clerk, technician, and intern) open at different stores throughout the company. This work was totally different from my other assignments, because it was critical to assess the candidate's prior *pharmacy* experience and to assess how their experience would translate into a Kroger pharmacy. How have they shown customer service in their previous pharmacy roles? Do they have experience with the particular pharmacy-related tasks the store will need them to perform (for example, filling prescriptions, cashiering)? In fact, we did not use the standard set of questions suggested by Kroger for general requisitions, because we needed to ask pharmacy-oriented questions instead.

17. Making pharmacy recruiting even more complex, we had to assess candidates relative to a number of regulatory requirements. To give just a few examples, a pharmacy technician must be licensed and certified (though all of this varies by state and I recruit for positions nationwide). The expiration date of an applicant's certification matters too. A pharmacy intern must be enrolled in an accredited pharmacy technician school. All of this complexity made the job more difficult and more complicated, and it was really important to get it all right.

18. Just like all CoRE employees, I carry a badge that I swipe to unlock the door to the CoRE facility. It happens all the time that employees enter the facility together and, when they do, only one employee will swipe but all employees will enter the door. In addition to entering the facility, I also swipe my badge to open the door when I am cutting through the elevator lobby as a shortcut to the bathroom or the other side of CoRE or something.

19. I don't swipe my badge to exit the facility. That's not required, and I'm not aware of anyone who does that.

20. I don't ever want to be late for work, so the earlier I can get to work, the better. I have sometimes gotten to CoRE and swiped my badge 20 to 40 minutes before I started to work. I have seen other recruiters do the same thing, including when the recruiter position was still classified as exempt.

21. I generally worked 8 ½ hours per day. I did not think of the small amount of time I spent working over 40 hours a week as being "overtime," because I was a salaried professional being paid to exercise my discretion and judgment as to important decisions about which candidates will be selected for employment throughout the company.

22. When I worked in the Central Division, I did work Saturdays, but I would get one of the weekdays off so I still only worked five days total in the week.

23. I received a notice in the mail to join the lawsuit that Joe, Derek and Madeline Hickey have brought against Kroger. But I didn't return a consent to join form because their lawsuit isn't something I believe in or want to be a part of.

24. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Laurie White

Executed on this 28th day of July, 2017.

EXHIBIT B

DECLARATION OF SHAWN SCOTT

I, Shawn Scott, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I started working for Kroger G.O. LLC in March 2015, when I was hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. This declaration covers the time period March 2015 to December 1, 2016. During that time, I was part of three different teams: the Michigan division (until approximately December 2015), the Mass Hire team (roughly all of 2016) and the Roundy's/Mariano's team.

2. On the Michigan team, I was one of the initial recruiters when the division went live in May of 2015. We recruited for any and every hourly associate position in the stores. Each recruiter on our team was assigned one or two districts within the division.

3. Our supervisor took a very hands-off approach and left it up to us to manage our districts how we saw fit. As a result, I had lots of flexibility in assessing the needs of my stores and self-managing my work in light of those needs. I would identify the stores with the greatest needs (using the open requisition report), for the stores for which I had made the most calls or had the most new applications (using the phone screen report), and also the stores with open interview slots (initially using a resource on the SharePoint site, though there is now a report for this too). Using this information, I would decide which stores to work on, how much time and effort to spend where, and generally how to manage my day. My supervisor told me, "Your district is your district. You own it." And so I had lots of discretion in deciding how best to do my own work and do it well. I never had a set number of people that my supervisor wanted me to call; instead, I knew what my needs were, and I would decide how best to align my efforts accordingly.

4. I decided which applicants to contact for the purpose of conducting a phone-screening interview. In making this decision, I would look at certain objective information on their applications (such as availability, whether they met Michigan's minimum age requirements, whether they could be rehired if they had previously worked for Kroger), but I would also sometimes evaluate other, more subjective parts of the application (such as prior work history).

5. The number of applications received for a given opening varied a lot based on the store's location. For stores in Detroit, for example, I often had many more applicants than I needed to call. As a result, I could be choosier in selecting who to call. I would sometimes also choose to consider some applications for openings at other, nearby stores. That was my choice to make if I decided to. At stores in more rural areas, by contrast, we often had much lower applicant flow,

and this made the process of deciding who to call very different since you had fewer people to choose from.

6. During the phone screen with the candidate, I would cover background information (such as store location, position hours and candidate availability, full-time or part-time status, rate of pay, etc.) before asking the candidates open-ended questions and evaluating their answers to decide who to refer to the store for an interview. Kroger suggested the questions to ask, but I could and did choose to ask additional, prodding questions when I decided they would be helpful to get more details from the candidate. And, although Kroger suggested the questions, it was completely up to me to assess the candidate's answers to my questions and whether the candidate did well enough to be scheduled for an in-store interview. In addition to evaluating the substance of a candidate's answers, I would also assess the person's attitude and friendliness. These are customer service positions, after all, and so I wanted to assess whether the person would be able to provide friendly customer service.

6. It was completely up to me to decide whether to reject a candidate or to refer him or her to the store for an in-person interview. I turned down candidates every day, though the frequency of rejecting candidates really varied depending on the quality of the phone screen and other factors.

7. During my time on the Michigan team, I also helped another CoRE supervisor manage a general inquiry line staffed by third-party contractors, who answered very basic questions from candidates (regarding application status, problems in completing the online assessment, etc.). Along with a few other CoRE recruiters, I helped train these contractors and even developed some training content for them to use. I was also a go-to person for the contractors if they had questions or needed anything. These duties were part of my job as long as CoRE had a general inquiry line, which was for several months.

8. As previously mentioned, I spent 2016 working on the Mass Hire team. During that time, I was still a CoRE recruiter, but my work was exclusively focused on recruiting for managerial positions in a number of pilot divisions (including Houston and Dallas). The candidates I was recruiting were for the Co-Manager position, which is an exempt role and is the second-highest manager in the store. Successful candidates, if hired, were placed into an "LE" or "Leadership Essentials" class, which Kroger used to refer to as the "MD-1" management development program.

9. Recruiting for managerial positions was very different from recruiting for non-exempt store positions. We developed a completely different process and completely different interview scripts. Our manager, Daniele Williams, really let us own LE recruiting and develop it and do it ourselves.

11. I collaborated with another recruiter, who was also working exclusively on LE recruiting during this time, to create the interview scripts ourselves. There were two different scripts, and they lined up with the two-phased screening process we developed for recruiting LE candidates.

12. Before even getting to the phone screens, however, we really took a lot of time scrutinizing a candidate's application to decide who was worth calling. Candidates needed to have at least a bachelor's degree or two years of managerial experience, but that was just the starting point. We would evaluate from the application the apparent quality of a candidate's work experience, whether he or she appeared to be a job hopper, why he or she left prior roles, etc. It was a really subjective and quite selective process. Candidate quality was of utmost importance at all steps in LE recruiting, since we were hiring future managers for the division and Kroger was investing so much in these individuals and would be entrusting them with the business.

13. The first phone screen lasted 20-30 minutes. This screen was primarily intended to assess a candidate's motivational fit with the position. What motivates them to apply to be a Co-Manager? Is this a good fit with what Kroger needs for the role?

14. If I judged a candidate to have done well during the first phone screen, I could schedule him or her for a second, longer phone screen. It was completely up to me (or another recruiter conducting the first phone screen) to decide whether or not to reject a candidate after the first phone screen.

15. The second phone screen lasted 45 minutes to an hour. This screen was a detailed exploration of the candidate's prior roles and experiences. The recruiter conducting this second phone screen would subjectively evaluating the candidate's answers with respect to Kroger's leadership model and decide, in the recruiter's discretion and judgment, whether the candidate should be referred to the division to be interviewed by an interview panel (which usually included a district manager and human resources manager).

16. Depending on the division we were recruiting for, I would conduct either the first or the second phone screen. If I was more closely acquainted with the division's requirements, I would tend to conduct the first phone screen, since that was the best place to identify a lack of fit relative to the division's requirements. Other times, I would conduct the second phone screen. (My colleague also regularly conducted either the first or the second phone screen.)

17. If a candidate did very well in the second phone screen, the recruiter (who could be me) had the discretion to pass the candidate along to a division hiring panel. Sometimes, the second phone screener could be more on the fence, in which case the two phone screeners could discuss their impressions of the candidate and decide together whether to reject the candidate or refer him or her to the division.

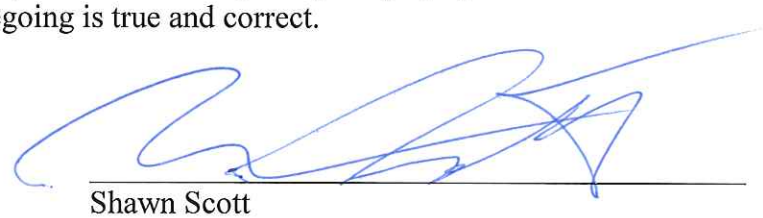
18. We had very good results with this LE recruiting pilot, received good feedback from the pilot divisions about the candidates we selected for them, and successfully filled a large number of LE classes in the divisions. We were constantly focused on assessing and ensuring candidate quality at all points, given that we were filling managerial roles. This required a lot of judgment, but it really paid off.

19. We were in frequent communication with the human resources manager or LE coordinator to get feedback on our candidates. Even when the division turned someone down, we often heard back that they understood why we had passed the candidate along. Early in the process, we had a videoconference with the division to gather this feedback, and later we discussed the candidates by phone and/or by email. This was all in addition to weekly calls we had with the LE coordinator in the divisions to discuss their needs and our progress in filling their needs.

20. I received a notice in the mail to join the lawsuit filed by a number of former recruiters who claim they were misclassified as exempt. I chose not to participate in their lawsuit because I don't agree with it. As a CoRE recruiter, I always had a lot of flexibility in my job. I was a salaried member of management and had the autonomy to be in charge and to own my own responsibilities. My supervisors and managers have never micromanaged me, and it has always been up to me to make the decision about which candidate to send and which candidate to reject.

21. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Shawn Scott

Executed on this 28th day of July, 2017.

EXHIBIT C

DECLARATION OF ERIC SHRIDER

I, Eric Shrider, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I worked for Kroger G.O. LLC beginning in February 2015, when I was hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. When I was first hired, I went through orientation and training for about 2 ½ or 3 weeks. About a week of this time was spent learning the technology needed for the job, and the rest of the time was spent introducing us to Kroger's culture, differences between generations, and other cultural and people-related topics that are important to the work we do as recruiters. I left Kroger in July 2017. This declaration covers my experiences as a recruiter at CoRE from February 2015 to December 1, 2016.

2. I was a member of the recruiter team that supports the Smith's division (which is out in the West), but I spent the first month or so supporting the Fry's division (in Arizona) because Smith's wasn't ready to roll out when I started in February. I was a member of the Smith's team until about March of 2016, when I was promoted to become a recruiting supervisor.

3. Even though recruiters were exempt, they kept track of the hours recruiters work. We were told to be logged in to the Avaya phone system for the entire time we were in the building. This includes any start-up time we spent at the CoRE before the shift began. My supervisor Tywanna Washington told us, "Whenever you get here, just log in." So that's what I always did, and it's also what my team did.

4. The start-up time before our shifts was not a strictly-enforced 30 minutes. I wouldn't even text Tywanna to tell her I was running late unless I thought there was a chance I wouldn't make it until *after* the shift began. But, like I said, I would log into Avaya as soon as I arrived, so all of that would show up in the phone records.

5. My work duties were really different from the duties of the other Smith's recruiters. Although I was a recruiter, I unofficially worked in a team lead capacity too, which meant that I would analyze various reports to see store needs and applicant activity and to use that information to put together an action plan for the whole Smith's team to attack the work during the next day.

6. I also developed a lot of the reporting I used. I have a background in commercial banking and am really good with Excel and analytics, so I had special access to Kroger's system and was able to research and analyze data and develop reports and other analytics for use in providing strategic direction for the week. This analytical work was a really important and regularly recurring part of my job as a recruiter, and it was up to me to analyze the data and figure out helpful ways to slice and dice the information so that it could help the CoRE run better.

7. As far as my recruiting duties are concerned, I would first rank and review the needs in the 27 Smith's stores I supported as well as the applicant activity at those stores. It was completely up to me, using this information, to decide what stores to work on and how in any given workday. It was my judgment call to figure out how to manage the workload. For example, if one store had a bunch of needs but barely any candidates and another store had just a single need and a hundred candidates, I might decide to prioritize the store with just a single need, because I knew I could fill it and then turn my attention to the other store. I ended up using a tracking spreadsheet I developed on my own in order to facilitate this process.

8. After ranking and reviewing my stores' needs and applicants, I would decide which applicants I wanted to call for each store. This was a judgment call too. Sure, there were some basic requirements that an applicant had to satisfy (for example, an applicant has to be available overnight for an overnight position), but I usually would end up with quite a few more applicants who met the minimum requirements than I actually needed to call.

9. This meant that I would look at other, more subjective factors to determine which applicants to call. It varied by recruiter, but I really put a priority on a candidate's prior work experience and how long they stayed at their past employers. I also really liked to see prior military experience or experience doing volunteer work or something like that. There is an organization in Utah called Desert Industries, which is kind of like Goodwill with a job placement service. I really liked when I found experience at Desert Industries on an application, because I found this often made for a good fit. Kroger never told me that these were good things to look for on an application. Instead, they were things I developed a sense for over time, based on my experience, intuition, and judgment. Also, it was completely up to the recruiter to decide which applicants to contact and which applicants not to contact. There was an assessment score based on something the applicant filled out while applying, but this was only one factor among many that I considered. In fact, I regularly decided to contact candidates with low assessment scores (even zeros) if I liked something else I saw on their application.

10. For applicants I chose to contact, the phone screen was a great opportunity to assess intangibles that don't come through in an application. I would listen for how social a candidate was (since a social person might do well in the store's front end but not the back end), how engaged they were in our conversation, and how passionate they were about a job or something else in their past. I really listened for whether a candidate had *accomplished* something in their past, since this to me was a good indicator that would do well at Kroger. There were a few questions Kroger had us ask to get the candidate talking, but Kroger didn't tell us how to assess the candidates' answers to those questions. It was up to us, as recruiting professionals, to figure out what to listen for and how to decide when to invite a candidate to interview at the store and when to decline the candidate.

11. I would regularly decline candidates whose applications (and assessment scores)

were stronger than other candidates I passed along, based on the quality of the phone screen I had with them. I've sent people to the store with zeros on their assessments, and I've also declined people with great assessments.

12. When I declined people after the phone screen because I felt they were not good candidates for the store — which I regularly did — I did not need to review my decision with my supervisor or anyone else. It was my call to make

13. My stores' hiring percentage as a Smith's recruiter ended up at 54%. This means that, of the candidates I referred to the stores, 54% of them received and accepted an offer of employment.

14. In addition to the reporting and analytic work I described earlier, I worked on other special projects too. For example, I was part of what we called the realignment committee. I spent about 6 hours/week for about 5 weeks on this committee. We were reviewing all the various deviations the different divisions at CoRE had from our core recruiting process so that we could select the best practices and realign the teams. There were lots of nuances in how the different divisions operate, so this means that our teams often worked in quite different ways.

15. Another special project was the "Main and Vine" project. In this project, I worked with two other recruiters and a manager to develop a recruiting strategy for a new Kroger banner in the Pacific Northwest. We developed a start-to-finish recruiting strategy and presented it to the project's board. Then, we were very involved in implementing the strategy and even flew out to Seattle to plan and manage various recruiting events. This was a very exciting and at times challenging project in part because it was initially top secret and we didn't even know the name of the banner at first.

16. I don't agree with the lawsuit that Joe Hardesty and other former CoRE recruiters have brought. The core of what recruiters did at CoRE was to use their judgment and intuition to decide who would make the best Kroger employees, and this is not hourly work.

17. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Eric Shrider

Executed on this 28th day of July, 2017

EXHIBIT D

DECLARATION OF KATELYN DAVIS

I, Katelyn Davis, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I have worked for Kroger G.O. LLC since July 20, 2015, when I was hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. This declaration covers the time period I worked for Kroger at CoRE from July 20, 2015 to December 1, 2016.

2. Unlike a lot of CoRE recruiters, I was hired not to support a specific division but rather all of the Kroger divisions. This means I was not on a specific team but instead was a "floater" who helped out the teams that have the greatest need at any given time. There are also floaters within teams who are not assigned specific stores within their division, but my role was as a floater for all of the CoRE teams.

3. My supervisor relied on me to help identify which teams have the greatest need, and I had a lot of say in figuring this out and deciding which team I support from week to week, or even from day to day if a team had an unexpected number of absences or something else that caused an immediate need to arise. In addition to supervising us CoRE floaters, my supervisor also supervised the Delta team, so he was really busy and I help him with a lot of tasks such as scheduling, among others.

4. Most recruiters had one or more special projects that they worked on in addition to reviewing applications and being on the phone with candidates. Because of my role as a floater, I had even more time to work on special projects and had a lot of flexibility with my time since I didn't have specific stores to support. This means I tended to spend less of my time on the phone than some other recruiters did, although this fluctuated quite a bit based on my projects as well as the level of the hiring needs within the divisions at any given time. There were whole days during which I did not spend any time on the phones, due to the projects I was working on. As a recruiter, it was really up to me to manage my time on my own, to determine what I needed to do and when I needed to do it.

5. I did a lot of reporting and analytics regarding CoRE's performance and results, and it was important to prioritize this work, especially periodic communications that were distributed across the entire Kroger enterprise. One important project of mine was related to the reporting work that I did. I envisioned and developed an "efficiency reporting" tool that has helped CoRE better assess the quality of our recruiting efforts. Instead of just looking at the number of candidates referred to the stores each day, this tool looks at a number of variables including how much time recruiters spend on the phones, how many interviews they schedule, and how many of those candidates are hired by the store. I was the one who identified the need for reporting like this, and I was given full discretion to develop the report from scratch. I figured out what information to capture, how to analyze it and

synthesize it, and how to present it most effectively. I developed it all myself on my own initiative. It is something I feel very close to.

6. Another project I worked on was developing and rolling out a pilot program for CoRE to recruit for Kroger manufacturing positions. CoRE branched out to support all kinds of recruiting needs outside of the stores, and this was another example of that. In this project, I worked with the manufacturing plant selected as the pilot, Kroger's State Avenue plant near Price Hill in Cincinnati, to figure out how CoRE could best support their recruiting efforts and to develop a plan for transitioning the plant to this new approach. I took a tour of the facility to understand the workplace I recruited candidates for, and I spent a lot of time learning their recruiting process, developing the best way for CoRE to handle this work, and working with higher-ups at the plant to manage this transition smoothly. As part of this work, I developed a phone script (which contained open-ended evaluative questions that don't have any right-or-wrong answers and require the recruiter's best judgment in assessing). When we piloted CoRE's recruiting for the State Avenue plant starting in June, I spent virtually all of my time on manufacturing recruiting. This project required me to makes all kinds of independent judgment calls, and I had lots of discretion in identifying and pursuing the best approach.

7. Yet another one of my projects was related to an enterprise-wide hiring event Kroger held in stores across all of its divisions. This was the first such company-wide event, and it required a lot of preparation and planning, as well as communication with all of the stores in all of the divisions to ensure that everyone knew what was happening and the event went smoothly. I developed a lot of the reporting for the event, so that the company could track the number of applicants who applied, were interviewed, and were hiring as part of this hiring event. As part of this reporting, I had to figure out how to identify and report these numbers separate and apart from the normal applicant activity that occurs every day, outside of the hiring event. My work on this project got so busy that there was one day I didn't spend any time on the phones, but again it's up to me to manage my time and figure out what needs to take priority.

8. I mentioned earlier that the manufacturing phone screen included open-ended questions that had no right or wrong answers. That was also true of the phone screens CoRE recruiters (including me) conducted with candidates for store positions. For example, I asked: "What interests you in working for Kroger?" It was up to the recruiter to assess the answer; there was no answer key. For example, I looked for answers that demonstrated (in my judgment) engagement and interest. I asked probing follow-up questions (that did not appear on any script) when I determined it would be necessary or helpful in assessing a candidate. But different recruiters took different approaches, and different recruiters looked for different things. We sometimes got insights in talking with each other about our experiences with candidates. I particularly learned from recruiters who used to work in the stores and could draw on the experience in assessing candidates. But Kroger hired us and payed us to exercise our judgment in deciding which candidates would make for good Kroger employees. It's up to us to decide that.

9. CoRE recruiters communicated directly with the stores as part of our jobs. This part of the job developed since CoRE went live, and the frequency and nature of these communications varied by division and by recruiter, but it was an important aspect of the job. We often talked with the stores to get feedback on candidates we sent, to better understand a store's specific needs when necessary, and to calibrate and customize our approach as needed. This communication also helped encourage and develop a sense of partnership with the divisions and, I think, really enhanced the candidate's experience.

10. Since I floated between the various teams in CoRE, I can say that the teams were very different from each other in a lot of important respects. I think these differences were often rooted in the differences between the divisions the teams support. After all, the stores operating under different banners (like Fred Meyer and Smith's) weren't always affiliated with Kroger and they operated in their own way for a very long time. The teams adapted to accommodate these differences. For example, King Soopers (which is a division we support out West) had a lot of requests and did not tend to have a lot of candidates. This required the CoRE recruiters supporting them to be very hands-on and to communicate a lot with all of the stores about any number of things. For example, the King Soopers team had to call every store on some weeks to learn and assess the results after hiring events and to develop a plan for tackling the stores' needs going forward. Kroger's Atlanta division, by contrast, was a high-volume division with lots of needs but also lots of candidates and a high hiring percentage. This meant that CoRE recruiters supporting Atlanta didn't have to be nearly as hands-on with the stores. Also, I noticed that some teams had different expectations than others. For example, some of the teams tended to focus on the number of outbound calls they made, while others focused on the number of interviews scheduled at the store. Still others looked more at the "efficiency" reporting that I developed (and described earlier). These are just a few examples of the many differences in how teams operated.

11. I read an article in the newspaper about a lawsuit filed by some former CoRE recruiters who say they weren't salaried professionals and should have been paid overtime. I don't agree with this. In particular, I disagree that we did not have final say in hiring. To the contrary, we could and did decide at any time during the recruiting process whether or not to send a candidate forward. We decided not to call applicants all the time. We regularly exercised our independent judgment —without needing anyone's input or approval — to decline candidates at the phone screen. This is what our job was about: to use our judgment and discretion to decide who would end up getting hired at the stores (and also in other positions outside of the stores). Stores didn't see who's applied; only we did. We chose who we reached out to and who we did not reach out to. We were hired to make that decision, and Kroger (including the stores we supported across the divisions) trusted our judgment in doing so. I received a notice regarding this lawsuit and decided not to join for the above reasons.

12. This is not just about weeding out a small number of applicants who fall short of minimal job qualifications (like availability, minimum age, etc.). I suppose a recruiter could pass along a large number of minimally-qualified applicants if he wanted to, since we have the discretion to do the job the way we think will deliver the best results. It is our prerogative to send more or fewer candidates to the store, as we see fit. However, I regularly say no to people with great applications after their phone screen doesn't go well in my judgment. And I don't think the store would appreciate me sending them lots of minimally-qualified candidates, because that means they still have to do a lot of the recruiting work and I am not adding a lot of value. That's why I tend to be quite selective when evaluating candidates.

13. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 28th day of July, 2017.

Katelyn Davis

EXHIBIT E

DECLARATION OF ERICA BROWN

I, Erica Brown, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I have worked for Kroger G.O. LLC since March 16, 2015, when I was hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. As a CoRE recruiter, I supported Kroger's Columbus division. I did this until I was promoted to the role of recruiting supervisor.

2. My division went "live" (that is, started being supported by the CoRE) after about five weeks of training

3. There was a period of adjustment after my division went live, when we were tweaking the process to perfect it and make it flow smoothly. Recruiters were very much involved in making these improvements and figuring out the best practice. For example, I worked with my colleagues to develop a better approach to the process of ranking and reviewing the applicants we were considering for phone screens.

4. As a recruiter, I supported thirty stores in the Columbus division. As part of my work, I would rank and review applications received for my stores based in part on applicants' assessment scores (derived from a questionnaire applicants completed online) relative to available positions at the store. The assessment alone was not determinative; it was just a tool. I also would look at the overall application and also evaluate important things like an applicant's previous job history. In training, they told us that we had ownership over the process and were empowered to make decisions, and this is what I did at every step along the way, including this one. I would use my best judgment to evaluate applications, and I decided not to contact applicants all the time for a large variety of reasons. This decision was mine to make.

5. For candidates I chose to contact, Kroger gave us a script as a tool for carrying out the phone-screening interview. I only had to follow the script as it was written in a few places typed in boldface font (such as one sentence explaining the background check process to a candidate I was planning to send to the store). Otherwise, I could and did tweak the way I conducted the interview. There were a number of open-ended questions that Kroger wanted us to ask, such as one about a work-related accomplishment the candidate was proud of. I would sometime tweaks questions like that to better suit the candidate. For example, I might ask about a life experience or a school-related activity if that was more applicable.

6. In addition, there was no answer key for how a candidate should answer my questions. Instead, we were empowered as salaried professionals to use our best judgment in assessing candidates' answers relative to a store's particular needs.

7. For example, if I was interviewing a candidate for a produce clerk position, I would listen closely for whether the candidate's explanation of customer service emphasized assisting the customer and making recommendations. For a meat clerk position, I would place more importance on whether I felt the candidate would be able to manage a line and deal with very specialized customer requests (such as for butterflied meat or meat cut for skewers) without becoming frustrated. I would also listen for and assess the quality of relevant background and experience for certain specialized positions such as a chef or a pharmacy technicians. But these are just approaches I developed for the phone screen in my own discretion and based on my best judgment. No one at Kroger told me how to evaluate a candidate's answers.

8. I regularly declined candidates who, after a phone screen, I felt were not good fits for the store. I did not need to get approval from a supervisor or anyone else when I did so.

9. For candidates I passed along to my stores, the expectation is that at least 50% of them end up being hired by the store. So the decisions I was making were really important to shaping the workforce at the stores. I was doing much more than just screening candidates for minimal qualifications.

10. I spent a lot of my time as CoRE recruiter doing work other than ranking and reviewing candidates or calling and receiving calls from candidates. For example, I am part of the CoRE Cultural Council, and we meet as a council for several hours every month and have additional meetings with our subcommittees.

11. I also traveled up to my division to share our best practices in assessing candidates with the local hiring representatives responsible for store-level recruiting activities.

12. In addition, I had a number of opportunities to develop sourcing information for use by my stores. For example, I would search within a given radius of stores looking to expand their applicant pool in order to identify and research organizations (like chambers of commerce, churches, and apartment complexes) we could partner with to generate more applications.

13. Another really exciting project was developing and implementing a complete recruiting and marketing strategy for a Main and Vine concept store. I worked with two other recruiters — with only very high-level and general guidance from a manager – to develop from the ground up a strategy for generating applicant flow for a new type of store Kroger was opening. It was up to us to envision the full strategy for getting the word out for a hiring event, and we explored all kinds

of potential avenues such as advertising on Pandora, on the sides of buses, at local community colleges, etc. Then we implemented our strategy and traveled to Seattle for the week to be boots on the ground making sure everything ran smoothly. In fact, I wasn't on the phone at all for the entire week we were in Seattle. It just shows how varied this job can be.

14. I would generally work about 8 1/2 hours a day for five days of the week. This is a few (but not many) hours over 40 in the week, but I never really thought of this as "overtime." Recruiters are paid to exercise judgment and discretion in the important work of hiring Kroger's workforce, and putting in a little extra was just part of being a salaried professional.

15. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Erica Brown

Executed on this 28th day of July, 2017.

EXHIBIT F

DECLARATION OF AIDAN KEENAN

I, Aidan Keenan, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I have worked for Kroger G.O. LLC since March 2015, when I was hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. This declaration covers the time period from March 2015 to December 1, 2016.

2. I was a recruiter on the Fred Meyer team at CoRE, and we supported the stores in Kroger's Fred Meyer division, located out West. We recruited to fill all hourly in-store positions at Fred Meyer stores. Fred Meyer stores are often bigger and have a lot more departments compared to Kroger stores in Cincinnati. As a result, we often recruited people to work in a wide variety of departments such as home, apparel, the gardening center, and home electronics. We also recruited for positions such as loss prevention specialist and playland attendant.

3. I was a floater on the Fred Meyer team, which meant that I was not assigned a particular district of stores but instead "floated" to wherever the greatest need may have been at any given time. The rest of the recruiters on the team were each assigned to a district (except for two recruiters who shared one really large district). I started out the week by assessing where the greatest needs were across the districts, and then I teamed up with the recruiters assigned to those districts to help meet those needs. On any given week, I recruited in multiple districts that had large needs. Where I focus in any given week depended on where I judge the greatest need to be, and also whether any recruiters were out of the office (in which case I would cover their districts).

4. The amount of recruiting work to be done in any given district really depended on the district and the week. Some districts had low needs some weeks compared to other districts with high needs. In addition, some districts had smaller candidate pools, which meant there were only so many candidates to call and only so much work we could do. By contrast, some other districts had a lot of needs but also a lot of candidates, so that it was easier to stay busy and fill more of the needs.

5. Whether a district or a store had a large candidate pool varied depending on the area. It really depended on factors such as the number of competitive businesses in the area, how their wages and benefits compared with Fred Meyer's, etc. Some stores were located in vacation areas with few year-round residents but an influx of lots of vacationers in season, such that the stores may have had a number of needs but few applicants. Sometimes college students would come back to these areas for the summer, but we really preferred to find longer-term employees for more than just the summer months. Similarly, stores in Alaska often had few applicants just because there were just very few people living nearby.

6. When there was a Fred Meyer store struggling with a small applicant pool, we often reached out to them to see how we could help. We sometimes brainstormed to develop sourcing strategies for the store such as hosting store hiring events, identifying community centers and other local institutions where we could advertise our needs and encourage applications, etc. Sometimes the store hadn't even thought of basic things such as posting "Now Hiring" posters in the store. We couldn't really execute our ideas because we were not on the ground at the store, but the stores often implemented our suggestions to improve their applicant flow.

7. When I was recruiting for a store, I first evaluated the store's needs and looked at the specific positions the store was looking to fill. Then I looked at the applications submitted to the store. I was always looking for the best fit candidates to call, and it was often the case that I didn't need to contact all of the applicants who submitted applications and met certain basic qualifications (such as a minimum age requirement, availability, listed interests matching the store's needs, etc.). In those cases, I used the applicant's previous work experience, volunteer experience, assessment score, etc. to judge which applicants were the best, and I contacted them and not the others. I certainly didn't need anyone's input or approval to decide which qualified applicants to contact and which not to. That was my decision to make as a recruiter.

8. When I called a candidate, I started off the phone conversation with a description of what the position entailed, the rate of pay, and the needed availability (which almost always included weekends). Then I asked a series of open-ended questions such as, "Why did you apply to Fred Meyer?" and "What does friendly customer service look like to you?" Kroger suggested which questions to ask, but I could also choose to ask additional questions to learn more about the candidate. And how I assessed the answers was completely my own judgment call. I was looking for outgoing candidates who would be excited to work at Fred Meyer and would want to be there. It helped if a candidate could give a great example of customer service or what they did in a previous position, but it was really my gut instinct that decided whether I invited a candidate to an in-store interview or declined them.

9. I said no to candidates every day after the phone screen. I did so at my own sole discretion as a recruiter, and no one approved my decision.

10. My level of selectiveness as a recruiter varied. If a store had few positions but lots of candidates, I would be more selective and may have said no to good candidates because I knew it would be possible to find truly great ones. In 2016 especially, we looked more closely at the quality of the candidates we refered to the store. This also made me (and probably a lot of others) more selective.

11. In addition to reviewing resumes and screening candidates, I also had a number of other job duties. As a floater, I helped my supervisor with a number of

tasks. I sent various reports to the division, and I attended a number of meetings. I also attended trainings from time to time.

12. In addition to all these other duties, I was a member of the R&D Committee. We looked to develop a better application process compared to our competitors. As part of our work, we analyzed Kroger's application process. We went through every step and came up with ideas about how to simplify and improve the process. We also completed a similar analysis of our competitors' application processes. Our goal was to come up with changes and improvements that make for a better candidate experience.

13. I did not work from home; I was at CoRE when I was working. Also, I was logged into the phone system whenever I was here, including any time spent at the beginning of my workday before I actually started taking inbound calls.

14. I understand there is a lawsuit saying that CoRE recruiters should be paid overtime. This doesn't make sense to me. As a member the management team, we were given full discretion to manage our own workload. We self-managed to get the job done, and it was up to us to figure out what needed to be done and when. This is what you would expect from salaried management. I've never felt forced to work longer, stay extra, not take a lunch, or anything like that.

15. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Aidan Keenan

Aidan Keenan

Executed on this 28th day of July, 2017.

EXHIBIT G

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 COURTNEY STROSNIDER PURSUANT TO 28 U.S.C. § 1746

I, Courtney Strosnider, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I have worked for Kroger G.O., LLC ("Kroger") since December 2014. I was originally hired to be a recruiter at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio. In May 2015, I was promoted to the position of recruiting supervisor on the mass hire team.

2. During my time as a recruiter, I exercised complete discretion in selecting applicants to contact for telephone interviews and evaluating candidates during the interview process. I used my own judgment to find best-fit candidates for in-store positions in an effort to reduce turnover and increase retention in the stores.

3. In reviewing applications, I evaluated a candidate's assessment score (depending on the specific position I was recruiting for), prior work history, resume (if attached by the candidate), availability, referrals, and criminal history. I ranked candidates, based on this

information, to determine who to contact for telephone interviews. I decided not to contact approximately 20 to 40 candidates per day based on the application materials.

4. During the telephone interviews I conducted, I tried to have a conversation with the candidate to get to know them and their qualifications. Kroger provided recruiters with an interview "script" that was meant to be a guide for the interviews. When I first started recruiting, I tended to follow the script fairly closely. As I became more comfortable in my role, I moved away from the script and instead went with the flow of the conversation I was having with the candidate. Every interview was different, and Kroger gave me the discretion to conduct telephone interviews how I saw fit.

5. As a supervisor, I observed that most of the recruiters on my team did not have the script in front of them during telephone interviews and were not following the script verbatim. This was fine with me because, as I mentioned above, the script was meant only as a guide to have a conversation with a candidate.

6. I determined best fit during my telephone interviews by evaluating candidates' responses to my interview questions, how happy the candidate would be doing the relevant job, and how the candidate would likely perform in the store. So many of Kroger's executives got their start with the Company in stores, so it was exciting to be able to recruit for these positions. I took the job very seriously and worked hard to select only best-fit candidates.

7. I rejected multiple candidates a day based on the telephone interviews.

8. When I was a recruiter on the mass hire team, I created what became known as a "blue sheet." The "blue sheet" provided various data regarding the hiring process at mass hire stores. Recruiters on the mass hire team regularly utilized the "blue sheet" after its creation.

9. Kroger did have some goals established for recruiters related to making outgoing calls and scheduling interviews but, in my experience, recruiters were not disciplined based on these goals. Instead, if a recruiter was very far under the goal, I had a coaching discussion with the recruiter to understand what their roadblocks were and how productivity could be increased in the future. In any event, I had no problem meeting these goals while still finding best-fit candidates for open positions when I was a recruiter. Whenever I spoke to my employees as a recruiting supervisor, I emphasized that the most important part of their job was finding quality candidates for Kroger positions.

10. When I was the recruiting supervisor for the mass hire team, Joseph Hardesty was one of my direct reports. Mr. Hardesty rarely, if ever, stayed at work after his scheduled time. In fact, Mr. Hardesty sometimes left early.

11. I disagree with the lawsuit brought by Joseph Hardesty, Madeline Hickey, and Derek Chipman. I had full discretion to handle my own workload and select applicants for available positions based on my experience and intuition. I received a notice to join this lawsuit but do not wish to do so because my experience as a recruiter does not match the experiences Mr. Hardesty, Ms. Hickey, and Mr. Chipman say they had.

12. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

I, Courtney Strosnider, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

7-27-17
Date of Execution

4836-6925-4476, v. 1

EXHIBIT H

DECLARATION OF BAILEY KEARNS

I, Bailey Kearns, being more than age eighteen and competent to testify about the matters contained herein, hereby declare and state as follows upon personal knowledge and information:

1. I have been with Kroger for 12 years. I worked in the stores — at both the Lebanon Marketplace and the Mason store — before coming to work at the Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio in late March of 2015. This declaration covers the time from September 2015 to December 1, 2016.

2. My first role at CoRE was as an hourly recruiting admin. As an admin, I would do a lot of back-end work to support and facilitate the recruiting process. For example, I would complete requisitions submitted by the stores so that recruiters could see them and begin recruiting to fill them. I would also perform basic upkeep of the process like completing system requests and things like that. Basically, my job as admin was to take care of the administrative work so that recruiters could focus on filling interview slots at the stores with best-fit candidates.

3. I was promoted to be a CoRE recruiter in approximately September 2015. During the time period outlined above, a recruiter's job was focused on selecting candidates that stores will want to hire. This started with selecting the most promising applications from a store's pool of online applicants. It then proceeded to a phone screen with the applicants I selected. At every stage of this process, it was up to me as recruiter to use my discretion and judgment to determine which candidate was the best fit to fill the store's need.

4. Of course, I had to make sure basic requirements were met (like availability and minimum age requirements). However, my real focus was to evaluate a candidate's answers to open-ended phone screen questions such as, for example, how the candidate would interact with customers to provide a great customer service experience. There was no back-and-white, yes-or-no answer to a question like that. I had to figure out, based on a candidate's answers to my questions, whether she was someone I would want to interact with if I worked at the store, whether she would be nice to others, whether she would be a team player, etc. It was a judgment call, and it was my job as recruiter to make it.

5. I turned down candidates every day after a phone screen. This was my decision to make, and I didn't need anyone's approval to do so. It was all part of finding and selecting the best candidates for my stores.

6. Within the CoRE, I was part of the Ralphs/Food 4 Less team and supported Kroger-affiliated stores under those banners in both California and the Midwest (Chicago). Food 4 Less stores are no-frills discount retailers who have a lot of drop pallets, and their customer service is much more geared toward getting

product out onto the sales floor. Productivity was emphasized at Food 4 Less over customer service, and there was a real emphasis on candidates needing to be able to handle the physical demands of the job. Indeed, we only recruited for two positions at Food 4 Less, the customer first clerk (who maintained store cleanliness, retrieves carts, and helped wherever needed) and the maintenance/janitor. By comparison, we recruited for a wide range of positions at Ralphs stores, and the emphasis at Ralphs was much more on traditional customer service. I had to develop my understanding of these differences over time, and I applied this understanding as I reviewed applications and conducted phone screens in order to recruit effectively for stores under both banners.

7. Different stores struggled to fill different positions. At some stores, almost all the applicants were under 18, and it was hard to fill any position outside of courtesy clerk. It was also often a struggle to get enough candidates for any position at stores in affluent areas, like the Malibu Ralphs (one of my stores). By comparison, a Food 4 Less store often had as many as 200-300 applicants, and their needs were often easier to fill from such a large pool. This affected the recruiting process because it affected how selective you could be.

8. As a recruiter, my supervisor trusted me to manage my own workload. It was up to me to decide how I would spend my today. Sometimes, I spent the whole day on the phones, and others I turned to some other non-phone parts of my job. In addition to analyzing various reports, I had a variety of projects that I worked on. I was part of a committee started a metrics board that we used to show where the various teams were with respect to hiring. I also represented Ralphs/Food 4 Less in a realignment process, which changed a number of recruiting practices in a number of the different teams.

9. I don't agree with the lawsuit that Joe Hardesty, Madeline Hickey, and Derek Chipman have brought. CoRE recruiters were salaried management. We had to manage our own workload and own our own business. It was up to me, using my best judgment, to make sure that my stores got interviews. No one was micromanaging me in this process. No one was telling me how to evaluate the candidates. The stores were looking to us to make sure we were providing best-fit candidates, and I was left to my own devices in doing so.

10. I acknowledge that I have provided this declaration of my own free will, that I was not under any obligation to do so, and that I was not pressured to do so by any individual or entity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Bailey Kearns

Bailey Kearns

Executed on this 28th day of July, 2017

EXHIBIT I

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 THERESA MONTI PURSUANT TO 28 U.S.C. § 1746

I am Theresa Monti and I am currently employed and have at all times relevant to this Declaration been employed as Vice President, Corporate Total Rewards for The Kroger Co. I am of legal age and competent to testify with respect to the matters stated below.

1. On December 1, 2016, recruiters employed at Kroger's Center of Recruiting Excellence ("CoRE") were reclassified as non-exempt employees. I was personally involved in this reclassification decision.

2. Kroger made the decision to reclassify CoRE recruiters, and announced it to employees, in November 2016. The decision was made based on the Department of Labor's proposed revisions to the FLSA overtime regulations, which required that employees be paid at least $47,476 per year to be eligible for the administrative exemption.

3. Kroger chose to reclassify CoRE recruiters rather than increase the salaries of all affected employees to meet the new requirement. There was no other reason for the reclassification.

I, Theresa Monti, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

7-26-17
Date of Execution

Theresa Monti