

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

KENNETH LYNN

3 Michelle Court  
Hulmeville, PA 19047,

-and-

CHARLENE AGNEW

275 Old Limekiln Road  
Chalfont, PA 18914,

-and-

MARGARET KNAPP

428 Parkvale Avenue  
Langhorne, PA 19047,

*on behalf of themselves and all other employees similarly  
situated,*

*Plaintiffs,*

v.

ARIA HEALTH SYSTEM

Red Lion & Knights Road  
Philadelphia, PA 19114,

-and-

ARIA HEALTH

Red Lion & Knights Road  
Philadelphia, PA 19114,

-and-

ROY A. POWELL

Red Lion & Knights Road  
Philadelphia, PA 19114,

-and-

MICHAEL E. PEPE

Red Lion & Knights Road  
Philadelphia, PA 19114,

-and-

FRANKFORD HOSPITAL PENSION PLAN

Frankford Hospital of the City of Philadelphia  
c/o Roy A. Powell

Red Lion & Knights Road  
Philadelphia, PA 19114,

-and-

COMPLAINT- CLASS ACTION  
AND DEMAND FOR JURY TRIAL

Civil Action No. \_\_\_\_\_

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**FRANKFORD HOSPITAL TAX SHELTERED  
ANNUITY**

**Frankford Hospital of the City of Philadelphia  
c/o Roy A. Powell  
Red Lion & Knights Road  
Philadelphia, PA 19114,**

*Defendants.*

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**NATURE OF CLAIM**

1. This is a proceeding for injunctive and declaratory relief and monetary damages to redress the deprivation of rights secured to plaintiffs, Kenneth Lynn, Charlene Agnew, and Margaret Knapp individually, as well as all other employees similarly situated (“Class Members”), under the Fair Labor Standards Act of 1938 (“FLSA”), as amended, 29 U.S.C. § 201 *et seq.*; under the Employee Retirement Income Security Act of 1974 (“ERISA”) 29 U.S.C. § 1001 *et seq.*; and under the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1961 *et seq.*

**JURISDICTION AND VENUE**

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343 (3) and (4) conferring original jurisdiction upon this Court of any civil action to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights; under 28 U.S.C. § 1337 conferring jurisdiction of any civil action arising under any Act of Congress regulating interstate commerce; under the Declaratory Judgment Statute, 28 U.S.C. § 2201; under 29 U.S.C. § 216(b); and under 18 U.S.C. § 1964(a) and (c).

3. Venue is appropriate in the Eastern District of Pennsylvania since the allegations arose in this district and the Plaintiffs reside in this district.

### CLASS ACTION ALLEGATIONS

4. The claims arising under ERISA and RICO are properly maintainable as a class action under Federal Rule of Civil Procedure 23.

5. The class action is maintainable under subsections (1), (2) and (3) of Rule 23(b).

6. The class consists of current and former employees of defendants whose pension and 403(b) plans were not credited with their non-reduced weekly wages and correct overtime compensation. Additionally, the class consists of current and former employees of defendants who were injured by defendants' scheme to cheat employees out of their property and to convert the employees' property, including their wages and/or overtime pay, by misleading employees about their rights under the FLSA.

7. The class size is believed to be over 4,000 employees.

8. The Plaintiffs will adequately represent the interests of the Class Members because they are similarly situated to the Class Members and their claims are typical of, and concurrent to, the claims of the other Class Members.

9. There are no known conflicts of interest between the Plaintiffs and the other Class Members.

10. The Class Counsel, Thomas & Solomon LLP, is qualified and able to litigate the Plaintiffs' and Class Members' claims.

11. The Class Counsel concentrates its practice in employment litigation, and its attorneys are experienced in class action litigation, including class actions arising under federal wage and hour laws.

12. Common questions of law and fact predominate in this action because the

claims of all Plaintiffs and Class Members are based on whether defendants' policy of not crediting employees with their non-reduced weekly wages and correct overtime compensation is a violation of ERISA or was part of a scheme to defraud Plaintiffs in violation of RICO.

13. The class action is maintainable under subsections (2) and (3) of Rule 23(b) because the Plaintiffs seek injunctive relief, common questions of law and fact predominate among the Plaintiffs and Class Members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

## PARTIES

### **A. Defendants**

14. Collectively, defendants Aria Health System, Aria Health, Roy A. Powell, Michael E. Pepe, Frankford Hospital Pension Plan, and Frankford Hospital Tax Sheltered Annuity (collectively, "Named Defendants") are related organizations through, for example, common membership, governing bodies, trustees and/or officers and benefit plans.

15. Named Defendants' health care facilities and centers include the following: Aria Health's Frankford Campus, Aria Health's Torresdale Campus, Aria Health's Bucks County Campus, The Pavilion (9501 Location), The Pavilion (2451 Location), The Professional Court, Aria Health Heart Center, Moss Rehabilitation at the Aria Division, Center for Gynecology & Women's Health at Aria Health, Sexual Assault Response Program/Rape Crisis Center, Pain Management Center, Torresdale Trauma Center, Aria Health Trauma Center, Endoscopy & Ambulatory Services Center, The Cancer Center at Aria Health, The Behavioral Health Center for Older Adults (collectively "Health Centers").

16. Named Defendants affiliated health care facilities and centers include the following: Aria Health Physician Services, Jefferson Health System, Inc., TJUH System, Inc.,

Thomas Jefferson University Hospitals, Inc., Thomas Jefferson University Hospitals, Inc. – Methodist Hospital Division, Thomas Jefferson University Hospital – Ford Road Campus, Magee Rehabilitation Hospital, Main Line Hospitals, Inc., Main Line Health, Inc, The Lankenau Hospital, Paoli Hospital, Riddle Memorial Hospital, Bryn Mawr Rehabilitation Hospital, The Bryn Mawr Hospital, Albert Einstein Health Care Network, Albert Einstein Medical Center, Elkins Park Hospital, Germantown Hospital, Frankford Health Care System, Jefferson Behavioral Health Network, Prestige Health, Frankford Hospital, Frankford Hospital Foundation, Frankford Hospital of the City of Philadelphia, Frankford Health Care System, Inc., FHCS Physician Services, Community Care Center of the Northeast, Hospital Medical Imaging, System Service Corporation, TF Development, Ltd., TMB Enterprises Partnership, Juniata Medical Building Partners, MossRehab, Frankford Hospital Foundation, Frankford Hospital Transitional Care Unit, Frankford Anesthesia Associates, Ltd., Frankford Medical Associates, Frankford Neonatology Associates, Frankford Physician Associates, Frankford Podiatry Associates, P.C., Frankford Therapy Associates, P.C., Frankford Trauma Associates, Frankford Health Care Alliance, Frankford Health Care Alliance Cooperative Association, Frankford Hospital Bucks County Campus Transitions Unit, Frankford Perinatal Center, Allergy and Asthma Associates of Bucks County, P.C., Anesthesia Associates of Bucks County, P.C., Bucks County Allergy Associates, P.C., Bucks County Cardiology Associates, P.C., Bucks County Endocrinology Associates, P.C., Bucks Dermatology Associates, P.C., Bucks E.N.T. Associates, P.C., Bucks Radiation Oncology Associates, Inc., Heartcare Associates of Bucks County, P.C., Women’s Health Associates of Bucks County, Torresdale Pediatrics (collectively, “Affiliates”).

17. Together the Named Defendants, the Health Centers and the Affiliates are

referred to as “Aria Health System” or “defendants.”

18. Aria Health System is an enterprise engaged in the operation of a hospital and/or the care of the sick and is a healthcare consortium.

19. Defendants operate over 15 health care facilities and centers and employ approximately 4,000 individuals.

20. Defendants constitute an integrated, comprehensive, consolidated health care delivery system, offering a wide range of services.

21. For example, defendants have centralized supply chain management, and financial, computer, payroll and health records systems that are integrated throughout their locations.

22. Further, defendants’ labor relations and human resources are centrally organized and controlled, including defendants’ employment of a Chief Human Resources Officer as part of the management team, as well as the maintenance of system-wide policies and certain employee benefit plans.

23. Defendants share common management, including oversight and management by a senior executive team and board of directors.

24. Defendants have common ownership.

25. At all relevant times, Aria Health System has suffered or permitted Plaintiffs and Class Members to perform work for it at its various health care locations.

26. Plaintiffs and Class Members are or have been employed by Aria Health System and/or have been jointly employed by Aria Health System.

27. Aria Health System operates locations, either directly or indirectly, through the Health Centers and Affiliates, and therefore is the employer of Plaintiffs and Class Members who are or were employed at all locations.

28. As such, defendants are the employer (single, joint or otherwise) of the Plaintiffs and Class Members and/or alter egos of each other.

29. In light of the economic realities of the enterprise operated by Aria Health System, Aria Health System is a joint employer of all Plaintiffs and Class Members.

30. Collectively, Aria Health System comprises a single, integrated enterprise, as they perform related activities through common control for a common business purpose.

31. Roy A. Powell is the President and CEO of Aria Health System.

32. Mr. Powell's responsibilities include actively managing Aria Health System.

33. In concert with others, Mr. Powell has the authority to, and does, make decisions that concern the policies defendants adopt and the implementation of those policies.

34. In concert with others, Mr. Powell has the authority to, and does, make decisions that concern defendants' operations, including functions related to employment, human resources, training, payroll, and benefits.

35. Due in part to his role as President, Mr. Powell is actively involved in the creation of the illegal policies complained of in this case.

36. Due in part to his role as President, Mr. Powell actively advises defendants' agents on the enforcement of the illegal policies complained of in this case.

37. Due in part to his role as President, Mr. Powell actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA,

ERISA and RICO.

38. In concert with others, Mr. Powell has the authority to, and does, make decisions that concern the reviewing and counseling of defendants regarding employment decisions, including hiring and firing of Plaintiffs and Class Members.

39. In concert with others, Mr. Powell has the authority to, and does, make decisions that concern employees' schedules, hours and standard benefit levels.

40. Mr. Powell has the authority to, and does, make decisions that concern standard pay scales.

41. Mr. Powell has the authority to, and does, make decisions that concern defendants' human resources policies, the resolution of issues and disputes regarding policies and their applications, the counsel locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

42. Mr. Powell has the authority to, and does, make decisions that concern defendants' employment and human resources records, including the systems for keeping and maintaining those records.

43. Mr. Powell has the authority to, and does, make decisions that concern training and education functions across Aria Health System.

44. Mr. Powell has the authority to, and does, make decisions that concern the type and scope of training employees must attend as well as any compensation they receive for attending training.

45. Mr. Powell has the authority to, and does, make decisions that concern payroll functions across Aria Health System.

46. Mr. Powell has the authority to, and does, make decisions that concern the

system for keeping and maintaining employees' payroll records, the timing and method with which payment is conveyed to employees, and the manner and method in which employees receive payroll information including their payroll checks.

47. Mr. Powell has the authority to, and does, make decisions that concern benefit plans across Aria Health System.

48. Mr. Powell has the authority to, and does, make decisions that concern the type and scope of benefits available to employees, the method and manner in which information regarding those plans is conveyed to employees, and the system for keeping and maintaining records related to employees' benefits.

49. Because Mr. Powell has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of Plaintiffs and Class Members, and control the drafting and enforcement of the policies which govern the hiring and firing of employees, Mr. Powell has the power to hire and fire employees.

50. Because Mr. Powell has authority to establish work schedules and/or conditions of employment, provide and direct support regarding human resources issues, including work schedules and/or conditions of employment, control the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, establish the type and scope of training employees receive, and administer employees' benefit programs, including standard benefit levels and the type and scope of benefits available to employees, Mr. Powell supervises and controls employees' work schedules and/or conditions of employment.

51. Because Mr. Powell has authority to establish employees' rate and method of payment and centrally control payroll functions, including standard pay scales, the provision

of payroll information, and the timing of payment, Mr. Powell determines the rate and method of employees' payment.

52. Because Mr. Powell has authority with respect to defendants' centralized records, including a database regarding employees' employment records, and systems for keeping and maintaining payroll, benefits, and other employment-related records, Mr. Powell maintains employees' employment records.

53. Because Mr. Powell provides day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment, controls the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, and administers employees' benefit programs, he is affirmatively, directly, and actively involved in operations of the defendants' business functions, particularly in regards to the employment of Plaintiffs and Class Members.

54. Because Mr. Powell is actively involved in the creation of the illegal policies complained of in this case, actively advises defendants' agents on the enforcement of the illegal policies complained of in this case and actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO, he actively participates in the violations complained of in this action.

55. Based upon the foregoing, Mr. Powell is liable to Plaintiffs and Class Members because of his active role in operating the business, his status as an employer, and/or according to federal law.

56. Michael E. Pepe is the Chief Human Resources Officer for Aria Health System.

57. Mr. Pepe is responsible for, provides direction and control over, and is authorized to direct all aspects of human resources functions across Aria Health System.

58. Due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Pepe is actively involved in the creation of the illegal policies complained of in this case.

59. Due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Pepe actively advises defendants' agents on the enforcement of the illegal policies complained of in this case.

60. Due in part to his role of overseeing human resources, training and education, and payroll and commission services, in concert with others, Mr. Pepe actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO.

61. Mr. Pepe is actively involved in reviewing and counseling defendants regarding employment decisions, including hiring and firing of Plaintiffs and Class Members.

62. Mr. Pepe is actively involved in decisions that set employees' schedules, hours and standard benefit levels.

63. Mr. Pepe is actively involved in decisions that set standard pay scales.

64. Mr. Pepe is actively involved in the determination and drafting of human resources policies, the resolution of issues and disputes regarding policies and their application, the counseling locations receive regarding human resources issues, and communications with employees about human resources issues and policies.

65. Mr. Pepe is actively involved in defendants' employment and human resources records, including the systems for keeping and maintaining those records.

66. Mr. Pepe is actively involved in training and education functions across Aria Health System.

67. Mr. Pepe is actively involved in determining the type and scope of training employees must attend as well as any compensation they receive for attending training.

68. Mr. Pepe is actively involved in payroll functions across Aria Health System.

69. Mr. Pepe is actively involved in the system for keeping and maintaining employees' payroll records, the timing and method with which payment is conveyed to employees, and the manner and method in which employees receive payroll information, including their payroll checks.

70. Mr. Pepe is actively involved in benefit plans across Aria Health System.

71. Mr. Pepe is actively involved in determining the type and scope of benefits available to employees, the method and manner in which information regarding those plans is conveyed to employees, and the system for keeping and maintaining records related to employees' benefits.

72. Because Mr. Pepe has authority to hire or fire employees, provide and direct support regarding human resources issues, including the hiring and firing of employees, and control the drafting and enforcement of the policies which govern the hiring and firing of employees, Mr. Pepe has the power to hire and fire employees.

73. Because Mr. Pepe has authority to establish work schedules and/or conditions of employment, provide and direct support regarding human resources issues, including work schedules and/or conditions of employment, control the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, establish the type and scope of training employees receive, and administer employees' benefit programs, including standard benefit levels and the type and scope of benefits available to employees, Mr. Pepe supervises and controls employees' work schedules and/or conditions of

employment.

74. Because Mr. Pepe has authority to establish employees' rate and method of payment and centrally control payroll functions, including standard pay scales, the provision of payroll information, and the timing of payment, Mr. Pepe determines the rate and method of employees' payment.

75. Because Mr. Pepe has authority with respect to defendants' centralized records, including a database regarding employees' employment records, and systems for keeping and maintaining payroll, benefits, and other employment-related records, Mr. Pepe maintains employees' employment records.

76. Because Mr. Pepe provides day-to-day support regarding human resources issues, including employees' work schedules and/or conditions of employment, controls the drafting and enforcement of the policies which govern employees' schedules and/or conditions of employment, and administers employees' benefit programs, he is affirmatively, directly, and actively involved in operations of defendants' business functions, particularly in regards to the employment of Plaintiffs and Class Members.

77. Because Mr. Pepe is actively involved in the creation of the illegal policies complained of in this case, actively advises defendants' agents on the enforcement of the illegal policies complained of in this case and actively ensures defendants' compliance or non-compliance with federal law, including the requirements of the FLSA, ERISA and RICO, Mr. Pepe actively participates in the violations complained of in this action.

78. Based upon the foregoing, Mr. Pepe is liable to Plaintiffs and Class Members because of his active role in operating the business, his role in the violations complained of in this action, his status as an employer, and/or otherwise according to federal and state law.

79. Defendants maintain ERISA plans known as the Frankford Hospital Pension Plan and the Frankford Hospital Tax Sheltered Annuity.

**B. Plaintiffs**

*Named Plaintiffs*

80. At all relevant times, Kenneth Lynn, Charlene Agnew, and Margaret Knapp (“Plaintiffs”) were employees under the FLSA, employed within this District and reside within this District.

*Class Members*

81. The Class Members are those employees of defendants who were suffered or permitted to work by defendants and not paid their regular or statutorily required rate of pay for all hours worked.

**FACTUAL BACKGROUND**

82. Aria Health System is one of the largest health care providers in Eastern Pennsylvania.

83. As discussed below, defendants maintained several illegal pay policies that denied Plaintiffs and Class Members compensation for all hours worked, including applicable premium pay rates.

*Meal Break Deduction Policy*

84. Pursuant to defendants’ “Meal Break Deduction Policy,” defendants’ computerized timekeeping system automatically deducts one half-hour from employees’ paychecks each day for a meal break.

85. Despite having this policy, defendants do not ensure that Plaintiffs and Class Members perform no work during the breaks.

86. Plaintiffs and Class Members do in fact perform work during those breaks and are not paid for that time.

87. Defendants know that the Plaintiffs and Class Members perform work during these meal breaks, but still do not pay them for this time pursuant to the Meal Break Deduction Policy.

88. Defendants maintain the Meal Break Deduction Policy throughout their facilities and centers.

89. Plaintiffs and Class Members allow defendants to operate on a 24/7 basis, and in doing so, Plaintiffs and Class Members often perform compensable work for defendants during their uncompensated meal breaks.

90. Defendants do not prohibit Plaintiffs and Class Members from working during their meal breaks and do not have rules against such work.

91. Although defendants' policy deducts 30 minutes of pay each shift, defendants expect Plaintiffs and Class Members to be available to work throughout their shifts and consistently require their employees to work during their unpaid meal breaks.

92. Plaintiffs and Class Members are not relieved by another employee when their break comes, or asked to leave their work location.

93. Defendants know that Plaintiffs and Class Members perform work during their meal breaks.

94. For example, Plaintiffs and Class Members perform work for the defendants, on defendants' premises, in plain sight, and at management's request.

95. Defendants' management has repeatedly observed Plaintiffs and Class Members working though their unpaid meal breaks. Defendants' management has gone so

far as to direct Plaintiffs and Class Members to work during their unpaid meal breaks even though defendants' management knew that they would not be able to have a full meal break.

96. Plaintiffs and Class Members had conversations with defendants' managers in which they discussed how they were working through their meal periods and were not getting paid for such work.

97. When questioned by employees about the Meal Break Deduction Policy, the defendants affirmatively stated that the employees were being fully paid for the work time for which they were entitled to be paid, even though defendants knew compensable work time was being excluded from the employees' pay. Such conversations occurred with Plaintiffs and Class Members on a number of occasions. These representations were part of a course of conduct (*see e.g.*, ¶¶ 116-20, 139-49) to defraud Plaintiffs and Class Members from the pay they were owed, and to mislead them into believing they had been fully paid as required by law.

98. Further, given the demands of the health care industry and short staffing, defendants' management knew that to get the tasks done they assigned to Plaintiffs and Class Members, when they needed to get done, Plaintiffs and Class Members had to work through their meal breaks, even during times they were not paid for their meal breaks.

99. Even though defendants know their employees are performing such work, defendants fail to compensate their employees for such work.

100. All Plaintiffs and Class Members are subject to the Meal Break Deduction Policy and are not fully compensated for work they perform during breaks, including, without limitation, hourly employees working at Aria Health System's facilities and centers, such as secretaries, housekeepers, custodians, clerks, porters, registered nurses, licensed practical

nurses, transport nurses, nurse aides, administrative assistants, anesthetists, clinicians, medical coders, medical underwriters, nurse case managers, nurse interns, nurse practitioners, nurse aides, practice supervisors, professional staff nurses, quality coordinators, resource pool nurses, respiratory therapists, senior research associates, operating room coordinators, surgical specialists, admissions officers, student nurse techs, trainers, transcriptionists, occupational therapists, occupational therapy assistants, physical therapists, physical therapy assistants, radiation therapists, staff therapists, angiotechnologists, x-ray technicians, CAT scan technicians, mammographers, MRI technologists, sleep technologists, surgical technologists, radiographers, phlebotomists, respiratory technicians, respiratory care specialists, respiratory care practitioners, clinical coordinators, medical assistants, home care nurses, home health aides, clinical case managers, midwives and other health care workers.

101. Plaintiffs and Class Members are entitled to compensation for all time they performed work for defendants, including during their unpaid meal breaks.

102. In addition, if Plaintiffs' and Class Members' hours had been properly calculated, the time spent working during meal breaks often would include work that should have been calculated at applicable premium pay rates.

103. All Plaintiffs and Class Members subject to the Meal Break Deduction Policy are members of Subclass I.

***Unpaid Preliminary and Postliminary Work Policy***

104. Defendants suffered or permitted Plaintiffs and Class Members to perform work before and/or after the end of their scheduled shifts.

105. However, defendants failed to pay Plaintiffs and Class Members for all time spent performing such work as a result of defendants' policies, practices and/or time recording

system (the “Unpaid Preliminary and Postliminary Work Policy”).

106. In addition, if Plaintiffs’ and Class Members’ hours had been properly calculated, the time spent performing work before and/or after their shifts often would have included work that should have been calculated at applicable premium pay rates.

107. All Plaintiffs and Class Members subject to the Unpaid Preliminary and Postliminary Work Policy are members of Subclass 2.

***Unpaid Training Policy***

108. Defendants also suffered or permitted Plaintiffs and Class Members to attend compensable training programs.

109. However, defendants failed to pay Plaintiffs and Class Members for all time spent attending such training sessions (the “Unpaid Training Policy”).

110. In addition, if Plaintiffs’ and Class Members’ hours had been properly calculated, the time spent attending training often would have included work that should have been calculated at applicable premium pay rates.

111. All Plaintiffs and Class Members subject to the Unpaid Training Policy are members of Subclass 3.

112. Collectively, the Meal Break Deduction Policy, the Unpaid Preliminary and Postliminary Work Policy, and the Unpaid Training Policy, are referred to herein as the “Unpaid Work Policies.”

***Additional Allegations***

113. Plaintiffs and Class Members were subject to defendants’ timekeeping policies which fail to ensure that employees are compensated for all hours worked, including pursuant to the Unpaid Work Policies.

114. Even though Aria Health System knows its employees are performing such work, Aria Health System fails to compensate its employees for such work

115. Defendants' practice is to be deliberately indifferent to these violations of the statutory wage and overtime requirements.

116. Through the paystubs and payroll information it provided to employees, Aria Health System deliberately concealed from its employees that they did not receive compensation for all compensable work that they performed and misled them into believing they were being paid properly.

117. Further, by maintaining and propagating the illegal Unpaid Work Policies, defendants deliberately misrepresented to Plaintiffs and Class Members that they were being properly paid for all compensable time, even though Plaintiffs and Class Members were not receiving pay for all time worked including applicable premium pay.

118. The defendants engaged in such conduct and made such statements to conceal from the Plaintiffs and Class Members their rights and to frustrate the vindication of the employees' federal rights.

119. As a result, employees were unaware of their claims.

120. Defendants' failure to pay overtime as required by the FLSA is willful.

121. Defendants, however, at all times, intended to violate applicable federal laws by failing to pay Plaintiffs and Class Members their regular or statutorily required rate of pay for all hours worked including applicable premium pay.

122. Among the relief sought, Plaintiffs and Class Members seek injunctive relief to prevent defendants from continuing the illegal policies and practices perpetuated pursuant to the Unpaid Work Policies.

123. Defendants sponsor pension and 403(b) plans including the Frankford Hospital Pension Plan and the Frankford Hospital Tax Sheltered Annuity (the “Plans”) for their employees.

124. Plaintiffs and Class Members are participants in and/or beneficiaries of the Plans.

125. Defendants failed to keep accurate records of all time worked by Plaintiffs and Class Members. By failing to keep such records, defendants’ records are legally insufficient to determine benefits.

126. Defendants failed to credit or even investigate crediting overtime pay as compensation used to determine benefits to the extent overtime may be included as compensation under the Plans. Defendants, while acting as fiduciaries exercising discretion over the administration of the Plans, breached their duties to act prudently and solely in the interests of Plans’ participants by failing to credit them with all of the hours of service for which they were entitled to be paid, including overtime to the extent overtime may be included as compensation under the Plans, or to investigate whether such hours should be credited. Under ERISA, crediting hours is a fiduciary function, independent of the payment of wages, necessary to determine participants’ participation vesting and accrual of rights.

127. As used in this Complaint, “mailed” means: (1) placing in any post office or authorized depository for mailed matter, any matter or thing to be delivered by the United States Postal Service; (2) causing to be deposited any matter or thing to be delivered by any private or commercial interstate carrier; (3) taking or receiving therefrom any such matter or thing; and/or (4) knowingly causing to be delivered by any such means any such matter.

128. Plaintiffs and Class Members allege that defendants devised, intended to

devise, and carried out a scheme to cheat Plaintiffs and Class Members out of their property and to convert Plaintiffs' and Class Members' property, including their wages and/or overtime pay (the "Scheme"). Defendants' Scheme consisted of illegally, willfully and systematically withholding or refusing to pay Plaintiffs and Class Members their regular or statutorily required rate of pay for all hours worked in violation of federal law, as described previously in this Complaint.

129. Defendants' Scheme involved the employment of material misrepresentations and/or omissions and other deceptive practices reasonably calculated to deceive Plaintiffs and Class Members. The Scheme involved depriving Plaintiffs and Class Members of their lawful entitlement to wages and overtime.

130. In executing or attempting to execute the Scheme and to receive the financial benefits of the Scheme, defendants repeatedly mailed payroll checks, either directly to Plaintiffs and Class Members or between defendants' business locations. These mailings occurred on a regular basis and more than 100 such mailings occurred in the last 10 years.

131. The payroll checks were false and deceptive because they misled Plaintiffs and Class Members about the amount of wages to which they were entitled, and whether defendants had included all compensable work time, as well as their status and rights under the FLSA. Plaintiffs and Class Members relied to their detriment on the misleading payroll checks that defendants mailed and those misleading documents were a proximate cause of Plaintiffs' and Class Members' injuries.

132. Defendants' predicate acts of mailing the misleading payroll checks in furtherance of their Scheme constitute a pattern of conduct unlawful pursuant to 18 U.S.C. § 1961(5) based upon both the relationship between the acts and continuity over the period of

time of the acts. The relationship was reflected because the acts were connected to each other in furtherance of the Scheme. Continuity was reflected by both the repeated nature of the mailings during and in furtherance of the Scheme and the threat of similar acts occurring in the future. The threat was reflected by the continuing and ongoing nature of the acts.

133. Defendants' predicate acts were related, because they reflected the same purpose or goal (to retain wages and overtime pay due to Plaintiffs and Class Members for the economic benefit of defendants and members of the enterprise); results (retention of wages and overtime pay); participants (defendants and other members of the enterprise); victims (Plaintiffs and Class Members); and methods of commission (the Scheme and other acts described in the Complaint). The acts were interrelated and not isolated events, since they were carried out for the same purposes in a continuous manner over a substantial period of time.

134. At all relevant times, in connection with the Scheme, defendants acted with malice, intent, knowledge, and in reckless disregard of Plaintiffs' and Class Members' rights.

135. Each of the Plaintiffs and Class Members is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964.

136. Each defendant is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

137. Defendants were members of an "enterprise" under 18 U.S.C. §§ 1961(4) and 1962(a), which was engaged in or the activities of which affected interstate and foreign commerce.

138. Each defendant received income from a pattern of conduct unlawful under RICO, in which defendants participated through continuous instances of providing Plaintiffs

and Class Members with misleading documents which defendants mailed and upon which Plaintiffs and Class Members relied to their detriment.

139. Plaintiffs and Class Members were injured in their business and property under 18 U.S.C. § 1964(c) by reason of defendants' commission of conduct which was unlawful under RICO.

140. Every wage payment that the defendants mailed to the Plaintiffs and Class Members as part of the Scheme constituted a new legal injury to the Plaintiffs and Class Members.

141. Therefore, each and every improper payment within the relevant statute of limitations period constitutes a new legal injury and the Plaintiffs and Class Members are entitled to recover based on the reduction in each improper payment.

142. Additionally, as set forth in the allegations above, including ¶¶ 92, 116-20, the defendants fraudulently concealed from the Plaintiffs and Class Members the facts that are the basis for their claims. Further, such conduct by the defendants equitably tolls the statute of limitations covering Plaintiffs' and Class Members' claims.

143. Because of such conduct, the Plaintiffs and Class Members did not discover in the relevant statute of limitations period that the defendants were not paying them properly.

144. The Plaintiffs and Class Members exercised due diligence, but still were unaware of their rights.

145. The Plaintiffs and Class Members are not experts in proper payment under federal labor laws, and more specifically are not aware of what time is compensable for interrupted and missed meal breaks, nor how the defendants' internal computer systems were determining the amount they were being paid.

146. Further, when questioned, the defendants falsely assured Plaintiffs and Class Members that the defendants understood federal and state labor laws and that based on that knowledge, the defendants were ensuring that they were properly paying the Plaintiffs and Class Members.

147. The defendants made this representation despite the fact that such claims were false, fully knowing that Plaintiffs and Class Members were relying on the defendants' "expertise" and assurances.

148. Further, these assurances were not contradicted by the information in legal postings required by state or federal law to be displayed prominently at places of work to which Plaintiffs and Class Members had access.

149. Prior to seeking legal advice from Class Counsel, the Plaintiffs were never alerted to the defendants' concealment of their violation of the law by failing to pay the Plaintiffs and Class Members properly.

150. Further, not until the commencement of this action were Class Members made aware that the defendants' conduct in fact violated the law.

151. Plaintiffs and Class Members were not classified as exempt employees because hourly employees do not fall under one of the enumerated exemptions under the FLSA.

**FIRST CAUSE OF ACTION**  
***FLSA***

152. Plaintiffs and Class Members reallege the above paragraphs as if fully restated herein.

153. Defendants willfully violated their obligations under the FLSA and are liable to Plaintiffs and Class Members.

**SECOND CAUSE OF ACTION**  
***ERISA—Failure to Keep Accurate Records***

154. Plaintiffs and Class Members reallege the above paragraphs as if fully restated herein.

155. Plaintiffs and Class Members bring these claims under 29 U.S.C. § 1132(a)(3), which confers on plan participants the right to bring suit to enjoin any violation of ERISA § 1059(a)(1).

156. Defendants failed to keep accurate records of all time worked by Plaintiffs and Class Members. By failing to keep such records, defendants' records are legally insufficient to determine benefits. Defendants failed to keep records "sufficient to determine the benefits due or which may become due" under the terms of the Plans as required by ERISA § 209(a)(1), 29 U.S.C. § 1059(a)(1).

**THIRD CAUSE OF ACTION**  
***ERISA—Breach of Fiduciary Duty***

157. Plaintiffs and Class Members reallege the above paragraphs as if fully restated herein.

158. Defendants breached their fiduciary duties under 29 U.S.C. § 1104(a)(1).

**FOURTH CAUSE OF ACTION**  
***RICO***

159. Plaintiffs and Class Members reallege the above paragraphs as if fully restated herein.

160. Plaintiffs and Class Members bring these claims under 18 U.S.C. § 1964(c), which confers on private individuals the right to bring suit for any injury caused by a violation of 18 U.S.C. § 1962.

161. Defendants' conduct, and the conduct of other members of the enterprise,

injured Plaintiffs and Class Members by refusing to pay their regular or statutorily required rate of pay for all hours worked. Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity, by devising a Scheme to obtain Plaintiffs' and Class Members' property by means of false or fraudulent representations, at least some of which were made in the misleading payroll checks which defendants mailed.

**WHEREFORE**, Plaintiffs and Class Members demand judgment against defendants in their favor and that they be given the following relief:


- (a) an order preliminarily and permanently restraining defendants from engaging in the aforementioned pay violations;
- (b) an award crediting Plaintiffs and Class Members for all hours worked under defendants' Plans;
- (c) an award of the value of Plaintiffs' and Class Members' unpaid wages, including fringe benefits;
- (d) liquidated damages under the FLSA equal to the sum of the amount of wages and overtime which were not properly paid to Plaintiffs and Class Members;
- (e) an award of reasonable attorneys' fees, expenses, expert fees and costs incurred in vindicating Plaintiffs' and Class Members' rights;
- (f) an award of pre- and post-judgment interest; and
- (g) such other and further legal or equitable relief as this Court deems to be just and appropriate.

#### **JURY DEMAND**

Plaintiffs demand a jury to hear and decide all issues of fact in accordance with Federal Rule of Civil Procedure 38(b).

Dated: November 20, 2009

THOMAS & SOLOMON LLP

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