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' REPLY IN SUPPORT OF MOTION FOR DECERTIFICATION

I. Introduction

The fatal flaw of Plaintiffs' opposition to Kroger's motion to decertify their collective action is apparent from the following heading contained in their response brief: "Kroger's focus on the various 'ways' in which class members perform their common job duties is inappropriate and irrelevant." (Doc. 59 at 34) According to Plaintiffs, the amount of discretion and independent judgment named and opt-in Plaintiffs used in performing their job duties "misses the point" because they were subject to the same classification decision, the same job description, and some of the same policies. Plaintiffs' position – which would obliterate the FLSA certification and decertification scheme in virtually every misclassification case – is simply incorrect.

Plaintiffs' response brief completely ignores Kroger's citation to *Perry*, and the cases cited within that opinion, holding that recruiters may be exempt from overtime if they exercise discretion and independent judgment in selecting best-fit candidates for available positions, even if they do not make the final hiring decision. This is exactly what opt-in Plaintiff Corbin Hom (and other named and opt-in Plaintiffs at various points during their employment) testified he did.

In fact, it is undisputed that recruiters only sent **two** candidates for each opening – so their selection decisions were clearly important. They were not sending a "group" of candidates who met minimal qualifications, as Plaintiffs suggest. Indeed, if a candidate did not meet Kroger's minimum qualifications, recruiters would not have been calling the candidate for an interview in the first place.

Based on the evidence, the Court should decertify the collective action because Plaintiffs have testified to exercising vastly different amounts of discretion in their duties as CoRE recruiters – differences that are critically important in both the exemption and decertification analyses based on existing case law. Although Plaintiffs repeatedly attack Kroger for "blatantly exaggerating" named and opt-in Plaintiffs' deposition testimony (by ignoring or otherwise minimizing the importance of what they actually said), an objective review of the testimony evidences clear differences in the key issue relevant to the application of the administrative exemption: the level of discretion exercised by each member of the collective. As a result, the finder of fact simply could not reach a uniform and correct decision with regard to all members of the collective based on the testimony, mandating decertification under existing precedent. Indeed, the potential for an unfair collective action result under the circumstances is high.

Plaintiffs' suggestion that common job descriptions and exempt statuses render collective treatment appropriate misses the mark. Indeed, some Plaintiffs admit that they did not follow the job description, which states that recruiters would provide stores with only "best-fit candidates for hourly store positions." **Plaintiffs cannot rely on a job description they admit they did not follow.** Moreover, the law requires the Court to assess Plaintiffs' actual day-to-day work experiences – what Plaintiffs actually do – in order to determine whether they are similarly situated. Here, there is no reasonable argument that named and opt-in Plaintiffs are similarly situated because their own testimony demonstrates significant disparity regarding the level of

discretion they exercised while working at CoRE.

This disparity, and the resulting improbability of a uniform decision, undermines the policy behind collective actions and subjects both parties to the risk of an unfair result. The collective action must be decertified.

II. Argument

A. The Plaintiffs' Factual and Employment Settings Are Different.

1. The Variation in How CoRE Recruiters Performed Their Duties Demonstrates They Are Not Similarly Situated.

The "key" to the similarly-situated inquiry is not whether Plaintiffs had the same duties. Instead, it is how Plaintiffs **performed their jobs pursuant to their prescribed duties**. *Lipnicki v. Meritage Homes Corp.*, 2014 U.S. Dist. LEXIS 155866, *8 (S.D. Tex. 2014). Plaintiffs cherry-picked quotes from a number of cases to support their argument that "position descriptions are extremely relevant" in determining whether employees are similarly situated. (Doc. 59 at 32) Plaintiffs' argument is meritless with respect to this case for multiple reasons. First, Plaintiffs cannot rely on the CoRE recruiter job description to support their argument that the members of the collective are similarly situated when it is undisputed that some members of the collective did not follow the document – which states that recruiters would work to provide stores with only "best-fit candidates" for available positions – in performing their duties. (Smith Aff., Ex. 2)

Second, Plaintiffs' argument is incorrect from a legal standpoint, and it glosses over the proper legal standard for determining how job duties are to be evaluated in determining collective certification. For instance, in *Kelly v. Healthcare Servs. Grp., Inc.*, although the court evaluated the relevant job description (which contained express clauses giving the employees no discretion in performing their duties), it also acknowledged that the key to the inquiry was

whether the employees **uniformly acted in conformity with it**. *Kelly*, 106 F.Supp.3d 808, 815 (E.D. Tex. 2015). Likewise, in *Morgan v. Family Dollar Stores, Inc.*, the court assessed a job description, but based its decision on multiple factors including lack of discretion afforded to managers, their day-to-day responsibilities, and several others. *Morgan*, 551 F.3d 1233, 1262 (11th Cir. 2008).

The law in this Circuit requires Courts analyzing misclassification cases to "focus on the actual day-to-day activities of the employee rather than more general job descriptions contained in resumes, position descriptions, and performance evaluations." *Wade v. Werner Trucking Co.*, 2012 U.S. Dist. LEXIS 156257, *15 (S.D. Ohio 2012) (citing *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 400 (6th Cir. 2004)). *See also, Bowman v. Crossmark, Inc.*, 2010 U.S. Dist. LEXIS 72350, *6 (E.D. Tenn. 2010) (*conditional* certification was denied where "[t]he evidence in the record does not support plaintiffs' contention that retail representatives nationwide perform their [] duties exactly as they do and that they are required to perform the tasks as they do"). Moreover, at least one court in this Circuit has determined that common job descriptions are insufficient for collective action certification because **"if a uniform job description was sufficient, every business in corporate America would be subject to automatic certification of a nationwide collective 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)) (emphasis added).

Courts in other jurisdictions agree – especially where, as here, differences relevant to a potential exemption exist. *See, e.g., Green v. Harbor Freight Tools USA, Inc.*, 888 F.Supp.2d 1088, 1098-99, 1103 (D. Kan. 2012)(job description irrelevant where it does not fully describe the scope of duties performed by employee, nor level of discretion utilized); *Martin v.*

Sprint/United Mgmt. Co., 2016 U.S. Dist. LEXIS 352, *19 * (S.D.N.Y. 2014)("[T]he fact of a common job description or a uniform training regimen does not, alone, make those persons subject to it 'similarly situated' under the FLSA.").

Indeed, Plaintiffs admit that "the only relevant question at this stage of the analysis is whether the members of the class are sufficiently similar in the essential criteria needed to uphold or reject the exemption." (Doc. 59 at 34) But what Plaintiffs fail to realize is that the degree of discretion and independent judgment CoRE recruiters exercised **is the essential criterion relevant to this case**. Plaintiffs' position in opposing decertification – that a common job description and classification decision are sufficient to maintain a collective action under the FLSA notwithstanding clear differences relevant to a dispositive exemption defense – turns the FLSA on its head and would moot the similarly situated analysis in virtually every misclassification case.

There can be little dispute here that Plaintiffs did not perform their jobs uniformly in accordance with their prescribed duties, and therefore the collective must be decertified. As outlined in Kroger's decertification motion, some Plaintiffs said they called every candidate for an open position without reviewing their application materials and selected every single candidate for a final in-store interview so long as the candidate did not cuss at them. These individuals admittedly failed to follow the very job description Plaintiffs attempt to rely upon to support their claim that collective members are similarly situated. On the other hand, other members of the collective testified that they exercised full discretion and independent judgment in both reviewing applications to determine who they would interview for openings and selecting candidates to send for the final interview based on criteria they established in their professional judgment, along with their "gut" and "intuition." Moreover, named and opt-in Plaintiffs testified to using varying amounts of discretion and independent judgment in completing their job duties

depending on numerous factors, including applicant pool size, supervisor instruction, and business goals. The amount of discretion exercised, which varied widely depending on the individual recruiter, is the cornerstone of the administrative exemption analysis.

Simply put, the key issue before the Court is not whether employees have similar job descriptions, or even general duties. It is whether the employees are similarly situated, which turns on an analysis of what the employees actually did in recruiting for Kroger. Here, the uncontroverted evidence demonstrates that Plaintiffs exercised widely varying degrees of discretion in performing their jobs. And because the amount of discretion used strikes at the core of the exemption analysis, a jury could not make a one-size-fits-all determination as to the key issue in this case: whether the employees are exempt. Accordingly, the Court must decertify the collective action.

2. Plaintiffs' Attempts To Minimize The Varying Testimony Of Members Of The Collective Action Are Meritless.

Although Plaintiffs incorrectly claim the degree to which members of the collective exercised discretion and independent judgment is "irrelevant," they nevertheless wrongly attack Kroger for "blatantly exaggerating" the relevant deposition testimony. These attacks, which are based on cherry-picked portions (mostly summary statements) from collective member depositions, should be rejected.

For example, Plaintiffs claim that opt-in Plaintiff Kelly Rutledge "never testified to declining or rejecting an applicant" based on work history or education. (Doc. 59 at 14) This is false. In fact, Rutledge admitted that she was "sure that did take place." (Rutledge Dep. 80:3-7) Rutledge also clearly testified that she regularly declined candidates at the application stage based on a complete review of the application materials and her assessment of how "the candidates fit[] the position" because she "didn't want to send poor candidates to a store." (*Id.* at

78:10-18; 79:1-4) Other named and opt-in Plaintiffs similarly testified to using full discretion in selecting applicants to contact for phone interviews at different times during their employment. (Chipman Dep. 141:22-142:3; 145:12-148:2)(level of discretion he used varied depending on the CoRE team for which he was recruiting, the number of relevant candidates, and the position); Burchett Dep. 31:21-32:15; 32:19-24; 45:1-6; 62:12-16; 69:8-25; 71:21-23)(utilized discretion to select only best-fit candidates to contact likely until January 2015). Critically, no recruiter testified that Kroger told them which candidates to select for telephone interviews.

The same is true with respect to evaluating candidates during the interview process. Although Plaintiffs admit that Hom added and removed questions from his interviews as he saw fit (Doc. 59 at 17), they ignore Hom's testimony that he exercised full discretion to select or reject candidates for one of two final, in-store interview slots based on his "gut" and "intuition" regarding whether the candidate would be a best fit for the store. (Hom Dep. 22:19-23:18; 24:23-26:1; 29:3-4) Instead, they merely cite a portion of Hom's deposition where he briefly summarized the interview process without going into further detail. (Doc. 59 at 17) Moreover, Hom never indicated that candidate responses "encompassed how he would determine whether an applicant met the minimum qualifications to schedule them for an in-store interview," as Plaintiffs claim. (*Id.*) In fact, the phrase "minimum qualifications" appears nowhere in Hom's testimony. On the other hand, Hom refers to finding the "best" candidates multiple times. (Hom Dep. 21:20-24; 22:2-23:18; 91:20-92:6) Plaintiffs similarly cannot dispute that Chipman, Hickey, Rutledge and Burchett all testified to using complete discretion to select applicants for final, in-store interviews at some times but not others. (*See* Doc. 47 at 12-13)

Hom's testimony also directly contradicts Plaintiffs' implication that Kroger's business goals uniformly hindered members of the collective from exercising discretion. When asked, Hom stated that he was able to meet his goals (even though he worked to find best-fit candidates

for available positions and regularly declined candidates based on their applications or telephone interviews). (Hom Dep. 113:20-114:3) Moreover, the documents Plaintiffs reference on this issue actually support Kroger's position. The e-mails some recruiters received from their supervisors uniformly stated that their focus should be on the **quality** of the candidates they sent to the stores. (*See* Smith Aff., Exhibit 8)[1] Moreover, Courtney Strosnider (a recruiter who later served as a recruiting supervisor during the relevant class period) testified that not speaking to enough good candidates was a perfectly acceptable excuse at CoRE for a recruiter not meeting her goals. (Strosnider Dep. 110:11-111:8)

Finally, the laundry list of alleged "similarities" Plaintiffs reference in opposition to Kroger's decertification motion is irrelevant. As with the other arguments Plaintiffs raise, the alleged similarities have nothing to do with whether and the extent to which members of the collective used discretion and independent judgment in performing their job duties.[2] For example, Plaintiffs reference having "access to the shared drive on the CoRE computer system" and using "Kroger-provided software." (Doc. 59 at 13, 35-36) Alleged similarities regarding these marginal issues are insufficient for collective action certification. If this were not the case, a collective of attorneys, paralegals, and legal assistants employed by the same firm would be appropriate since they all utilize the same document management system.

Try as they might, Plaintiffs cannot refute the clear differences in the extent members of the collective used discretion and independent judgment in performing their job duties.[3] Some

[1] Although Plaintiffs reference the fact that Rutledge's supervisor mentioned quantitative aspects of her job during "coaching" sessions, they ignore that Rutledge was also specifically praised for her quality numbers. (Rutledge Dep. 43:23-44:6)

[2] The same is true with respect to Plaintiffs' argument that recruiters assisted with other teams. The fact that recruiters helped their colleagues does not mean that all recruiters used the same level of discretion and independent judgment. Indeed, the evidence shows otherwise.

[3] Plaintiffs also attack Kroger for blatantly exaggerating other duties members of the collective performed. This attack is based on Plaintiffs' misperception that Kroger seeks to prove that CoRE recruiters did not have the primary

members' depictions of their jobs (for all or a portion of their employment at CoRE during the relevant class period) are similar to the recruiter in *Perry*, and the other cases cited therein, where the court determined that the administrative exemption applied. Yet Plaintiffs ask the Court to throw these individuals in the same collective as others who claimed to select every single candidate who did not cuss at them so that a jury can make a single determination regarding Kroger's liability. Collective treatment is inappropriate, unfair, and contrary to established precedent under the circumstances.

3. Kroger's Decision to Classify CoRE Recruiters as Exempt Does Not Make Collective Treatment Appropriate.

Kroger's decision to classify CoRE recruiters as exempt is not controlling with respect to the similarly-situated analysis, as Plaintiffs suggest. In order to establish they are similarly situated, Plaintiffs must establish not just that they "suffer from a single policy" **but also that** "proof of that policy or conduct in conformity with that policy proves a violation as to all the plaintiffs." *See Gentrup v. Renovo Servs., LLC*, 2010 U.S. Dist. LEXIS 143203 at **23-24 (S.D. Ohio Aug. 17, 2010) (citing *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567 (6th Cir. 2009)) (emphasis added). Where individualized considerations predominate, fairness and procedural concerns require the Court to decertify the class. *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009).

Uniform classification is only relevant to the extent it eases the individualized inquiry into whether collective treatment is appropriate. *See Vinole v. Countrywide Home, Inc.*, 246 F.R.D. 637, 642 (S.D. Cal. 2007) (applying principle in Rule 23 context). Indeed, numerous courts have concluded that an employer's decision to classify a particular group of employees as

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duty of finding best-fit candidates for available positions. (Doc. 59 at 20-21) To the contrary, these other duties, which further exemplify the use of discretion and independent judgment, are part and parcel of recruiters' primary duty to select best-fit candidates for positions and therefore should be considered in the relevant exemption analysis.

exempt does not eliminate the need to make individualized, factual determinations regarding what members of the proposed collective actually do. *Hill v. R&L Carriers*, 2011 U.S. Dist. LEXIS 27997 at **15, 26-27(N.D. Ca. March 3, 2011)(uniform corporate policies exempting employees from overtime pay and manager testimony that collective members "should be performing the same job" not enough when variation existed regarding how employees exercised discretion and independent judgment); *Green v. Harbor Freight Tools USA, Inc.*, 888 F.Supp.2d 1088, 1100 (D. Kan. 2012)(holding that "Plaintiffs cannot rely on common proof evidence of Harbor Freight's decision to classify the Store Manager position as exempt" at decertification stage in light of differences related to application of relevant exemption analysis); *Stevens v. HMS Host Corp.*, 2014 U.S. Dist. LEXIS 119653 at *14 (E.D.N.Y. Aug. 26, 2014)("Defendants' blanket classification decision and uniform corporate policies do not on their own render plaintiffs similarly situated….Ultimately, determining whether plaintiffs' employment settings were similar requires the Court to examine the deponents' testimony about their particular job duties and level of managerial authority."). *See also* cases cited in Kroger's opposition to class certification (Doc. 62 at 33-36).

Moreover, even the cases Plaintiffs cite in their memorandum in opposition demonstrate that the issue of a common exemption decision is not determinative and that the Court should review the evidence regarding Plaintiffs' job duties "in great detail." *See Judkins v. Southerncare, Inc.*, 74 F.Supp.3d 1007, 1012 (S.D. Iowa 2015)(noting that although some courts have been persuaded by an employer's decision to classify an entire category of employees as exempt it was still necessary to conduct an inquiry as to whether class members are actually performing similar duties); *Pendlebury v. Starbucks Coffee Co.*, 518 F.Supp.2d 1345, 1553 (S.D. Fla. 2007)("merely classifying a group of employees as exempt does not automatically qualify them as similarly situated").

This case presents the classic example where the Court should give very little, if any, deference to Kroger's decision to classify its recruiters as exempt in determining whether collective certification remains appropriate. The evidence and testimony in this case demonstrate that recruiters' exercise of discretion varied widely. Accordingly, a jury could not come to one conclusion with respect to whether the recruiters are exempt.

The collective action should be decertified.

B. Decertification is Appropriate Because Kroger Cannot Apply a Representative Defense to the Entire Collective.

1. Where Testimony Regarding Discretion Varies Collective Treatment is Improper.

Kroger's defense – that each recruiter exercised discretion in performing his or her duties – cannot be applied without performing analyses with respect to each member of the collective.[4] For this reason alone, collective treatment of Plaintiffs' claims is inappropriate. Plaintiffs' argument that Kroger's defenses pertain to the collective as a whole is inaccurate, overlooks the substance of Kroger's arguments in this case, and demonstrates the obvious weakness in Plaintiffs' argument in favor of collective treatment.

When defending a misclassification case in which collective members perform different duties, courts acknowledge that employers "will have highly individualized defenses to the various claims." *Oetinger v. First Residential Mortg. Network, Inc.*, 2009 U.S. Dist. LEXIS 61877, at *10 (W.D. Ky. 2009). The cases Plaintiffs cite to suggest courts "routinely certify class and collective actions in the administrative exemption context" are factually distinguishable. For instance, in *Swigart v. Fifth Third Bank*, a Rule 23 case, there was no

[4] To the extent Plaintiffs imply that Kroger bears that burden of establishing its defenses at this stage, they are incorrect. (Doc. 59 at 37) Although Kroger may ultimately bear the burden of establishing its exemption defense with respect to each employee who brings a claim, "Plaintiffs bear the burden of establishing that they can present common proof [with respect to the] exemption" issue at the decertification stage. *Campbell*, 253 F.R.D. at 622.

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. Moreover, evidence showed that the putative class all followed a uniform playbook that contained "non-negotiable" polices that had to be followed. 288 F.R.D. 177, 181 (S.D. Ohio 2012). Here, some members of the collective have specifically testified that Kroger allowed them to use their discretion to select candidates for final, in-store interviews, and Plaintiffs have identified no "non-negotiable" policies that meaningfully prohibited the use of discretion in their jobs. Indeed, the evidence shows that recruiters performed their jobs very differently and used different levels of discretion in evaluating candidates.

The other cases Plaintiffs cite are also factually distinguishable because each case involved circumstances where there was little to no variation in the amount of discretion employees exercised – the key issue in the administrative exemption analysis. *See, e.g., Kelly v. Healthcare Servs. Grp., Inc.*, 106 F.Supp.3d 808, 828 (E.D. Tex. 2015)(clear company policy that stated employees were not allowed to change job routines without permission and did not do so); *Judkins v. Southerncare, Inc.*, 74 F.Supp.3d 1007, 1013 (S.D. Iowa 2015)(no variation among class members regarding amount of discretion used); *Ahle v. Veracity Research Co.*, 738 F.Supp. 896, 905-907 (D.Minn. 2010)(no issue regarding how levels of discretion varied between class members); *Perez v. Allstate*, 2014 U.S. Dist. LEXIS 130214, *19 (E.D.N.Y. 2014)(nearly all decisions to be made were governed by strict policies); *Garcia v. Freedom Mortg. Corp.*, 790 F.Supp.2d 283, 287 (D.N.J. 2011)(no argument that class members exercised varying levels of discretion); *Jackson v. Bloomberg, L.P.*, 298 F.R.D. 152, 165-166 (S.D.N.Y. 2014)(court addressing **conditional** certification, which is a much less stringent standard).

Kroger's defenses in this case cannot be applied uniformly because of the varying testimony regarding how potential members of the collective performed their job duties. The United States District Court for the District of Kansas dealt with a similar factual scenario in *Green v. Harbor Freight Tools USA, Inc.*, 888 F.Supp.2d 1088 (D. Kan. 2012). In *Green*, the court analyzed whether collective treatment was proper for a group of store managers asserting violations under the FLSA. *Id.* In analyzing whether certification remained appropriate in light of the employer's exemption defense, the court noted the following: (1) testimony differed as to the level of supervision exercised over their work; (2) testimony differed as to the amount of discretion the managers had to make payroll decisions; and (3) testimony differed over the amount of discretion related to managing subordinate employees. *Id.* at 1101-1102. The district court granted the employer's motion for decertification and found that "[b]ecause the amount of discretion a store manager has, and the relative amount of control he or she exercised over the employees and operations of the store are crucial factors to be considered in an FLSA exemption analysis," collective certification was inappropriate. *Id.* at 1103.

Cases from other courts also note that the inability to present a representative defense is fatal to collective certification. *See Stevens v. HMS Host Corp.*, 2014 U.S. Dist. LEXIS 119653 (E.D.N.Y. 2014). In *Stevens*, the court found the "variation and dissimilarity across the deponents' testimony [to be] immediately apparent." *Id.* at *15. The court decertified the collective and held that the "wide differences in employment settings and job duties greatly complicate the use of representative proof either to prove the correctness of the executive classification or to rebut such a showing." *Id.* at *18. *See also Johnson v. Big Lots Stores, Inc.*, 561 F.Supp.2d 567, 586 (E.D. La. 2008)("wide-ranging diversity along key criteria . . . make collective adjudication imprudent.").

Plaintiffs' attempt to distinguish *Hill v. R&L Carriers* on this issue is without merit. Although it is obvious that the kinds of job duties performed by dispatchers would differ from those performed by recruiters, the fact remains that the potential collective members in *Hill* testified to exercising different levels of discretion and independent judgment in performing their jobs. This fact was dispositive. 2011 U.S. Dist. LEXIS 27997 at *15 (N.D. Ca. 2011)("As described above, some City Dispatchers exercised more discretion than others. An investigation of the degree of each opt-in Plaintiffs' exercise of discretion would prove too unwieldy at trial.") As in *Hill*, the testimony of named and opt-in Plaintiffs varies with respect to how much discretion they exercised in recruiting for Kroger. Some exercised significant discretion throughout their employment. Others exercised significant discretion only at certain times (based on the size of a store's applicant pool, the team they were working for, or alleged instructions from their supervisors). Still others claim they never exercised meaningful discretion. *Hill*, along with the many other cases outlined above, support the decertification of Plaintiffs' collective action.

The evidence before the Court establishes that the individual circumstances of particular collective members will be the cornerstone of the fact-finder's determination whether they were misclassified by Kroger. These circumstances unquestionably vary, so collective treatment is not appropriate.

2. The Evidence Demonstrates the Administrative Exemption Applies to CoRE Recruiters.

Without citing case law, Plaintiffs argue the administrative exemption does not apply to CoRE recruiters. This is incorrect.[5] In a case with very similar facts dealing with recruiters, which Plaintiffs ignored in their opposition brief, the United States District Court for the Eastern District of Michigan held that recruiters were exempt under the administrative exemption even where they lacked final hiring authority. *Perry v. Randstad Gen. Partner (US) LLC,* 2015 U.S. Dist. LEXIS 61822 at *8 (E.D. Mich. 2015). The court reasoned that because the recruiters had authority to assess candidates and decided whether to present certain candidates to the client, and focused to make the determination whether a candidate would be the "best fit" for a position and client, they exercised sufficient discretion to qualify under the exemption. *Id.* Other courts have reached similar conclusions with respect to recruiters. *See, e.g., Andrade v. Aerotek, Inc.*, 700 F.Supp. 2d 738 (D. Md. 2010)(recruiter was exempt where the record demonstrated she exercised discretion in selecting candidates to be sent to the hiring manager for approval); *Quintiliani v. Concentric Healthcare Solutions, LLC,* 944 F.Supp.2d 738 (D. Ariz. 2013)(recruiter exempt where duties involved finding "best fit" candidates). *Perry*, and the other cases cited therein, fly in the face of Plaintiffs' suggestion that a regulation referencing "human resource managers" and "personnel clerks" renders CoRE recruiters non-exempt. Indeed, Plaintiffs are neither human resource managers nor personnel clerks, and their duties in exercising discretion to select best-fit candidates make them exempt.

[5] Kroger agrees that the Court is not to make a decision on the merits at the decertification stage. However, the cases highlighted below provide the necessary background for understanding why the variation established in the record is vital to the decertification analysis.

C. Collective Treatment of Plaintiffs' Claims Would Undermine the Policy Behind Collective Actions.

The purpose underlying collective actions—resolving **common** issues of law and fact in one action—cannot be effectuated if Plaintiffs' claims are treated collectively here. It is undisputed that Plaintiffs' day-to-day work experiences (and specifically how much discretion they exercised) vary. And because the amount of discretion used is the crux of the administrative exemption analysis, a jury likely could not reach a uniform decision as to Plaintiffs' status. If the jury were forced to render such a decision, the potential for an incorrect result would be significant. Simply stated, it would be "senseless to proceed as a collective action when Plaintiffs' experiences . . . vary from day to day, and from individual to individual." *Reed v. County of Orange*, 2010 U.S. Dist. LEXIS 6157, *50-51 (C.D. Cal. 2010).

Moreover, opt-in Plaintiffs will not be prejudiced in having to proceed with their claims individually. Plaintiffs' assertion that decertification would "place each plaintiff back at square one without the benefit of pooled resources" ignores the hundreds of hours of discovery already conducted in this case and the well-developed record that resulted. All that would be left for individual plaintiffs is to proceed with their claims through dispositive motion briefing and/or trial. To suggest individual Plaintiffs would be back at square one is simply not accurate.

Adjudication as a collective action only works where the jury is able to render a single decision. Such is not the case here. The collective action should be decertified.

III. CONCLUSION

Collective treatment is inappropriate. Plaintiffs' testimony shows the extent they exercised discretion at work varied substantially. Because these differences go to the very heart of the administrative exemption analysis, this case should not proceed as a group action. For these reasons, Defendants respectfully request that the Court grant their Motion for Decertification.

Respectfully submitted,

/s/ David K. Montgomery
David K. Montgomery (0040276)
Ryan M. Martin (0082385)
Jackson Lewis P.C.
PNC Center, 26th Floor
201 East 5th Street
Cincinnati, OH 45202
Telephone: (513) 898-0050
Facsimile: (513) 898-0051
David.Montgomery@jacksonlewis.com
Ryan.Martin@jacksonlewis.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th 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

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