UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOSEPH HARDESTY, et al., Individually and on behalf of All Others Similarly Situated	:	Case No. 1:16-cv-00298
	:	Judge Timothy Black
Plaintiffs,	:	
v.	:	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION UNDER FED. R. CIV. P. 23(a) AND 23(b)(3)**
THE KROGER CO., et al.,	:	
Defendants.	:	

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I. INTRODUCTION

Defendant Kroger opposes certification of Named Plaintiffs' Ohio wage claims based upon the same mischaracterizations of law and fact set forth in Kroger's motion to decertify (Doc#47), and should similarly be rejected for some of the same reasons set forth in the Named Plaintiffs' memorandum in opposition (Doc#59). More specifically:

- Kroger once again attempts to exaggerate the importance of insignificant differences in some CoRE Recruiters' temporary or minor job duties, and correspondingly misleads the Court with the incorrect indication that said insignificant differences can defeat the establishment of Fed. R. Civ. P. 23(a) (Numerosity, Commonality, Typicality, Adequacy of Representation), and Rule 23(b)(3) (the predominance of common questions of law and fact, and the superior method of adjudication provided by class certification). As this Court is well aware, insignificant differences in temporary or minor job duties will not prevent class certification, nor will they satisfy the FLSA's administrative exemption, which focuses entirely on an employee's ***primary job duty*** (i.e., their principal, main, major or most important duty).

- The focus of Kroger's Memorandum in Opposition upon whether insignificant differences or temporary duties of CoRE Recruiters satisfy the FLSA's administrative exemption prematurely asks the Court for a decision on the merits. Although eventual summary judgment briefing will further confirm that the administrative exemption does not apply to the CoRE Recruiters, the inquiry is not properly before the Court at this time, nor necessary for deciding the appropriateness of class certification.

- Notwithstanding the prematurity of such briefing, Kroger does not expressly dispute that all CoRE Recruiters had the same *primary* job duty of screening online applicants using a Kroger-provided recruiting script, and scheduling such applicants for in-store interviews. DOL regulations and case law make clear that such a primary duty of screening and scheduling, ***regardless of how it is performed***, is legally insufficient to meet the administrative exemption's primary duties test. Therefore, Kroger's arguments regarding the purported insignificant differences in CoRE Recruiter job duties, or method of performance, is nothing more than a "red herring" that will not prevent class certification.

- Kroger fails to rebut (and often improperly asks this Court to ignore) the overwhelming evidence supporting the elements of certification under Rule 23(a) and 23(b)(3), including (i) documents and testimony establishing that all CoRE Recruiters performed the same primary job duty of screening and scheduling candidates; (ii) evidence that CoRE Recruiters were entirely interchangeable, and in fact were consistently interchanged, between teams and divisions; and (iii) Kroger's undisputed single, uniform policy decision to classify all CoRE Recruiters as exempt, based upon anticipated common job duties of the CoRE Recruiters and without any individualized analysis as to a CoRE Recruiter's team, store assignments, or particularized job duties.

For the foregoing reasons, and those set forth more specifically below, the Named Plaintiffs respectfully requests that this Court certify their Ohio wage claims under Fed. R. Civ. P. 23, approve the submission of the proposed notice to class members, and order that Defendant Kroger supplement its original production of names/addresses and other relevant information regarding Kroger's CoRE Recruiters employed from the beginning of its operations in 2014 to December 1, 2016.

II. THE ADMINISTRATIVE EXEMPTION

Like its motion to decertify, Kroger's Rule 23 memorandum entirely focuses on the application of the FLSA's administrative exemption to the CoRE Recruiters, claiming that because CoRE Recruiters engage in allegedly varying duties, individualized treatment under the exemption is required. As this Court knows, the application of the administrative exemption is a question reserved for the merits of this case. The U.S. Supreme Court has made clear that while certification analysis may inevitably "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551, 180 L. Ed.2d 374 (2011), such inquiry "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen, Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195, 185 L Ed.2d 308 (2013). Rather, merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied. *Id.*

Here, the administrative exemption can should *only* be considered to the extent that it is relevant to Rule 23(a)'s prerequisites. Because Kroger's opposition relies upon mischaracterizations of the administrative exemption, however, an overview of the exemption's requirements is necessary to the Court's certification analysis.

To meet the administrative exemption's requirements, an employer must show three elements by a preponderance of the clear and affirmative evidence:

(1) The employee is compensated on a salary or fee basis at a rate of not less than $455 per week …;
(2) The employee's *primary duty* is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
(3) The employee's *primary duty* includes the exercise of discretion and independent judgment with respect to matters of significance.

29 CFR § 541.200(emphasis added); *See also Orton v. Johnny's Lunch Franchise, LLC,* 668 F.3d 843, 847 (6th Cir.2012).

A. CoRE Recruiters' "primary duty" is to perform telephone screenings of online applicants and schedule them for in-store interviews

Under the second and third factors of 29 CFR § 541.200, the employee's "primary duty" is the focus. *Burton v. Appriss, Inc.*, 682 F.App'x 423 (6th Cir.2017). The term "primary duty" means the principal, main, major or most important duty that the employee performs. 29 CFR § 541.700(a). Determination of an employee's primary duty must be based on all the facts in a particular case, with a major emphasis on the character of the employee's job as a whole. *Id.* Factors to consider when determining the primary duty of an employee include, but are not limited to:

(i) the relative importance of the exempt duties as compared with other types of duties;
(ii) the amount of time performing exempt work;
(iii) the employee's relative freedom from direct supervision; and
(iv) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. While time alone is not the sole test, the amount of time spent performing exempt or non-exempt work can be a useful guide in determining whether such work is the primary duty of an employee. (*Id.* at 541.700(b)); According to 29 CFR § 541.700(b):

> The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement…Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

In *Burton v. Appriss*, 2017 U.S. App. LEXIS 4763 at *10 (6th Cir. 2017), the court determined that a plaintiff who spent only one third of her time in sales was precluded from showing that sales was her "primary duty," where she could not show that her selling duties were "more important" than the management duties where she spent the majority of her time. *See also Kelly v. Healthcare Servs. Grp., Inc.*, 106 F. Supp.3d 808, fn. 10 (E.D. Tex. 2013)("a showing of similarity concerning the amount of time spent doing exempt versus manual labor is highly probative.").

Here, Kroger cites to various alleged differences in minor or temporary assignments performed by certain CoRE Recruiters which have provided declarations on Kroger's behalf. Kroger fails to argue that any of these supplemental additional duties are "primary duties," or that these supplemental, additional duties were of such importance that the CoRE Recruiters screening and scheduling duties were subordinate to them. Instead, these declarations claim that individuals performed temporary assignments related to General Office recruiting, recruiting related to management positions, or various "floater" duties. These declarations were submitted for the first time in Kroger Memorandum in Opposition, and have not been subjected to cross-examination.

More importantly, however, these variances in job duties cited to by the declarants completely miss the point of the administrative exemption. Specifically, as set forth above the exemption is not concerned with ***any*** potential minor or temporary duties that an employee may perform. Rather, the exemption focuses on an employee's *primary duty* (i.e., their principal, main, major or most important duty). In this case, the evidence overwhelmingly shows that all CoRE

Recruiters have the same *primary job duty* of screening online job applicants and scheduling them for in-store interviews.

First, Kroger's own common job description provides a central focus on screening online applicants and scheduling them for in-store interviews:

> The Recruiter will be part of a dedicated recruiting team providing our grocery retail stores with best-fit candidates for hourly store positions. **The Recruiter will assess and screen applications, conduct phone screens, prepare interview packages, and present stores with a qualified slate of applicants**…

The job description's "essential job duties" provide further support, stating up front that CoRE Recruiters will "**[s]creen candidate applications** using best-fit criteria such as availability and behavioral assessment[,]" "**[c]onduct phone screens** to confirm interest and availability and share information about the position[,]" and "[a]ct as a steward of **positive candidate experience**."

Kroger training documents also confirm these primary duties, stating that the "three main duties" of a Recruiter are (1) reviewing candidate applications; (2) phone screening candidates and scheduling interviews; and (3) forwarding candidates to store specific job requisitions. *See* Doc#55, pg. 20.

Kroger's uniform decision to classify all CoRE Recruiters as exempt also supports this conclusion. Former CoRE General Manager Buck Moffett stated that the CoRE Recruiters were made exempt based upon his "overall vision" for the role and how CoRE Recruiters would conduct their job on a day-to-day basis. Moffett Dep. 39:4-23. Moffett indicated that this "overall vision" for the CoRE Recruiters was to "*ensure that the person that they are forwarding to the store meets our expectations for someone that would interact with our customers*," **which is done through a "phone screen."** Moffett Dep. 20:22-21:12; 39:4-40:6; 41:9-23(emphasis added).

Kroger phone records also indicate that CoRE Recruiters spent nearly all their time screening and scheduling candidates. CoRE Recruiters, as a group, spent 90% or more of their

time in the phone systems each week. (*See* Exhibit 8 to Smith Affidavit, attached to Doc#55 as Exhibit A). Even Kroger's employee-declarants, who Kroger claims spent significant periods outside of the phone system, spend the vast majority of their days (over 50%) performing phone screens:

Employee[1]	Average Recruiting Time
Erica Brown	86% (7/13/2015-5/1/2016)
Katelyn Davis	69% (7/27/2015-7/10/2016)
Bailey Kearns	86% (12/13/2015-7/10/2016)
Aidan Keenan	86% (7/13/2015-7/10/2016)
Shawn Scott	88% (7/13/2015-1/18/2016)
Eric Shrider	74% (7/13/2015-4/10/2016)
Laurie White	86% (8/3/2015-7/10/2016)

The fact that all CoRE Recruiters spent the majority of their time screening and scheduling candidates is highly persuasive to a finding that it is their primary job duty.

Screening and scheduling is also the CoRE Recruiters most important duty. This is made clear by Buck Moffett's testimony that CoRE Recruiters were regularly interchanged between teams to ensure adequate support. Moffett Dep. 106:7-23. CoRE Recruiters confirmed this fact, testifying that they would regularly support other teams' "needs" as part of their regular job duties. (Hardesty Dep. 32:4; Chipman Dep. 79:2-8; Rutledge Dep. 14:25-15:3; 58:15-59:2; Ward Dep. 26:8-23; Burchett Dep. 47:13-24).

Further, Kroger had a focus on performance goals and metrics concerning screening calls and interviews scheduled, a further indication of the importance of this duty. Specifically, CoRE Recruiters were required to meet minimum numbers of calls made and interviews scheduled per day, and were regularly "coached" or disciplined when they did not meet or exceed their call numbers. *See* pp. 19-20 of Doc#59. For example, Ellen Martin, a CoRE Recruiter on the mass hire

[1] Phone data for Courtney Strosnider is unavailable given that Ms. Strosnider was promoted to a supervisory role in May 2015, and no phone records from Kroger are available prior to that period.

team, was given a formal verbal warning by her supervisor for failing to meet her numbers, with an indication that "[i]f this pattern of low productivity is to continue in the future, she will receive a formal write-up." *See* Strosnider Dep. Exhibit 7. Courtney Strosnider, supervisor for the mass hire team, also sent out weekly updates to her team regarding her team's performance numbers, including calls made and interviews scheduled. Strosnider Dep. Exhibit 23.

Finally, contrary to Kroger's arguments, there is extensive testimony by both CoRE Recruiters and members of management showing that all CoRE Recruiters were primarily screening applicants and scheduling interviews:

- **Hardesty Deposition:** We did those special little projects early on in our hiring…Once the phone of the CoRE center got up and running, very few special projects. **We were all just simply setting up interviews and screening people on the phones**. (Hardesty Dep. 174:25-175:6).

- **Whitlow Deposition:** [Question]: What did the job consist of?; [Answer]: **Making outbound phone calls to candidates who applied to store positions as well as taking inbound calls**. (Whitlow Dep. 15:14-17; 16:6-11).

- **Chipman Deposition:** I guess **primarily I would phone screen candidates, schedule them for an interview** at pretty much store jobs at Kroger facilities, or Kroger grocery stores. (Chipman Dep. 82:24-83:6).

- **Hickey Deposition:** [Question]: And when you first started what were you doing on a day-to-day basis?; [Answer]: **Calling candidates, screening them to schedule them for phone interviews**. (Hickey Dep. 47:18-21).

- **Rutledge Deposition:** [Question]: What was your objective?; [Answer]: **To man a phone, to take inbound and outbound phone calls, and screen candidates for potential in-store interviews**. (Rutledge 121:14-16).

- **Taske Deposition:** [Question]: So would you agree with me that due to whatever circumstances you encountered in your position as a recruiter, you weren't able to perform your job as you were trained to by Kroger?; [Answer]: **I was able to schedule interviews, and that was the main goal**. (Taske Dep. 54:21-55:2)…[Question]: Do you know of any recruiters whose job duties had them being off the phones for any length of time? [Answer]: I don't recall specific individuals, **but there was the expectation that metrics were still reached no matter what extra activities could have been**. (Taske Dep. 78:21-79:2).

- **Ward Deposition:** [Question]: What is your job? What do you do?; [Answer]: **To make appointments for people**. (Ward Dep. 18:6-11).

- **Hom Deposition:** [Question]: Do you know whether any other teams operate differently in terms of how they recruit, what stores or what things they look at in terms of where they want to – what stores they want to recruit for, at what point, anything like that? [Answer]: Do I have an understanding of that? No. I mean, it's all – like I said, **we're all recruiters, so we're all doing our job for the most part**…**We're all doing the same thing for the most part**; [Question]: How do you know that?; [Answer]: **Because we're all recruiters and we all need to hit our metrics**. (Hom Dep. 52:24-53:15).

- **Victoriano Deposition (Kroger HR Officer):** [Question]: Okay. Now the CoRE recruiters, do you have an understanding as to what they primarily do, what their job duties are?...[Answer]: So they – **they evaluate candidates that apply for positions**…**they contact candidates, and they work to send quality candidates to stores or these other business areas for open positions**. [Question]: Okay. And when they contact the candidate, do you have an understanding as to what they do? [Answer] **So they're screening them to see if they could be a fit for an open role**. (Victoriano Dep. 17:9-19; 7-15).

- **Schiff Deposition (Current CoRE General Manager and designated Kroger 30(b)(6) Representative):** [Question]: And it lists, Review Candidate's Applications, Phone Screen Candidates, and Schedule Interviews; Forward Candidates to Store, Specific Job Requisitions, is that right? [Answer]: Yes; [Question]: Okay. **And that's an accurate description of the recruiter's three main duties for all recruiters, is that correct, no matter what team you're on; is that right?** [Answer]: **At a high level**. (Schiff 30(b)(6) Dep. 102:13-23).

(*See also* Declarations of Named and Opt-In Plaintiffs, Exhibit E-L of Named Plaintiff's Motion for Certification; Declaration of Laurie White, ¶ 11-13; Declaration of Shawn Scott, ¶ 6-7; Declaration of Eric Schrider, ¶ 11-13; Declaration of Erica Brown, ¶ 4-9; Declaration of Aidan Keenan, ¶ 3-5, 7-8).

Simply put, there can be no dispute that screening online applicants and scheduling interviews was what CoRE Recruiters' primarily did on a day-to-day basis, given Kroger's own documents and testimony conceding the same, the interchangeability of CoRE Recruiters among teams and divisions, the amount of time spent performing such tasks, the importance Kroger placed on performing such tasks by way of minimum numbers to meet and coachings/disciplinary actions

for failure to meet them, and CoRE Recruiter testimony regarding their primary performance of such tasks.

B. Screening online applicants and scheduling in-store interviews is not "the performance of work directly related to the management or general business operations of the employer or the employer's customers"

Once an employee's primary duty is determined, the next relevant question is whether an employee meets the first "duties test" set forth in 29 CFR § 541.201. That is, the CoRE Recruiters' primary duty of screening and scheduling candidates must be "the performance of work directly related to the management or general business operations of the employer or the employer's customers." 29 CFR § 541.201(a). To meet this requirement, an employee "must perform work *directly related* to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." *Id.* (emphasis added). This "running or servicing of the business" includes work in functional areas such as "…personnel management; human resources; employee benefits…and similar activities." *Id.* at 541.201(b).

Work "directly related to the management or general business operations of the employer," in the context of human resources or personnel management, plainly contemplates employees who *actually manage* personnel and make such personnel decisions or recommendations regarding personnel matters. This may include hiring, managing disciplining and terminating employees or job candidates. *See* Dep't of Labor Opinion Ltr., Wage & Hour Div. 2005 DOLWH LEXIS 59 (Oct. 25, 2005). It may also include interviewing applicants, researching and implementing personnel processes and policies, and directly making recommendations to the company's hiring managers. *See* Dep't of Labor Opinion Ltr., Wage & Hour Div., 2000 DOLWH 10 (Dec. 8, 2000). It may even include employees who place candidates in contract positions, where such employees

also "communicate directly with the employer's clients, and have authority to discipline, manage, coach, and counsel the candidates after placement. *Andrade v. Aerotek, Inc. (Andrade II*), 700 F. Supp.2d 738 (D. Md. 2010). However, such work "directly related to the management or general business operations of the employer" plainly *does not* include the mere screening of online job applicants and scheduling of in-store interviews. *See Ogden v. CDI Corp.* 2010 U.S. Dist. LEXIS 66686 at *8-9 (D. Ariz. 2010)(finding no authority for the proposition that plaintiff's primary duties – scouting for candidates and recommending them to an account manager, constituted "the performance of work directly related to the management or general business operations of the employer.").

DOL Regulation 29 CFR §541.203(e) supports this conclusion.[2] In particular, the regulation makes a critical distinction between (a) **exempt "human resources managers" or "management consultants,"** who formulate, interpret or implement employment policies, or study the operation of a business and proposes changes in organization; and (b) **non-exempt "personnel clerks"** who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment. *Id.* Non-exempt personnel clerks reject all applicants who do not meet minimum standards for the particular job or for employment by the company. *Id.* The minimum standards used by screeners are set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or company officials. *Id.*

[2] It is not entirely clear whether 29 CFR § 541.203(e) applies to the first or second primary duties test of the administrative exemption, or both. Some cases have interpreted it under the first duties test (primary duty is the performance of work directly related to the to the management or general business operations of the employer). *See, e.g., Ogden v. CDI Corp.*, 2010 U.S. Dist. LEXIS 66686 at *8-9 (D. Ariz. 2010). Others have applied the regulation to the second duties test (primary duty involves discretion and independent judgment with respect to matters of significance). *See Andrade v. Aerotek*, 700 F. Supp.2d 738, 747 (D. Md. 2010). In either event, this regulation clearly provides support for the fact that the CoRE Recruiters' primary duty of screening and scheduling applicants for in-store interviews does not fall within the administrative exemption.

"When [both] the interviewing and screening functions are performed by the human resources manager or personnel manager *who makes the hiring decision or makes recommendations for hiring* from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions." *Id.*

Here, the CoRE Recruiters fall squarely in line with the regulation's example of personnel clerks who screen candidates for minimum qualifications and fitness for employment. They do not make the hiring decision or even recommend that a particular candidate be hired, (Schiff Dep. 99:3-13; Moffett Dep. 20:14-18, nor are they involved in any aspect of the hiring process beyond the initial phone screen and scheduling of an in-store interview. Moffett Dep. 66:10-67:13. Once an in-store interview is set up by the CoRE Recruiter, their involvement in the hiring process ends. (*Id.*). The regulation dictates that such a duty simply does not meet the test set forth in 29 CFR § 541.201.

The court in *Ogden v. CDI Corp.* came to the same conclusion with respect to a similar plaintiff-recruiter. 2010 U.S. Dist. LEXIS 66686 at *8-9 (D. Ariz. 2010). Specifically, the plaintiff-recruiter testified to performing various job duties, including searching for qualified candidates, determining whether their background matches a job order, contacting a candidate and determining salary requirements, providing resumes of qualified candidates to his account manager, contacting a candidate for an interview with the client, and if the client was interested in the candidate, calling the candidate to make an offer on behalf of the client. *Id.* at *7. The defendant-employer argued that such services were "in functional areas such as research, personnel management, human resources, and similar activities that are recognized as functions directly related to the running or servicing of a business[.]" *Id.* at *8. The court rejected this argument, however, finding no authority for the proposition that plaintiff's primary duties–scouting for candidates and recommending them

to an account manager who, in turn, had complete discretion as to whether to recommend the candidate to a client–constituted "the performance of work directly related to the management or general business operations of the employer." 2010 U.S. Dist. LEXIS 66686 at *8-9 (D. Ariz. 2010).

Since this finding can be made with respect to the "primary duty" of all CoRE Recruiters, an analysis of the "management or general business operations" test warrants certification of the Named Plaintiffs' Rule 23(b)(3) class.

C. The CoRE Recruiters' primary duties do not include "the exercise of discretion and independent judgment with respect to matters of significance"

The exemption's second duties test requires that an employee's primary duty be the exercise of "discretion and independent judgment with respect to matters of significance." 29 CFR § 541.202(a). The exercise of "discretion and independent judgment" involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. *Id.* The term "matters of significance" **refers to the level of importance or consequence of the work performed**. *Id.*(emphasis added). "Discretion and independent judgment" must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. 29 CFR § 541.202(e). Further, **the phrase *does not* include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work**. *Id.* (emphasis added). Finally, an employee does not exercise "discretion and independent judgment with respect to matters of significance" merely because the employer will experience financial losses if the employee fails to perform the job properly. 29 CFR § 541.202(f).

The DOL regulations provide various factors to determine whether an employee "exercises discretion and independent judgment with respect to matters of significance," including:

(1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;
(2) whether the employee carries out major assignments in conducting the operations of the business;
(3) whether the employee performs work that affects the business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
(4) whether the employee has the authority to commit the employer in matters that have significant financial impact; whether the employee has the authority to waive or deviate from established policies and procedures without prior approval;
(5) whether the employee has authority to negotiate and bind the company on significant matters;
(6) whether the employee provides consultation or expert advice to management;
(7) whether the employee is involved in planning long- or short-term business objectives;
(8) whether the employee investigates and resolves matters of significance on behalf of management; and
(9) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 CFR § 541.202(b). These are typical management tasks. The relevant distinction in 29 CFR § 541.203(e) between human resources managers and personnel "screening" clerks (set forth above) also provides relevant insight, indicating that such minimal "screening" duties do not constitute exempt work unless done in conjunction with human resources management work.

Here, the CoRE Recruiters' primary duties of screening applicants and scheduling interviews, no matter how such duties are performed, simply does not require the exercise of "discretion and independent judgment *with respect to matters of significance*." The CoRE Recruiters do not make or recommend final hiring decisions. At most, they conclude whether to send along multiple online applicants to in-store interviews which are neither final recommendations for hiring nor actual hiring decisions. From there, the local store hiring representatives make the final hiring decision or recommendation from this pool of qualified candidates, after comparing and evaluating "possible courses of conduct, and acting or making a decision after the various possibilities have been considered." *See* 29 CFR § 541.202(a).

It is also worth noting that a CoRE Recruiter's scheduling of applicants for interview slots in no way commits the store to hiring the candidate, which, again, is in the sole and exclusive discretion of the local hiring representative. In fact, CoRE Recruiters have testified that more than 50% of the time a store will not hire the candidate sent to them (*See* Hom Dep. 29:5-14; Rutledge Dep. 42:18-25), and that even if a candidate is not sent along by a CoRE Recruiter, there are frequent occasions when that decision may be overridden by management at CoRE or the local store. (Rutledge 23:10-20; Hardesty Dep. 90:4-91:5; Chipman Dep. 178:15-179:20).

The distinction between employees who examine data and provide options, and employees who are the final decisionmakers exercising independent judgment after examining possibilities based on that data is reflected in Sixth Circuit case law. In *Foster v. Nationwide,* the Sixth Circuit distinguished Nationwide's Special Investigators from Department of Defense investigators in 2005 WH Opinion Letter 25:

> DOL described the investigators' primary duty as gathering factual information and preparing a report that would allow the government agency [the decision maker] to determine whether to employ the individual under investigation. The DOL opined that the investigators were "merely applying their knowledge in following prescribed procedures or determining which procedure to follow, or determining whether standards are met." 2005 DOLWH LEXIS 25, 2005 WL 3308592.

Foster v. Nationwide, 710 F.3d 640, 649 (6th Cir. 2013). In contrast, Nationwide's Special Investigators did not merely gather information so that other employees could consider and make decisions; they "conducted investigations with the goal of resolving the indicators of fraud." *Foster*, 710 F. 3d at 650. *See also, Cameron v. Abercrombie & Fitch*, 2012 U.S. Dist. LEXIS 131557, *21 (SD Ohio 2012)("while there is evidence that Plaintiff may have offered recommendations to resolve fit problems or to save money, there is also evidence that she often merely laid out possible options rather than making actual recommendations." Hence there was an issue of fact whether the exemption applied). Here the primary duty of the CoRE Recruiters

involved gathering information and presenting options; the CoRE Recruiter does not make final recommendations or make the hiring decisions. This being the case, it is clear that whether the CoRE Recruiters' primary duty involved an exercise of independent judgment can be resolved efficiently in a Rule 23(b)(3) class.[3]

D. Kroger's alleged differences in the CoRE Recruiters' exercise of discretion and independent judgment do not weigh against certification of the class

Defendant alleges that the CoRE Recruiters performed their job differently and these differences mandate that a class cannot be certified because these differences will require a different analysis for each recruiter: "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." (Defendant's Memorandum in Opposition, Doc#62, p. 9).

These purported distinctions, however, do not show that the CoRE Recruiters performed different tasks; rather, at most they show that the recruiters had different *ways* of performing *the same task*. Again, the recruiter's primary duties were the same. Further, there is no indication that there were differing policies that required these recruiters to exercise these allegedly different levels of discretion. Instead all alleged levels of discretion were open to all CoRE Recruiters. The CoRE Recruiters themselves simply chose how thorough their investigation would be. It would be

[3] There is, of course, much more that could be said with respect to an analysis of independent judgment and discretion. See e.g. 29 CFR 202(b) quoted above.) However, from this facet of the analysis, it should be evident that the matter of whether the primary duty involves independent judgment can be resolved on a class basis.

absurd to hold that each individual recruiter could himself determine whether he would be exempt under the FLSA or not simply be deciding how thorough he wanted to be in his examination of the applicant applications.

Kroger's argument that the recruiters exercised differing levels of discretion does not mandate a determination that a 23(b)(3) class should not be certified.[4]

III. NAMED PLAINTIFFS MEET THE FED. R. CIV. P. 23(a) AND 23(b)(3) CERTIFICATION REQUIREMENTS

With a full understanding of the administrative exemption's requirements, it becomes clear that Kroger's arguments opposing certification are meritless.

A. Named Plaintiffs have set forth an identifiable, unambiguous class to which they are members

First, Named Plaintiffs have clearly set forth a proper class definition:

> All employees classified as recruiters, who i) were employed at Kroger's Center of Recruiting Excellence ("CoRE") in Blue Ash, Ohio, at any time from the beginning of the CoRE's operations in 2014 to December 1, 2016, and ii) worked in excess of forty (40) hours during any given workweek.

Kroger claims that the Named Plaintiffs' limitation to recruiters who "worked in excess of forty (40) hours during any given workweek" is flawed because it "begs a legal question at issue in this case." Doc#62, p. 36. This argument is confusing, to say the least. It is obviously true that individual recruiters who did not work in excess of forty (40) hours during any given workweek would not have a claim in this lawsuit. But it does not follow that placing such a limitation on the class "begs a legal question." Rather, it is a simple limitation on the class, meant to avoid ambiguity

[4] Defendant Kroger also makes an argument that it reclassified all its recruiters as non-exempt in November 2016, because of changes in the overtime regulations announced by the Obama administration that would change the salary basis for the exemptions to $47,476/year. (Dkt 62, p. 25). However, by November 2016, the results of the presidential election were known and it was virtually certain at that time that those regulations would not be going into effect. In fact, the current DOL has informed the 5th Circuit of plans to revisit the provisions of the Obama regulations on this point. (See *State of Nevada, et al. v. United States Department of Labor*, et al., No. 4:16-CV-00731 on appeal to the Fifth Circuit). Thus it is possible to consider that Kroger re-classified its CoRE recruiters because there was significant reason to believe that the recruiters were non-exempt independent of the Obama regulations.

in employees who never worked potential overtime hours (i.e. part-time employees, employees who worked only a day, etc.). It would seem in Kroger's best interests to agree to such a limitation, so that class members who do not have a claim are not unnecessarily included in the suit. Further, Kroger cites no law (and it would make no sense) that such a limitation, *which is meant to create a clear, identifiable class*, inevitably makes this class unidentifiable or ambiguous.

Kroger also claims that, per its phone records, the "vast majority" of recruiters worked less than 40 hours per week, and that a challenge to the accuracy of such records would require the Court to conduct "mini-hearings" on each class member. Doc#62, pp. 36-37. This is demonstrably false, as Kroger's own weekly work schedules show that all CoRE Recruiter teams have been regularly scheduled to work 9.5-hour days, with a one-hour lunch break, five days a week, thus constituting 42.5 hours of scheduled work (well above the 40 hours necessary for overtime compensation). *See* Exhibits 15-18 of Smith Affidavit, attached as Exhibit A to Doc#55. Further, all CoRE Recruiters who have opted in to the FLSA matter have provided testimony that they were regularly scheduled to (and did) work more than forty hours per week. (*See* Exhibits E-L of Doc#55; Doc#62, Ex. A White Declaration, ¶ 21).

B. Plaintiffs meet the four prerequisites of Fed. R. Civ. P. 23(a)

1. Numerosity

Under the same baseless theory regarding hours worked, Kroger claims that the number of potential class members is impossible to determine until the "merits of each recruiter's potential claim is evaluated." Doc#62, p. 37. This is patently false for the same reasons set forth above (i.e., work schedules and testimony indicating all class members worked more than 40 hours per week).

Kroger also argues numerosity is not met because "fewer than 30 people are interested in pursuing claims," apparently based upon the 27 Plaintiffs who have opted in to the FLSA litigation.

Doc#62, p. 37. Such an argument ignores the fact that most of the employees who were provided notice of the FLSA collective action were current Kroger employees who were likely to have a reasonable fear of retaliation for their participation in such lawsuit, an important consideration in deciding whether joinder is impracticable. *See Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 183 (S.D. Ohio 2012). Indeed, Opt-In Kelly Rutledge testified to at least one potential class member who did not opt in due to fear of retaliation. Rutledge Dep. 146:18-25.

Named Plaintiffs did receive a decent 15% response rate from potential class members, 48% of which were former employees.[5] Such a response rate is typical where employees are required to affirmatively opt-in to a lawsuit. *See McCormick v. Festiva Dev. Group, LLC*, D.Me. No. 09-365-P-S, 2010 U.S. Dist. LEXIS 14856, at *15 (Feb. 11, 2010)("The opt-in rate in FLSA collective action not backed by a union is generally between 15 and 30 percent…The same inertia that promotes low response rates in opt-in collective actions fosters low *opt-out* rates in class actions maintained under Fed. R. Civ. P. 23(b)(3)."); *See also Ellis v. Edward D. Jones & Co., L.P.*, 527 F.Supp.2d 439, 444 (W.D. Pa. 2007)("Although a variety of reasons for failure to opt in have been posited, the strongest, at least among comparatively well-educated English-speaking parties, is likely "inertia": the view that the notice received in the mail is just another piece of junk that the recipient has neither the time nor interest to read, let alone act on.").

Finally, it is undisputed that 180 or more employees were eligible to receive notices in the FLSA litigation, and a class of that size easily meets the numerosity requirement.

[5] Even assuming Kroger's speculation regarding class members' lack of interest in the lawsuit has merit (it does not), there is a simple procedure under Fed. R. Civ. P. 23 to determine such interest: the opt-out or request for exclusion forms. This process certainly provides an adequate procedure for individuals who are not interested in the lawsuit to be excluded. Further, if Kroger truly disputes numerosity based upon lack of interest, it can request that the Court revisit the issue after exclusion forms are received. *See* Fed. R. Civ. P. 23(c)(1)(C)("An order that grants or denies class certification may be altered or amended before final judgment.").

2. Commonality

Consistent with its overarching theory, Kroger claims the Named Plaintiffs cannot establish commonality due to purported differences in class members' job duties, together with variances in the ways in which CoRE Recruiters perform their screening and scheduling tasks. As set forth above, this argument fails to understand that (a) the administrative exemption focuses only on employees' *primary* job duties (here, screening and scheduling applicants); and (b) that the differences as to the ways in which CoRE Recruiters perform their limited screening and scheduling functions makes no difference in the administrative exemption because such duties, no matter how they are performed, arguably do not constitute exempt work. Kroger's arguments are simply off-point.

a. Kroger's uniform classification decision, common job description, training documents, and other common documents are compelling evidence of commonality

There is a great deal of compelling evidence within Kroger's own documents and testimony indicating that all CoRE Recruiters had the same primary job duties of screening and scheduling. Rather than dispute this evidence, Kroger argues that the Court should ignore it and instead focus on its recently provided employee declarations from eight current employees, who claim to perform job duties other than or in addition to screening/scheduling, and exercise levels of discretion which are different than the levels exercised by other CoRE Recruiters. (Doc#62, p. 33).

Kroger's request that the Court turn a blind eye to evidence set forth in Kroger testimony, job descriptions and training documents simply has no basis in law. Multiple courts, including this one, have found that general uniform policies which are applied to a group of employees are critical to a finding of commonality. *See Dukes v. Wal-Mart*, 564 U.S. 338, 131 S. Ct. 2541, 2553 (2011)("significant proof that an employer operated under a general policy of discrimination" can satisfy commonality for purposes of Rule 23); *Swigart v. Fifth Third* Bank, 288 FRD 177, 184

(S.D. Ohio 2012)(finding that "all of the purported critical differences in job duties were not enough to stop defendant from conducting a blanket audit in determining whether to classify all its MLOs as exempt from overtime…"); *Hurt v. Commerce Energy*, 2013 U.S. Dist. LEXIS 116383 at *11 (N.D. Ohio 2013)("because the Plaintiffs have identified state-wide policies that a jury could find are inconsistent with exempt, independent contractors, the Court finds that the proposed class satisfies the commonality requirement."); *Meyer v. United States Tennis Assn*., 297 F.R.D. 75, 83 (S.D.N.Y.2013)("Given the uniform classification of [Umpires], the uniform description of [Umpires'] duties, the . . . [finite three-week period during which the U.S. Open event takes place once a year], and the discrete, geographical location of the [Open], this Court concludes that Plaintiffs have sufficiently established commonality."); *Nerland v. Caribou Coffee*, 564 F. Supp.2d 1010, 1019, 1031 (D. Minn. 2007)(Finding that "[t]he job description is competent generalized evidence of the uniform scope of duties and responsibilities of all Caribou store managers, and a factual demonstration that every Caribou store manager…[was] expected to perform these duties."); *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 539 (S.D. Ohio 2013)("Collectively, the job descriptions, training program, comprehensive manuals, and suggested daily schedule strongly indicates that uniformity exists in the work performed by LAETs.").

Further, CoRE General Manager Rana Schiff has testified on behalf of Kroger that the CoRE Recruiter job description is an accurate representation of the jobs Recruiters actually performed:

> Q. At the top of Exhibit 6, it says, The Kroger Company Corporate Position Profile. What is a corporate position profile?
>
> A. It's the profile that describes the job.
>
> Q. And how is a corporate position profile used by Kroger?

A. To hire individuals

[…]

Q. Okay. And this corporate position profile would have been applicable to all recruiters, Correct –

A. Yes.

Q. -- okay, no matter what team they may have worked for, no matter if they were doing mass hire; is that correct?

A. Yes.

[…]

Q. Have the recruiters' job duties changed at all, as a result of being changed to Nonexempt?

A. No.
Q. And again, referring back to Exhibit Number 6, the only change you referred to was the FLSA statute. With respect to that profile from October 30th, 2014, that would be the only difference as of today, correct?
A; That I'm aware of.

Schiff Dep. 53:5-13; 54;2-9; 61:19-62:4.

Such evidence is extremely supportive of the notion that all CoRE Recruiters were hired to perform the same primary job duty of screening and scheduling applicants. It is also competent evidence that these are the primary duties *actually performed* by the CoRE Recruiters, especially where it directly contradicts declarations submitted by the employer which claim otherwise.

b. *CoRE Recruiters' testimony and other documentary evidence supports that all CoRE Recruiters actually performed the same primary job duties, thus further satisfying commonality.*

Additional documentary evidence and testimony shows that the CoRE Recruiters *in fact* performed the same primary job duties of screening and scheduling candidates. Phone records show that CoRE Recruiters, including Kroger's own declarants, spent the vast majority of their time in the phone systems. Additionally, CoRE Recruiters and Kroger management all testify to

CoRE Recruiters primarily performing the tasks of screening and scheduling candidates. Kroger had minimum call metrics for CoRE Recruiters to meet on a daily basis, including calls made and interviews scheduled. As indicated above, CoRE Recruiters were coached or disciplined when they did not meet these numbers. All of this evidence shows not just that CoRE Recruiters ***had*** the primary job duties screening and scheduling, but that such a duty was ***actually performed*** on a day-to-day basis.

Kroger baselessly attempts to claim that certain CoRE Recruiters, particularly their declarants, spent much of their time performing duties other than screening and scheduling. However, Kroger's own records contradict this claim. For instance, despite Kroger's claims that Laurie White spent significant time outside the phone system, she is shown as spending 86% of her time in the phone systems from August 2015 through July 2016.[6] The other declarants have similar percentages during the relevant period, ranging from 69% to 88% of average recruiting time. It makes little sense to claim that these individuals did not conduct any screening or scheduling activities for significant periods of time, when they were logged in to the phone systems on such a consistent basis.

Kroger also cites to Briana Whitlow as someone who spends the vast majority of her time training employees, not conducting phone screens. Doc#62, p. 32. However, Ms. Whitlow indicated that her involvement in "training" was outside of her normal recruiting duties:

> Q. Okay. Also in your resume, you indicate, under Special Assignments, the CoRE training department. And there's a number of bullet points there. Were these duties that were outside of your normal recruiting duties?
> A. Yes.

[6]Ms. White's declaration is also directly contradicted by weekly production recaps for the mass hire team, created by her supervisor, Courtney Strosnider. *See* Strosnider Dep. 200:11-202:12 and Exhibit 23. Such records indicate that both Ms. White and Ms. O'Aku were regularly scheduling interviews daily, and taking inbound and outbound calls during this time, week by week. *Id.*

Whitlow Dep. 59:12-17. Despite becoming involved in training, Ms. Whitlow confirmed that she still had her regular duties to perform as a CoRE Recruiter, as communicated to her by her team manager. Whitlow Dep. 39:1-4; 40:15-17; 60:16-21.[7]

CoRE Recruiter testimony and Kroger documentation indicate that CoRE Recruiters actually performed the screening/scheduling tasks set forth in Kroger's job descriptions and training documents.

c. Hendricks v. TQL and other cases cited by Kroger are distinguishable, and in fact provide support for commonality among CoRE Recruiters

Kroger cites extensively to limited portions of *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529 (S.D. Ohio 2013), in which the court partially denied certification of one subclass (LAEs) of employees, while certifying another subclass (LAETs). Doc#62, p. 29. A review of *Hendricks* makes clear that the portion of the case denying certification is entirely distinguishable from the CoRE Recruiters. Specifically, the LAE putative subclass members in *Hendricks* were alleged to be subject to three different exemptions: the highly compensated employee exemption, the executive exemption, and the administrative exemption. The Court found that "with all three exemptions in play, each requiring different facts to be proved, it will be impossible for the Court to resolve exemption defenses in one stroke." *Id.* at 541. The court found the highly compensated employee exemption most problematic, where evidence showed that at least some of the LAE's earned at least $100,000 and regularly oversaw the work of two or more sales support personnel. *Id.* at *541.[8] Of particular concern were the differences in the way the LAE's spent their time with respect to different exemptions. *Id.* at 541.

[7] It is also telling that Ms. Whitlow's reason for expressing interest in training was that she was "bored" with the repetitiveness and lack of flexibility in the CoRE Recruiter job, "making the same outbound phone calls to candidates that applied, and taking those inbound phone calls as well." *Id.* at 61:23-63:4.

[8] The Court also indicated it would reconsider its decision if the plaintiff is able to present evidence demonstrating that a narrower class of LAEs can be certified. *Id.* The Court further explained this in a footnote: "For example, LAEs

Here, the CoRE Recruiter class is alleged to be subject to only one exemption. This exemption can be proved through common evidence, as set forth above. The fact is, CoRE Recruiters have far more in common with the LAET subclass which *was* certified in *Hendricks*. In finding commonality with respect to LAETs, the court found that "the job descriptions, training program, comprehensive manuals, and suggested daily schedule strongly indicates that uniformity exists in the work performed by LAET's." *Id.* at 539. Additionally, the court found commonality to exist in the day-to-day duties, based primarily upon the time spent performing them:

> The testimony from putative class members further demonstrates that the day-to-day duties and responsibilities performed by LAETs are substantially similar. The evidence shows that when LAETs are not in training **they spend the majority of their time monitoring the delivery of freight and covering freight for the LAE's**. When LAET's work independent of their mentor LAE, **they spend their time in sales training and then begin prospecting in an attempt to reach their (uniform) Weekly Sales Revenue Goals**. The Court finds that with such uniformity in the duties and responsibilities of LAET's, the parties will be able to submit common proof on the issues of whether these duties satisfy the management/business operations prong and the discretion/independent judgment prong of the administrative exemption.

Id. at 539-540(citations omitted).

Beyond *Hendricks*, Kroger cites to various other cases mostly outside of the Sixth Circuit, all of which are distinguishable on their facts. *See Hughes v. Gulf Interstate Field Servs.*, 2015 U.S. Dist. LEXIS 88205 (S.D. Ohio 2015)(denying certification *pre-discovery*, where plaintiffs solely relied upon employee affidavits to establish commonality with respect to multiple exemptions); *Romero v. H.B. Auto. Group, Inc.*, 2012 U.S. Dist. LEXIS 61151 at *52-53 (S.D.N.Y. 2012)(denying certification where plaintiff sought to certify a class consisting of employees in a variety of jobs and subject to different exemptions, though also noting that plaintiff could have

who are not on commission would seem to be a natural line of demarcation: they do not earn enough to qualify for the highly-compensation employee exemption and, the Court surmises, likely to not customarily and regularly direct the work of two or more employees. As with the LAET subclass, it appears that only the administrative exemption would be relevant to this group." *Id.*

bridged the "conceptual gap" between their claims and those of the class with "significant proof that the employer acted under a 'general policy' to engage in the allegedly unlawful conduct."); *Novak v. Boeing Co.*, 2011 U.S. Dist. LEXIS 146676 (C.D. Cal. 2011)(denying certification under separate California law where three exemptions were at issue, and the putative class is comprised of individuals working in widely varied groups and teams, under different conditions, and who have different supervisors, job duties, and educational backgrounds.); *Dailey v. Groupon, Inc.*, 2014 U.S. Dist. LEXIS 119190 (N.D. Ill. 2014)(denying certification where plaintiff solely relied on survey results from a particular time period and employee declarations to establish commonality. The court also noted that if the plaintiffs had limited their claims to the time when defendant had a consistent, company-wide policy regarding the work done by Account Representatives, then the commonality element could be satisfied).[9]

Simply put, none of these cases or their portions cited to by Kroger are binding on this Court, nor are they representative of the present facts in this case.

d. Purported differences as to the ways in which CoRE Recruiters perform their primary job duty does not defeat commonality

Beyond its baseless arguments concerning variances in minor job duties, Kroger also claims that purported differences in ***how*** CoRE Recruiters performed their primary screening and scheduling functions precludes certification. Again, such an argument fails to understand the legal insignificance of such differences, where the primary duty at issue (screening/scheduling) has been defined by DOL regulations to be non-exempt work. *See* 29 CFR § 541.203(e). In other words, DOL Regulations make clear that the work of screening and scheduling candidates for minimum qualifications and fitness for employment is simply not the "performance of work directly related

[9] This point in *Dailey* regarding a limiting of the class period is re-iterated in *Pietrzycki v. Heights Tower Serv.*, 197 F. Supp.3d 1007 (N.D. Ill. 2016)(finding that, unlike *Dailey*, the present case deals solely with time periods that involve an allegedly uniform HTS custom and practice).

to the management or general business operations of the employer," nor does it involve "the exercise of discretion and independent judgment *with respect to matters of significance*." Thus, a decision as to whether CoRE Recruiters' primary duties are exempt is a question common to the class, and capable of class wide resolution.[10]

3. Typicality

As stated in the Named Plaintiffs' original motion, Joseph Hardesty, Derek Chipman, and Madeline Hickey meet the typicality requirements of Rule 23(a) because their claims for overtime result from the same course of conduct applicable to all class members: Defendant's general policy of classifying CoRE Recruiters as exempt from overtime. *See Hurt v. Commerce Energy, Inc.*, 2013 U.S. Dist. At *12 *citing Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007)(A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.). Kroger appears to dispute typicality within its arguments concerning commonality. As such, the Named Plaintiffs re-incorporate their responses to Defendant's arguments set forth above.[11]

4. Adequacy of Representation

Without citing any relevant case law, Kroger argues that the three Named Plaintiffs are not adequate representatives of the class because they are former employees, and their on-the-job experiences are somehow different from a "significant portion" of the class they seek to represent. Doc#62, p. 38. To the contrary, all three Named Plaintiffs (i) were subject to the same policy decision concerning CoRE Recruiters' exempt status, (ii) regularly engaged in the same primary duties of screening and scheduling candidates, (iii) were all subject to the same job description

[10] Further, the fact that CoRE Recruiters personally choose to exercise different levels of "discretion" in reviewing applications does not require a conclusion that the primary job duties of CoRE Recruiters are not the same.
[11] As noted by the U.S. Supreme Court in *Dukes*, the commonality and typicality factors "tend to merge." *Dukes*, 131 S. Ct. at 2551 n.5.

setting forth common job duties, (iv) underwent similar training, and (v) were all employed at the same location within the relevant class period, working in excess of forty hours per week. The claims of the Named Plaintiffs, and the defenses against them, are common to the class. The same strategies that will vindicate the Plaintiffs' claims will also vindicate those of the class. *See Hurt*, 2013 U.S. Dist. LEXIS 116383 at *13.[12]

C. Plaintiffs satisfy the requirements of Fed. R. Civ. P. 23(b)(3)

1. Common questions of law or fact common to the members of the class predominate over any questions affecting only individual members

Like its arguments concerning commonality, Kroger claims that the Named Plaintiffs do not meet Rule 23(b)(3)'s requirements that common questions predominate because the administrative exemption question "can only be addressed through individualized proof based on the testimony of potential class members." Doc#62, pg. 40. Again, competent evidence set forth above and in previous briefings show this contention to be false. All CoRE Recruiters have the same *primary duty* of screening online applicants and scheduling candidates for interviews, as shown by their own testimony, testimony of CoRE Management, Kroger's job description, training documents, common policy decision, and weekly call data. The central legal question in this case is whether such a primary duty sufficiently meets the administrative exemption's requirements. Because this question is dispositive to the litigation and can be resolved on a classwide basis, it predominates over questions affecting only individual class members. *See Tyson v. Bouaphakeo*, 194 L. Ed.2d 124, 134, 136 S.Ct. 1036, 2016 U.S. LEXIS 2134 (March 22, 2016)(When "one or

[12] Kroger also claims, without any factual basis, that Named Plaintiff Joseph Hardesty cannot be an adequate representative because he has a separate pending lawsuit against Kroger for discrimination. Doc#62, pg. 38. They provide no support or analysis of how Mr. Hardesty's entirely separate lawsuit, concerning entirely different issues, somehow makes his interests antagonistic to the interests of the members of the class. *See Yost v. First Horizon Nat'l Corp*, 2011 U.S. Dist. LEXIS 60000 at *43 (W.D. Tenn. 2011) citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 2250-51 (1997). To the contrary, Mr. Hardesty's interests are exactly in line with those of the class—pursuing amounts in overtime owed to him due to Kroger's willful misclassification of his position.

more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."); *See also Nerland*, 564 F. Supp.2d at 1034-35 ("claims will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position."). As with the commonality and typicality requirements, the predominance inquiry is directed towards the issue of liability. *Nerland*, 564 F. Supp.2d at 1035. If the liability issue is common to the class, common questions are held to predominate over individual questions. *Id.*

In opposing predominance, Kroger again asks the Court to ignore the extensive evidence of common Kroger policies and procedures in favor of its own employee-declarant testimony. In doing so, Kroger relies exclusively on outside circuit law for the false proposition that "common classification decisions, job descriptions, and policies do not predominate over individual inquiries relevant to the administrative exemption." Doc#62 pg. 40. Notwithstanding the fact that these cases are in no way binding on this court, a review of the decisions proves that they actually *support* the clear precedent that such policy decisions and documents are critical to the certification analysis.

Kroger first cites to *Braun v. Safeco Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 184123 (C.D. Cal. 2014), a case which involved five separate subclasses of "Claims Adjusters" and "Automobile Examiners" bringing claims under California wage laws. *Id.* at 11. However, contrary to Kroger's position the *Braun* court specifically acknowledges the persuasiveness of a company policy under which job titles or positions are uniformly classified as exempt. *Id.* at *31 ("the Ninth Circuit has

held that evidence of a company policy under which certain job titles or positions are uniformly classified as exempt is relevant to the predominance inquiry."). Further, the court noted that "[c]entralized rules regarding job duties and responsibilities are also probative of predominance…because such rules 'suggest a uniformity among employees that is susceptible to common proof.'" *Id.* While the court declined to certify the class at issue, it did so on the reasoning that the plaintiffs' particular evidence of common "policies and procedures," were simply a set of documents used in "claims training," did little more than establish broad guidelines for class members' general duties, and failed to explain how such policies established whether class members are "primarily engaged" in exempt activities, or whether they customarily and regularly exercise discretion and independent judgment. *Id.* at 34-35. Simply put, the *Braun* plaintiffs did not establish that all potential class members performed the same jobs which could be determined to be exempt or non-exempt.

Contrast this with the extensive evidence of Kroger's common company policies and documents, including (i) Kroger's single uniform policy decision to classify all CoRE Recruiters as exempt based upon common job duties of screening and scheduling; (ii) a common job description setting forth such common duties of screening and scheduling; (iii) training documents confirming a CoRE Recruiter's "three main duties" are screening applicants and scheduling interviews; (iv) phone records demonstrating that CoRE Recruiters spent the vast majority of their time performing screening and scheduling tasks; and (v) testimony from class members and management that a CoRE Recruiters' main job is to screen and schedule candidates. Unlike *Braun*, the Named Plaintiffs have the type of common documents and testimony which establish predominance.[13]

[13] Other cases cited to by Kroger similarly support the notion that common policy decisions and documents are critical to the predominance analysis. *See Patel v. Nike Retail Servs.*, 2016 U.S. Dist. LEXIS 45588 (N.D. Cal. 2016)(citing

Simply put, there is extensive evidence of the common primary job duties of CoRE Recruiters. While this evidence is not Named Plaintiffs' only support for predominance, it obviously should be accorded a great deal of weight in finding common issues predominate.

2. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy

Kroger primarily argues against superiority under the same flawed reasoning set forth above—their speculation that CoRE Recruiters perform different job duties and exercise varying levels of discretion in their screening and scheduling functions. Doc#62, p. 45. Because such issues have been sufficiently addressed, Named Plaintiffs will simply re-incorporate its responses here.

Additionally, Kroger claims that the Named Plaintiffs have not offered "any" evidence concerning how the Court could possibly manage the case if it were certified. Obviously, this court has managed class actions before, even in the misclassification context. *See, e.g., Swigart*. The management of 180 class members, who all have the same position, worked at the same location, perform the same primary duties, and were subject to the same common Kroger policy decision, can be represented at trial by the Named Plaintiffs who will assert rights on their behalf as to overtime compensation. That is the entire point of a class action—to allow those with relatively small claims to pool resources and allow representatives to bring claims on their behalf. Further, a factfinder's determination that the administrative exemption does not apply to the Named Plaintiffs

Ninth Circuit precedent for the fact that uniform corporate policies will often bear heavily on questions of predominance, though declining certification as to the plaintiff's claims because of evidence disputing the nature of how Nike's policies translate to the availability of discretion.); *Dailey*, 2014 U.S. Dist. LEXIS 119190 at *28 (finding that *because a company-wide policy* managing Account Reps did not exist until late 2011, individualized inquiries will predominate when determining whether members of Plaintiffs' proposed classes fell within the administrative exemption."); *In re Morgan Stanley Smith Barney LLC Wage & Hour Litigation*, 2016 U.S. Dist. LEXIS 48648 at *17 (D. N.J. 2016)(Relying upon employer's internal documents to find that the roles among class members vary considerably, thus disfavoring predominance.); *Zackaria v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 67048 at *25 (C.D. Cal. 2015)("Classes are often certified where 'an employer's uniform policy . . . is uniformly implemented, since in that situation predominance is easily established.'").

will be as binding to them as it is to every other CoRE Recruiter. Such a trial is no less manageable than any other class action litigation.

Kroger also again cites to the response rate of individual class members in the FLSA collective action, claiming this somehow demonstrates "hostility" toward the litigation. As this Court knows, the FLSA collective action operates under an entirely different procedure than Rule 23—it is an "opt-in" procedure, where Rule 23 contemplates an "opt-out." Obviously, class members—the majority of which at the time of the FLSA notice period were current employees at CoRE—will be hesitant to submit an opt-in form declaring themselves a plaintiff in a lawsuit against their current employer, for fear of retaliation from Kroger. Moreover, the response rate of the FLSA class members—27 of 180, or 15% of potential members—is not as "anemic" as Kroger might lead the Court to believe. Such a response rate is right in line with other rates in FLSA litigation.

IV. CONCLUSION

Defendant's arguments in opposition to certification are simply misplaced in light of what the administrative exemption actually requires. CoRE Recruiters all performed the same primary job duties of screening and scheduling candidates, and a decision as to whether such duties meet the administrative exemption's requirements can be determined on a classwide basis. For the reasons set forth herein and in the original motion, Named Plaintiffs respectfully request that this Court certify this action under Rule 23(b)(3), approve the submission of the proposed notice to class members, and order that Defendant Kroger supplement its original production of names/addresses and other relevant information regarding Kroger's CoRE Recruiters employed from the beginning of its operations in 2014 to December 1, 2016, so that the attached notices can be sent to appropriate potential class members.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served electronically through the District Court's electronic case filing system upon David K. Montgomery, Esq., and Ryan M. Martin, Esq., Jackson Lewis P.C., PNC Center, 26th Floor, 201 East Fifth Street, Cincinnati, Ohio 45202, this 28th day of August, 2017.

/s/ Peter A. Saba
Peter A. Saba (0055535)