

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOHN DUNCHESKIE, *et al.*,

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

Plaintiffs,

v.

TEMPLE UNIVERSITY HEALTH SYSTEM, INC., *et
al.*,

Defendants.

PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION FOR
EXPEDITED NOTICE TO AFFECTED
EMPLOYEES

Civil Action No. 09-CV-5551

Judge J. Curtis Joyner

TO BE ELECTRONICALLY
FILED

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
EXPEDITED NOTICE TO AFFECTED EMPLOYEES

PRELIMINARY STATEMENT

The United States Supreme Court has directed district courts to ensure that employees receive "accurate and timely" notice of a pending Fair Labor Standards Act ("FLSA") action. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). This action requires that employees be informed of its existence.

As the Supreme Court recognized in *Hoffman-LaRoche*, employees need to learn of the case quickly, even before any discovery is conducted, because the statute of limitations is running on their recovery. As now-Justice Sotomayor held, the workers' claims "die daily" until they opt-into the lawsuit. *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997) (Sotomayor, J.).

As this Court recently held in *Pereira v. Foot Locker, Inc.*, under the FLSA, plaintiffs' need only make a minimal showing that employees are "similarly situated" in order for notice to be sent. *Pereira v. Foot Locker, Inc.*, Civ. No. 07-cv-2157, 2009 WL 2951028, at *4 (E.D.

Pa. Sept. 11, 2009) (Joyner, J.). This low burden correlates with the minimal relief sought (simply notifying employees about the case), the important rights at stake, and the fact that such rights are being extinguished on a daily basis. Now is *not* the time to decide which party will ultimately succeed on the merits, or to sort out other merits or damages-based issues, but only to determine whether employees are similarly situated such that they should receive court-authorized notice about this case, allowing them to make an informed decision on whether to opt-in and protect their rights.¹

Courts in this state and across the country have always ordered the issuance of notice under the facts and circumstances presented here: where a large health system automatically deducts meal breaks from employees' work time and does not "ensure," as the FLSA requires, that the employees actually stop working during that time.

In this case, plaintiffs easily meet their modest burden for sending court-authorized notice. By operation of defendants' Meal Break Deduction Policy, hourly employees across defendants' large health system automatically lose one-half hour of pay each work day for a meal period even though the defendants are not "ensuring," as the FLSA requires, that these employees are in fact performing no work during those meal periods.

Therefore, in accordance with the inescapable weight of caselaw on the precise issues presented here, all of defendants' hourly employees should receive *Hoffmann-La Roche* notice.

FACTS

The named plaintiffs, John Duncheskie, Diane Read, Thelma Harris and Eleanor Jackson, joined by more than 180 other current and former employees, filed this action

¹ Through this motion, plaintiffs only seek certification pursuant to the FLSA. Plaintiffs will seek class certification pursuant to Rule 23 in accordance with the Local Rules or this Court's Order through a subsequent motion.

against Temple University Health System, Inc., and the other defendants (the “defendants” or “Temple Health System”) as a collective action under the FLSA, 29 U.S.C. § 216(b).

In particular, pursuant to the Meal Break Deduction Policy, defendants deduct one-half hour from employees’ pay each day employees work for a meal break. However, because the defendants do not ensure that employees stop working during that break – and on the contrary ask the employees to work during that time – employees end up working thousands of hours a year for which they receive no pay.

The statements from plaintiffs submitted with this motion discuss the operation and application of the Meal Break Deduction Policy. Plaintiffs confirm that they are subject to the Meal Break Deduction Policy.²

Given the nature of entire operations, the defendants expect hourly employees to be available to work during their meal breaks, and the defendants do not take any efforts to ensure the employees are not working during their unpaid meal breaks.³ To the contrary, defendants expect their employees to perform work during the meal breaks and know the

² All affidavits referenced herein are attached to the Affirmation of Justin M. Cordello, sworn to November 24, 2009 (“Cordello Aff.”). Affidavit of John Duncheskie, sworn to September 2009 attached as Exhibit E to the Cordello Aff. (“Duncheskie Aff.”) ¶¶ 3-5; Affidavit of Diane Read, sworn to September 2009 attached as Exhibit F to the Cordello Aff. (“Read Aff.”) ¶¶ 3-5; Affidavit of Thelma Harris sworn to October 13, 2009 attached as Exhibit G to the Cordello Aff. (“Harris Aff.”) ¶¶ 3-5; Affidavit of Eleanor Jackson, sworn to September 2009 attached as Exhibit H to the Cordello Aff. (“Jackson Aff.”) ¶¶ 3-5; Affidavit of Francis Rooney, sworn to October 12, 2009 attached as Exhibit I to the Cordello Aff. (“Rooney Aff.”) ¶¶ 3-5; Affidavit of Linda Clark, sworn to October 7, 2009 attached as Exhibit J to the Cordello Aff. (“Clark Aff.”) ¶¶ 3-5; Affidavit of Thankamma George, sworn to October 17, 2009 attached as Exhibit K to the Cordello Aff. (“George Aff.”) ¶¶ 3-5; Affidavit of Esther Zetzer, sworn to October 30, 2009 attached as Exhibit L to the Cordello Aff. (“Zetzer Aff.”) ¶¶ 3-5; Affidavit of Antoinette Bloomfield, sworn to October 30, 2009 attached as Exhibit M to the Cordello Aff. (“Bloomfield Aff.”) ¶¶ 3-5; Affidavit of John Canty, sworn to October 13, 2009 attached as Exhibit N to the Cordello Aff. (“Canty Aff.”) ¶¶ 3-5.

³ Duncheskie Aff. ¶¶ 8-11, 19, 21; Read Aff. ¶¶ 8-11, 19, 21; Harris Aff. ¶¶ 8-11, 18, 20; Jackson Aff. ¶¶ 8-11, 19, 21; Rooney Aff. ¶¶ 8-11, 19, 21; Clark Aff. ¶¶ 8-11, 19, 21; George Aff. ¶¶ 8-11, 19, 21; Zetzer Aff. ¶¶ 8-11, 19, 21; Bloomfield Aff. ¶¶ 8-11, 19, 21; Canty Aff. ¶¶ 8-11, 18, 20.

employees do so.⁴ Employees continue about their regular duties and are not paid for their meal breaks even though they are working for defendants.⁵ Employees eat their meals while working because they rarely have time for a meal break due to the defendants' demands.⁶ Therefore, it is an everyday occurrence that lunches are interrupted by work and the employees do not receive a full, uninterrupted 30 minute meal break.⁷

Defendants for years have been reducing staffing which imposes larger and larger burdens on all levels of hourly employees to respond to the needs of the defendants, especially given the importance of the work that needs to be performed, regardless of whether they are on a meal break.⁸ Thus, the facilities are so hectic that employees have no time to take full, uninterrupted meal breaks.⁹

As a further way to cut costs, defendants also pressure employees to keep overtime hours down, resulting in employees not being paid for all the hours they worked.¹⁰ Overall, although plaintiffs appreciate that it is vital for the efficient operation of defendants' business

⁴ Duncheskie Aff. ¶¶ 10, 11, 23-26, 29, 31; Read Aff. ¶¶ 10, 11, 23-26, 29, 31; Harris Aff. ¶¶ 10, 11, 22-25, 28, 30; Jackson Aff. ¶¶ 10, 11, 23-26, 29, 31; Rooney Aff. ¶¶ 10, 11, 23-26, 29, 31; Clark Aff. ¶¶ 10, 11, 23-26, 29, 31; George Aff. ¶¶ 10, 11, 23-26, 29, 31; Zetzer Aff. ¶¶ 10, 11, 23-26, 29, 31; Bloomfield Aff. ¶¶ 10, 11, 23-26, 29, 31; Canty Aff. ¶¶ 10, 11, 22, 25, 28, 30.

⁵ Duncheskie Aff. ¶¶ 7, 10-15, 17, 34, 38; Read Aff. ¶¶ 7, 10-15, 17, 34, 38; Harris Aff. ¶¶ 7, 10-14, 16, 33, 37; Jackson Aff. ¶¶ 7, 10-15, 17, 34, 38; Rooney Aff. ¶¶ 7, 10-15, 17, 34, 38; Clark Aff. ¶¶ 7, 10-15, 17, 34, 38; George Aff. ¶¶ 7, 10-15, 17, 34, 38; Zetzer Aff. ¶¶ 7, 10-15, 17, 34, 37; Bloomfield Aff. ¶¶ 7, 10-15, 17, 34, 38; Canty Aff. ¶¶ 7, 10-14, 16, 33.

⁶ Duncheskie Aff. ¶ 34; Read Aff. ¶ 34; Harris Aff. ¶ 33; Jackson Aff. ¶ 34; Rooney Aff. ¶ 34; Clark Aff. ¶ 34; George Aff. ¶ 34; Zetzer Aff. ¶ 34, Bloomfield Aff. ¶ 34; Canty Aff. ¶ 33.

⁷ Duncheskie Aff. ¶¶ 15, 27, 32, 34; Read Aff. ¶¶ 15, 27, 32, 34; Harris Aff. ¶¶ 14, 26, 31, 33; Jackson Aff. ¶¶ 15, 27, 32, 34; Rooney Aff. ¶¶ 15, 27, 32, 34; Clark Aff. ¶¶ 15, 27, 32, 34; George Aff. ¶¶ 15, 27, 32, 34; Zetzer Aff. ¶¶ 15, 27, 32, 34, Bloomfield Aff. ¶¶ 15, 27, 32, 34; Canty Aff. ¶¶ 26, 31, 33.

⁸ Duncheskie Aff. ¶ 16; Read Aff. ¶¶ 16,42; Harris Aff. ¶¶ 15,41; Jackson Aff. ¶¶ 16, 42; Rooney Aff. ¶¶ 16,42; Clark Aff. ¶¶ 16,42; George Aff. ¶¶ 16,42; Zetzer Aff. ¶¶ 16,41, Bloomfield Aff. ¶¶ 16,42; Canty Aff. ¶¶ 15,40.

⁹ Duncheskie Aff. ¶ 38; Read Aff. ¶ 38; Harris Aff. ¶ 37; Jackson Aff. ¶ 38; Rooney Aff. ¶ 38; Clark Aff. ¶ 38; George Aff. ¶ 38; Zetzer Aff. ¶ 37, Bloomfield Aff. ¶ 38.

¹⁰ Duncheskie Aff. ¶ 43; Read Aff. ¶ 43; Harris Aff. ¶ 42; Jackson Aff. ¶ 43; Clark Aff. ¶ 43; George Aff. ¶ 42; Zetzer Aff. ¶ 43, Bloomfield Aff. ¶ 43; Canty Aff. ¶ 41.

that employees work during their meal breaks, the question remains why the defendants refuse to compensate employees when they are working during their meal break.¹¹

Under these circumstances, defendants clearly know employees continued to perform work during meal breaks. In fact, managers see the work being performed during meal breaks and even direct plaintiffs to work during their unpaid meal breaks, even though management knows that plaintiffs would not be able to have a full meal break.¹² Defendants' management also knows that to get the assigned tasks by the appointed deadline, employees have to work through their meal breaks although they will not get paid for such time.¹³

Because the automatic deduction is taken by the defendants' payroll system, all hourly employees, regardless of their unit or department, are subject to the automatic deduction of 30 minutes per shift.¹⁴ Thus all hourly positions, from secretaries to housekeepers and from technicians to nurses are subject to the Meal Break Deduction Policy.¹⁵

Based on defendants' illegal policy, plaintiffs request notice be ordered by this Court to allow current and former employees the opportunity to participate in this litigation.

¹¹ Duncheskie Aff. ¶ 18; Read Aff. ¶ 18; Harris Aff. ¶ 17; Jackson Aff. ¶ 18; Rooney Aff. ¶ 18; Clark Aff. ¶ 18; George Aff. ¶ 18; Zetzer Aff. ¶ 18; Bloomfield Aff. ¶ 18; Canty Aff. ¶ 17.

¹² Duncheskie Aff. ¶¶ 23, 24, 30; Read Aff. ¶¶ 23, 24, 30; Harris Aff. ¶¶ 22, 23, 29; Jackson Aff. ¶¶ 23, 24, 30; Rooney Aff. ¶¶ 23, 24, 30; Clark Aff. ¶¶ 23, 24, 30; George Aff. ¶¶ 23, 24, 30; Zetzer Aff. ¶¶ 23, 24, 30; Bloomfield Aff. ¶¶ 23, 24, 30; Canty Aff. ¶¶ 22.

¹³ Duncheskie Aff. ¶¶ 29, 30; Read Aff. ¶¶ 29, 30; Harris Aff. ¶¶ 28, 29; Jackson Aff. ¶¶ 29, 30; Rooney Aff. ¶¶ 29, 30; Clark Aff. ¶¶ 29, 30; George Aff. ¶¶ 29, 30; Zetzer Aff. ¶¶ 29, 30; Bloomfield Aff. ¶¶ 29, 30; Canty Aff. ¶¶ 28, 29.

¹⁴ Duncheskie Aff. ¶¶ 3-5, 10; Read Aff. ¶¶ 3-5, 10; Harris Aff. ¶¶ 3-5, 10; Jackson Aff. ¶¶ 3-5, 10; Rooney Aff. ¶¶ 3-5, 10; Clark Aff. ¶¶ 3-5, 10; George Aff. ¶¶ 3-5, 10; Zetzer Aff. ¶¶ 3-5, 10; Bloomfield Aff. ¶¶ 3-5, 10; Canty Aff. ¶¶ 3-5, 10.

¹⁵ Duncheskie Aff. ¶¶ 12-14, 34; Read Aff. ¶¶ 12-14, 34; Harris Aff. ¶¶ 12,13, 33; Jackson Aff. ¶¶ 12-14, 34; Rooney Aff. ¶¶ 12-14, 34; Clark Aff. ¶¶ 12-14, 34; George Aff. ¶¶ 12-14, 34; Zetzer Aff. ¶¶ 12-14, 34; Bloomfield Aff. ¶¶ 12-14, 34; Canty Aff. ¶¶ 12, 14, 33.

ARGUMENT

I. NOTICE SHOULD ISSUE BECAUSE COURTS GRANT NOTICE WHEN HEALTHCARE SYSTEMS AUTOMATICALLY DEDUCT MEAL BREAKS

Federal courts always grant notice when, as here, large healthcare systems implement automatic meal break deduction policies without ensuring that employees are relieved of all work duties during their meal breaks.

A. The Weight of Case Law Favors Notice.

Every court that has considered a motion for notice involving an automatic meal break deduction policy at a health care institution has granted notice. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, Civ. No. 09-85J, 2009 WL 1361265 (W.D. Pa. May 14, 2009); *Kuznyetsov v. West Penn Allegheny Health Sys., Inc.*, Civ. No. 09-CV-379, 2009 WL 1515175 (W.D. Pa. June 1, 2009); *Taylor v. Pittsburgh Mercy Health Sys.*, Civ. No. 09-377, 2009 WL 2003354 (W.D. Pa. July 7, 2009); *Frye v. Baptist Mem'l Hosp.*, No. 07-2708, 2008 WL 6653632 (W.D. Tenn. Sept. 16, 2008); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2009 WL 3334784 (W.D.N.Y. Oct. 14, 2009); *Hinterberger v. Catholic Health Sys.*, No. 08-CV-380S, 2009 WL 3464134 (W.D.N.Y. Oct. 21, 2009); *Collozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y. 2009); *Fengler v. Crouse Health Sys., Inc.*, 595 F. Supp. 2d 189 (N.D.N.Y. 2009); *Hamelin v. Faxton-St. Luke's Healthcare*, Civ. No. 6:08-CV-1219 (DNH/DEP), 2009 WL 211512 (N.D.N.Y. Jan 26, 2009); *Ohsann v. L.V. Stabler Hosp.*, No. 2:07-CV-0875-WKW, 2008 WL 2468559 (M.D. Ala. June 17, 2008); *Brown v. Maximum Efficiency Squared, LLC*, No. 2:07-CV-889-MEF, 2008 WL 1924983 (M.D. Ala. Apr. 30, 2008).¹⁶

¹⁶ These cases involving improper meal break deduction policies in the health care industry are consistent with decisions regarding meal breaks generally. See e.g. *Sherrill v. Sutherland Global*

These cases establish that once plaintiffs have demonstrated, through their sworn statements, the existence of an automatic deduction policy where defendants have failed to ensure that employees do not actually work during their unpaid meal breaks, notice is provided to all affected employees. *Id.* Given the factual similarities of these cases to the case here, this overwhelming authority compels notice to be issued here. These cases also demonstrate that regardless of what type of work-related duties are responsible for the unpaid time, the result is the same: notice is granted. *Id.*

1. Camesi v. University of Pittsburgh Medical Center

In *Camesi*, the court granted notice to a class of more than 30,000 hourly, non-exempt employees of the University of Pittsburgh Medical Center (“UPMC”), on the basis of UPMC’s automatic meal break deduction policy. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 2009 WL 1361265, at *6. These employees worked at approximately 1,000 different locations which comprised the UPMC health system. *Id.* at *5.

UPMC’s meal break policy automatically deducted a full half hour from each hourly employees’ work time each day. *Id.* at *1-2. As here, the affirmations submitted by plaintiffs demonstrated that employees either missed, or were interrupted during, their automatically-deducted meal breaks by various work-related duties, and thus were not paid for all of their work time. *Id.* at *1, 4-5.

Serv., 487 F. Supp. 2d 344 (W.D.N.Y. 2007); *Barrus v. Dick’s Sporting Goods, Inc.*, 465 F. Supp. 2d 224 (W.D.N.Y. 2006); *Carmody v. Florida Ctr. for Recovery, Inc.*, No. 05-14295-CIV, 2006 WL 3666964 (S.D. Fla. Nov. 8, 2006); *Mares v. Caesars Entm’t, Inc.*, No. 4:06-CV-0060-JDT-WGH, 2007 WL 118877 (S.D. Ind. Jan. 10, 2007); *Jones-Turner v. Yellow Enter. Sys., LLC*, No. 3:07-CV-218-S, 2007 WL 3145980 (W.D. Ky. Oct. 25, 2007); *Crawford v. Lexington-Fayette Urban County Gov’t*, No. 06-299-JBC, 2008 WL 2885230 (E.D. Ky. July 22, 2008).

While UPMC had also implemented a policy whereby an employee could affirmatively “cancel” a meal break deduction if he/she worked during their meal break, the court found that “[t]he law is clear that it is the employer’s responsibility, not its employees’, to ensure compensation for work ‘suffered or permitted’” by the employer. *Id.* at *4. The court held that in addition to the automatic deduction policy, “[d]efendants’ arguable attempt to shift statutory responsibilities to their workers [itself] constitutes an ‘employer policy’ susceptible to challenge at this stage in the proceedings.” *Id.* at *4.

Accordingly, based on plaintiffs’ affirmations demonstrating unpaid work time and UPMC’s automatic deduction policy (including UPMC’s attempts to shift their timekeeping responsibilities to the employees), the court found that plaintiffs had easily met their burden, and granted notice to *all* of defendants’ non-exempt, hourly employees. *Id.* at *5. The court further held this proof was more than sufficient to warrant notice regardless of whether the normal lenient standard was applied, or even a “more exacting” standard. *Id.* at *4.

2. Kuznyetsov v. West Penn Allegheny Health System, Inc.

Similarly, in *Kuznyetsov*, the court granted notice to all non-exempt employees throughout the West Penn Allegheny Health System (“West Penn”). *Kuznyetsov v. West Penn Allegheny Health Sys., Inc.*, 2009 WL 1515175, at *5-6. As here and in *Camesi*, the health system had also implemented an automatic meal break deduction which automatically deducted a half hour meal break from every hourly employees’ pay every shift. *Id.* at *4.

As here, plaintiffs’ affirmations asserted that plaintiffs “were not paid when they were required to work through, or during part of, their 30 minute meal breaks” as a result of work-related duties and inadequate staffing, and that defendants failed to “ensure that [plaintiffs] received their full meal break.” *Id.* at *3. West Penn attempted to counter plaintiffs’

evidence by showing that they had instituted a policy whereby employees could report to the “timekeepers” if they missed a meal break, and the automatic meal break deduction would be cancelled. *Id.* at *4-5.

However, the court held that such a “cancellation” policy does not go far enough to protect employees’ rights under the FLSA. *Id.* at *5. The court agreed with plaintiffs that, under the applicable law, it was the defendant-employer’s responsibility to ensure that employees were not working during their unpaid meal breaks, and that “[a]rguably, [and illegally] [d]efendants’ policies shift the responsibility to the employees.” *Id.* at *5. As in *Camesi*, this unlawful attempt to shift the burden furnished a basis for notification to the employees. *Id.* at *5.

The defendants also argued that notice should be limited to employees with patient care duties (an amorphous limitation at best) and/or to certain physical locations. *Id.* at *3, 5. The court rejected both of these arguments. *Id.* As to the “patient care” limitation, the court noted that the law required the employer to “ensure” that its employees receive a full meal break whenever there is an automatic deduction (not simply that the deduction could theoretically be cancelled). *Id.* at *5. It was this common illegal policy of failing to ensure actual meal breaks, which made all non-exempt employees “similar” to each other. *Id.* This was not like other cases in which there was a different, and more limited, common factual allegation, that patient care responsibilities caused meal break interruptions. *See e.g. See Gordon*, 2009 WL 3334784; *Hinterberger*, 2009 WL 3464134; *Collozzi*, 595 F. Supp. 2d 200; *Fengler*, 595 F. Supp. 2d 189; *Hamelin*, 2009 WL 211512. As the court held, “there is no dispute that the policies affect all non-exempt employees, regardless of job title or work location.” *Kuznyetsov*, 2009 WL 1515175, at *5. As to restricting notice only to those

facilities in which plaintiffs worked, the court found West Penn's uniform application of an automatic meal break deduction policy justified notice being sent to all hourly employees of West Penn. *Id.*

Based on defendants' impermissible attempts to shift the responsibility for tracking and properly recording employee work hours, a duty which is the employer's alone, and the evidence contained in plaintiffs' affirmations, the court granted notice to *all* hourly West Penn employees. *Id.* at *4-5.

3. Frye v. Baptist Memorial Hospital

Again, in *Frye*, plaintiffs sought notice based on the hospital system's automatic meal break deduction policy. *Frye v. Baptist Mem'l Hosp.*, 2008 WL 6653632. Plaintiffs' submitted six admissible declarations from employees stating that, for various reasons, employees were not always paid for all of the time which they spent working during their unpaid, and automatically deducted meal breaks. *Id.* at *1-3.

Defendants went to extraordinary lengths to disprove plaintiffs' allegations by presenting evidence that the automatic deduction actually did not apply at every one of its facilities, and additionally offering "seven hundred declarations of hourly employees declaring that 'they always have been properly compensated for all of the time that they have worked and always have accurately recorded their time.'" *Id.* at *3. The defendants further submitted declarations claiming that not all hourly employees were subject to the automatic deduction. *Id.* at *3. Finally, the defendants relied heavily on the widely varying implementation of the time exception policies, as well as the separate administrative and leadership functions at its various locations. *Id.* at *3-4.

Despite defendants' extensive efforts and evidentiary submissions, and in light of plaintiffs' declarations, the court held that notice should issue to *all* those employees "who were subject to an automatic 30-minute payroll deduction for lunch breaks." *Id.* at *7.

4. Taylor v. Pittsburgh Mercy Health System

In *Taylor*, plaintiffs submitted affirmations swearing that the defendant health system, Pittsburgh Mercy ("Mercy"), had implemented an automatic deduction policy for employee meal breaks. *Taylor v. Pittsburgh Mercy Health Sys.*, 2009 WL 2003354, at *1-2. Plaintiffs' affirmations also demonstrated that Pittsburgh Mercy "was aware of, permitted and/or demanded" that employees continue to perform work during their unpaid and automatically-deducted meal breaks, and that employees were not paid for all such work time. *Id.* at *1. Unlike *Camesi* and *Kuznyetsov*, plaintiffs only had evidence that the automatic meal break deduction policy applied at one of defendants' locations. *Id.* at *2-3.

In *Taylor*, no written policy governing defendants' meal break deductions policy was produced, but the court held this was "not dispositive" given the plaintiffs' affirmations. *Id.* at *2 ("Mercy Hospital does not expressly deny that such a policy existed, and, even if Defendants did, this would not provide a basis for refusing certification.").

Despite the fact that the automatic deduction policy was unwritten, and that defendants had refused to confirm their actual policy, the court held that the issuance of notice was appropriate. *Id.* at *2.

5. Ohsann v. L.V. Stabler Hospital

Again, in *Ohsann v. L.V. Stabler Hospital*, hourly employees challenged defendants' implementation of an automatic meal break deduction policy. 2008 WL 2468559, at *2. As here, defendants had failed to ensure that employees were not working during their

automatically deducted meal breaks, and employees reported that they routinely had interrupted meal breaks as a result of “a heavy workload for an understaffed employer in the context of a facility that operates around the clock and sometimes in situations that require urgent care.” *Id.*

In granting notice to all hourly employees, the court noted that “[i]t is undisputed that the proposed plaintiffs-indeed, all non-exempt hourly employees-were subject to the same ‘unified policy, plan, or scheme,’ *i.e.*, the automatic meal period deduction[.]” *Id.* at 2.

6. Berger v. Cleveland Clinic Foundation

The auto deduction claims are so strong that they not only receive conditional certification at Stage I, but warrant final certification for trial. For example, in *Berger v. Cleveland Clinic Found.*, the court was asked to consider certification for a class of hourly employees who were subject to a health system’s automatic meal break deduction policy under both the FLSA’s more stringent and final stage-two standard, and under the even higher Rule 23 certification standard. *Berger v. Cleveland Clinic Found.*, No. 1:05 CV 1508, 2007 WL 2902907, at *2 (N.D. Ohio Sept. 29, 2007). Plaintiffs had experienced routine meal break interruptions for which they were not compensated by operation of defendant’s automatic deduction policy. *Id.*

Unsurprisingly, the court granted final trial certification under both the FLSA and Rule 23. *Id.* at *19-25. As to plaintiffs’ FLSA claims, the court held that because the plaintiffs had demonstrated that the class of hourly employees were all “subject to the same meal break policies at issue in this case...[a] central policy exists that binds the potential class members together[.]” and thus plaintiffs had “satisfied the requirements to bring a collective action[.]” *Id.* at *21-22.

In certifying plaintiff's class claims under the even more exacting Rule 23 standard, the court held that the "key issue in the instant case is whether [defendant] allowed [the hourly employees] to record, and be reimbursed for, their interrupted lunches." *Id.* at *25. Because the disputed policy, and the issues arising therefrom, applied to all potential class members, the court granted Rule 23 certification of plaintiffs' claims. *Id.*

7. Notice in Cases Concerning Patient-Care Employees

In addition to the cases cited above, notice has been ordered in other meal break cases which are not based on the employer's generalized failure to "ensure" a break was taken, or its cancellation policy, but instead on the more limited claim that employees with patient care responsibilities had their meal breaks interrupted. *See Gordon*, 2009 WL 3334784; *Hinterberger*, 2009 WL 3464134; *Collozzi*, 595 F. Supp. 2d 200; *Fengler*, 595 F. Supp. 2d 189; *Hamelin*, 2009 WL 211512. Here, too, the courts granted notice to all employees with such responsibilities.

Despite the factual dissimilarity from this case, which is based both on the uniform problem of defendants not ensuring the employees stopped work during the auto deduct period and the employers' improper attempt to shift liability to the employees to follow the FLSA's timekeeping requirements, these patient-care cases are instructive. As here, in each of these cases, a large health system had implemented an automatic meal break deduction policy. *Gordon*, 2009 WL 3334784, at *1-2; *Hinterberger*, 2009 WL 3464134, at *1-2; *Collozzi*, 595 F. Supp. 2d 200, 203; *Fengler*, 595 F. Supp. 2d 189, 192; *Hamelin*, 2009 WL 211512, at *3. In each case, plaintiffs submitted affirmations describing how employees would routinely have missed or interrupted meal breaks as a result of work-related patient-care duties, but would not be paid for this work time. *Gordon*, 2009 WL 3334784, at *1-2; *Hinterberger*, 2009

WL 3464134, at *1-2; *Collozzi*, 595 F. Supp. 2d 200, 208; *Fengler*, 595 F. Supp. 2d 189, 196-97; *Hamelin*, 2009 WL 211512, at *7.

Predictably, just like the *Camesi*, *Kuznyetsov*, *Taylor* and *Frye*, the court's analysis returned to the one salient fact in these cases: these hospital systems had implemented an automatic meal break deduction policy and employees affected by that policy (and in these cases, the more limited patient care problems) were to receive notice of the lawsuit. *Gordon*, 2009 WL 3334784, at *5; *Hinterberger*, 2009 WL 3464134, at *5, 10; *Collozzi*, 595 F. Supp. 2d 200, 208-209; *Fengler*, 595 F. Supp. 2d 189, 196-97; *Hamelin*, 2009 WL 211512, at *8.

B. Notice Should Issue In This Case Because Defendants Automatically Deduct Time For Meal Breaks Without Ensuring Employees Do Not Perform Work.

As in *Camesi*, *Kuznyetsov*, *Frye*, *Taylor*, *Ohsann*, *Berger*, *Fengler*, *Hamelin*, *Collozi*, *Gordon* and *Hinterberger*, defendants in this case have implemented an automatic meal break deduction policy, and yet have failed to ensure that plaintiffs are completely relieved of work-related duties during those unpaid meal breaks.¹⁷ Each of those courts examined the exact issues presented here and reached the same conclusion--that notice should be granted to affected employees. As such, notice should issue here.

Plaintiffs have produced more than sufficient evidence to warrant notification under the liberal FLSA standards by showing that similarly situated employees were subject to a common policy, practice and/or system that deducted a full half hour meal break from employees' work time for each shift, and that the defendants violated the law because they

¹⁷ *Duncheskie Aff.* ¶¶ 6, 8, 10, 21; *Read Aff.* ¶¶ 6, 8, 10, 21; *Harris Aff.* ¶¶ 6, 8, 10, 20; *Jackson Aff.* ¶¶ 6, 8, 10, 21; *Rooney Aff.* ¶¶ 6, 8, 10, 21; *Clark Aff.* ¶¶ 6, 8, 10, 21; *George Aff.* ¶¶ 6, 8, 10, 21; *Zetzer Aff.* ¶¶ 6, 8, 10, 21; *Bloomfield Aff.* ¶¶ 6, 8, 10, 21; *Canty Aff.* ¶¶ 6, 8, 10, 20.

made no effort to “ensure” the employees were relieved of duty during that time.¹⁸ Further, as in *Camesi* and *Kuznyetsov*, the defendants’ unsuccessful (and impermissible) policy to shift their statutory responsibility to the employees provides an additional basis for notice.

The evidence here is not confined to employer demands regarding patient care, or to localized implementation of policies. Instead, as in *Kuznyetsov*, *Camesi*, *Frye* and *Ohsann* the violations extend to all hourly employees subject to the auto deduct policies for whom the defendants did not “ensure” a break was actually taken as required with an auto deduct payroll system. *Kuznyetsov*, 2009 WL 1515175, at *3 (“I disagree with Defendants that the affiants only allege that they worked through meal periods as a result of patient care needs. To the contrary, they also assert that they work through meals due to staffing issues...Consequently, I do not find merit to this argument.”); *Camesi*, 2009 WL 1361265, at *5 (“the Court rejects Defendants’ arguments...that notice should be limited to nurses working at the same facilities as the named Plaintiffs.”) *see also Frye*, 2008 WL 6653632, at *6-7; *Ohsann*, 2008 WL 2468559, at *2.

Additionally, plaintiffs have alleged that all “defendants” (as defined in the Complaint ¶ 17) are liable to plaintiffs and class members under numerous theories of liability. *See* Complaint at ¶¶ 18-30. Therefore, any person who is “directly or indirectly” under the common control of Edmond F. Notebaert, Robert Birnbrauer, Jeanes Hospital, or any of the other defendants, is an “employee” under the FLSA, and is entitled to notice if subject to the auto deduction policy. 29 C.F.R. 791.2(b)(3); *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (“[The FLSA] contains its own definitions, comprehensive enough to require

¹⁸ Duncheskie Aff. ¶¶ 6, 8, 10, 21; Read Aff. ¶¶ 6, 8, 10, 21; Harris Aff. ¶¶ 6, 8, 10, 20; Jackson Aff. ¶¶ 6, 8, 10, 21; Rooney Aff. ¶¶ 6, 8, 10, 21; Clark Aff. ¶¶ 6, 8, 10, 21; George Aff. ¶¶ 6, 8, 10, 21; Zetzer Aff. ¶¶ 6, 8, 10, 21; Bloomfield Aff. ¶¶ 6, 8, 10, 21; Canty Aff. ¶¶ 6, 8, 10, 20.

its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (“the FLSA...defines an ‘employee’ to include ‘any individual employed by an employer,’...[a] definition, whose striking breadth we have previously noted”); *Falk v. Brennan*, 414 U.S. 190, 195 (1973) (noting the “expansiveness of the Act’s definition of ‘employer’”); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (stating that “Congress and the courts have both recognized that, of all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of ‘employee.’”) (citations omitted); *Equal Employment Opportunity Comm’n v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (citing a statement of Senator Hugo L. Black’s and holding “that the term ‘employee’ in the FLSA was given ‘the broadest definition that has ever been included in any one act.’” 81 Cong.Rec. 7657).

Based on these allegations, the liability for defendants’ illegal Meal Break Deduction Policy alleged by plaintiffs and class members in this case extends to all defendants, including their locations and affiliates, because of the FLSA’s broad definition of “employer” and the expansive reach of its joint employment doctrine. *Id.* As such, notice should issue as to all hourly employees of the entire Temple Health System subject to the Meal Break Deduction Policy, including any that report directly or indirectly up the chain of command to Edmond F. Notebaert (Temple Health System’s President and CEO) or Robert Birnbrauer (Temple Health System’s Vice President of Human Resources).

Accordingly, as in *Camesi*, *Kuznyetsov*, *Frye* and *Ohsann*, notice should issue to all hourly employees subject to the automatic meal break deduction.

II. GRANTING NOTICE IN HOSPITAL OVERTIME CASES COMPORTS WITH THE FLSA'S LEGAL STANDARDS

That courts routinely grant notice in the hospital overtime cases is not surprising, and is entirely consistent with the legal standards regarding notice in FLSA cases generally.

A. Defendants' Meal Break Deduction Policy Does Not Comply with the Law.

Although this Court has held that the merits of the case are irrelevant in determining whether to let employees know about the lawsuit and the expiring statute of limitations, some legal background on these claims is useful. *Pereira v. Foot Locker, Inc.*, 2009 WL 2951028, at *4 (“The merits of Plaintiff's claims do not need to be evaluated at this stage in order for notice to be approved and sent out to proposed conditional collective action members; this Court evaluates only whether the Plaintiffs are similarly situated.”); *see also Comesi*, 2009 WL 1361265, at *2-3, 4 (“[a] plaintiff's burden at this preliminary stage is minimal,’ and ‘when making [the notice determination,] *the court does not weigh the merits, resolve factual disputes, or make credibility determinations*[.]” (emphasis added by the court)(citations omitted)); *Frye*, 2008 WL 6653632, at *4-5, 7 (“Although Defendant's arguments about the individualized nature of some of Plaintiff's claims may raise valid concerns, those arguments are better addressed at the second stage of the similarly situated inquiry.”); *Kuznyetsov*, 2009 WL 1515175, at *1-2, 5; *Taylor*, 2009 WL 2003354, at *3. Defendants' Meal Break Deduction Policy runs afoul of the FLSA because the defendants do not “ensure” the employees stop working during their meal breaks. If the employer's policy permits its employees to work through their meal period – and certainly if the employer knows and encourages them to do so – it has no legitimate basis to program its computer system to then take the employees' pay from their paychecks each day.

As a starting point, under the FLSA, all time employees are “suffer[ed] or permit[ted]” to work must be compensated. 29 U.S.C. § 203(g). The regulations explain this broad standard:

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

29 C.F.R. § 785.11.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13.

Further, if defendants knew or had reason to know that employees were working, such time is compensable as overtime for employees. *See Comesi*, 2009 WL 1361265, at *4; *see also* 29 C.F.R. § 825.105(a) (applying the “suffer or permit” definition of “employ” under the FLSA to the FMLA stating that “[m]ere knowledge by an employer of work done for the employer by another is sufficient to create” liability); *see also* 29 C.F.R. § 785.11 (if an “employer knows or has reason to believe that an employee is continuing to work the time is working time”).

Thus, the scope of time for which employees must be paid under the FLSA is very broad – *any time an employee is permitted to work (even voluntary work) must be compensated*. This rule applies equally when an employee performs work during a meal period, and as a result,

any work performed by employees during meal breaks must be compensated. Thus, particular care must be taken when employers decide to deduct time automatically from employees' paychecks for meal breaks.

More specifically, the United States Department of Labor ("DOL") has issued particular guidance directed to health care employers on the issue of meal break deductions. *See Wage and Hour Division, U.S. Dep't of Labor, Factsheet No. 53, The Health Care Indus. & Hours Worked* (2008) (Cordello Aff. Ex. D). Courts have found this document to be particularly instructive. *See Kuznyetsov*, 2009 WL 1515175, at *5; *Camesi*, 2009 WL 1361265, at *4-5; *Collozzi*, 595 F. Supp. 2d 200, 206-207; *Fengler*, 595 F. Supp. 2d 189, 195-96; *Hamelin*, 2009 WL 211512, at *5-6. The DOL instructs healthcare employers who chose to automatically deduct 30-minutes per shift that they must *ensure* that the employees are receiving the full meal break. *See id.*; 29 C.F.R. § 785.19. The failure to "ensure" that employees receive a full meal break when automatically deducting time for a meal break means the employer is violating the FLSA.

Certainly, in some employment settings, it might be possible for an employer to "ensure" a full, uninterrupted meal period, such as a manufacturing facility where the employer can shut down an assembly line for 30 minutes while the employees take their break, or a small office where the telephones are turned off for 30 minutes during the lunch period so that employees can take their breaks.

But that is simply not the nature of defendants' business. Health care is a 24-hour, 7-day a week operation, and defendants do not shut down their health care facilities for 30 minutes every day for employees to take meal breaks. Nor do they take any steps to stop employees from working. Quite to the contrary, the defendants in fact expect and know that

their employees are performing work during their meal breaks – for example by observing employees working during meal periods, by expressly asking employees to perform work during meal breaks, by assigning tasks that cannot be accomplished except by working during meal breaks, by understaffing their facilities and by requiring employees to answer pages during meal breaks.¹⁹ And, as discussed above (Point I. B.), employees themselves confirm that they performed work during their meal breaks, which means that defendants failed to ensure that employees took their breaks.²⁰ As a result, defendants’ Meal Break Deduction Policy violates the law because defendants’ policy is not to ensure their employees stop working during time the defendants are automatically deducting from their pay.

Just as the defendants did in *Camesi, Kuznyetsov, Frye, Taylor, Ohsann, Berger, Fengler, Hamelin, Collozi, Gordon* and *Hinterberger*, defendants in this case have failed to ensure that employees are not working during their unpaid meal breaks. Such actions and policies violate the FLSA, and thus notice to affected employees should be granted.

B. The Standard For Granting Notice Is Minimal And Notice Is Liberally Granted.

Turning to the legal standard for notice, as this Court recently held, the standard for sending notice is “extremely lenient.” *Pereira*, 2009 WL 2951028, at *4 (“extremely lenient standard” (citing *Parker v. Nutrisystem, Inc.*, Civ. No. 08-1508, 2008 WL 4399023, at *5

¹⁹ Duncheskie Aff. ¶¶ 11, 16, 17, 23, 27, 29, 30, 31, 43; Read Aff. ¶¶ 11, 16, 17, 23, 24, 27, 29, 30, 31, 45; Harris Aff. ¶¶ 11, 15, 16, 22, 23, 26, 28, 29, 30, 44; Jackson Aff. ¶¶ 11, 16, 17, 23, 24, 27, 29, 30, 31, 45; Rooney Aff. ¶¶ 11, 16, 17, 23, 27, 29, 30, 31, 44; Clark Aff. ¶¶ 11, 16, 17, 23, 27, 29, 30, 31, 45; George Aff. ¶¶ 11, 16, 17, 23, 27, 29, 30, 31, 44; Zetzer Aff. ¶¶ 11, 16, 17, 23, 24, 27, 29, 30, 31, 44; Bloomfield Aff. ¶¶ 11, 16, 17, 23, 27, 29, 30, 31, 45; Canty Aff. ¶¶ 11, 15, 16, 22, 26, 28-30, 43.

²⁰ Duncheskie Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; Read Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; Harris Aff. ¶¶ 7-10, 14, 23, 31, 32, 37; Jackson Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; Rooney Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; Clark Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; George Aff. ¶¶ 7-10, 15, 24, 32, 33, 37; Zetzer Aff. ¶¶ 7-10, 15, 24, 32, 33, 37; Bloomfield Aff. ¶¶ 7-10, 15, 24, 32, 33, 38; Canty Aff. ¶¶ 7-10, 15, 31, 32.

(E.D. Pa. Sep. 26, 2008) (Bartle, C.J.)). Other courts have similarly described the standard as “liberal,” “low,” “modest” or “minimal.” *Camesi*, 2009 WL 1361265, at *2; *Kuznyetsov*, 2009 WL 1515175, at *2 (“modest factual showing”); *Taylor*, 2009 WL 2003354, at *3 (“modest factual [showing]”); *Lugo v. Farmer’s Pride, Inc.*, Civ. No. 07-cv-00749, 2008 WL 638237, at *3 (E.D. Pa. Mar. 7, 2008) (Baylson, J.) (“very lenient burden”); *Harris v. Healthcare Serv. Group, Inc.*, Civ. No. 06-2903, 2007 WL 2221411, at *3 (E.D. Pa. July 31, 2007) (Yohn, J.) (“lenient burden”); *Bosley v. Chubb Corp.*, No. Civ.A. 04CV4598, 2005 WL 1334565, at *2-4 (E.D. Pa. June 3, 2005) (Surrick, J.) (“liberal standard” which only requires “some factual showing”); *De Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001) (Kelly, J.) (“low burden”).

Courts handling cases involving automatic meal break deduction policies at large health systems have also held that, at most, plaintiffs must merely make a “modest factual showing” that class members were subject to a single decision, policy, or plan. *Kuznyetsov*, 2009 WL 1515175, at *2; *Taylor*, 2009 WL 2003354, at *2-3; *Frye*, 2008 WL 6653632, at *4-6; *Gordon*, 2009 WL 3334784, at *4; *Collozzi*, 595 F. Supp. 2d 200, 205-206. To determine whether plaintiffs have met their burden in such cases, the courts look to the pleadings and any sworn statements submitted by plaintiffs. *Kuznyetsov*, 2009 WL 1515175, at *2-3; *Frye*, 2008 WL 6653632, at *4-7; *Gordon*, 2009 WL 3334784, at *3-4; *Collozzi*, 595 F. Supp. 2d 200, 205-206; *Fengler*, 595 F. Supp. 2d 189, 194-95; *Hamelin*, 2009 WL 211512, at *4-5.

The low standard is consistent with effectuating the well-established Third Circuit and Supreme Court precedent that the FLSA is to be read broadly and liberally to effectuate its remedial purpose. *Lusardi v. Xerox Corp.*, 99 F.R.D. 89, 93 (D.N.J. 1983); *Sperling v.*

Hoffmann-La Roche Inc., 862 F.2d 439, 447 (“The court emphasized both the ‘broad remedial purpose’ of the FLSA and the ‘interest of the courts in avoiding multiplicity of suits.’”). As discussed above, these standards are easily met in cases such as these. *See Camesi*, 2009 WL 1361265; *Kuznyetsov*, 2009 WL 1515175; *Taylor*, 2009 WL 2003354; *Frye*, 2008 WL 6653632; *Ohsann*, 2008 WL 2468559; *Berger*, 2007 WL 2902907; *see also Gordon*, 2009 WL 3334784; *Hinterberger*, 2009 WL 3464134; *Collozzi*, 595 F. Supp. 2d 200; *Fengler*, 595 F. Supp. 2d 189; *Hamelin*, 2009 WL 211512; *Brown*, 2008 WL 1924983.

C. Efficiency is Gained Through Hearing All Claims in One Case.

A collective action also promotes the efficient litigation of plaintiffs’ claims.

Without the collective action mechanism, the Court will be faced with hundreds of individual lawsuits complaining of the same violations. *Collozzi*, 595 F. Supp. 2d 200, 205 (“[c]ollective adjudication will avoid the proliferation of individual lawsuits that could result in disparate rulings and wasting of judicial and party resources. Requiring [the named plaintiff] and opt-in plaintiffs to file separate cases in multiple federal district courts would not be an economic use of judicial resources.”) (citations omitted); *Fengler*, 595 F. Supp. 2d 189, 194; *Hamelin*, 2009 WL 211512, at *4. In this suit there are already more than 180 opt-ins whose claims would have to be heard separately without judicious use of the collective action mechanism. Because the policy applies broadly to all hourly employees, all such employees are appropriately joined in a single case.

To help manage the collective action litigation as it moves forward, the Court has many tools at its disposal, such as creating subclasses. *See Ballaris v. Wacker Silttronic Corp.*, No. 00-1627-KI, 2001 WL 1335809, at *3 (D. Or. Aug. 24, 2001) (noting that after discovery the class could be divided into subgroups); *In re Visa Check/MasterMoney Antitrust*

Litig. v. Visa, USA, Inc., 280 F.3d 124, 141 (2d Cir. 2001) (“There are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.”).

Ultimately, issues related to case management as the case moves forward are appropriately addressed at Stage II, but defendants cannot claim that at this initial stage it would be more efficient for this Court to try the issue of defendants’ Meal Break Deduction Policy in 180 separate lawsuits. *Pereira*, 2009 WL 2951028, at *2, 6 (“When discovery is complete, a more fact-specific second-stage inquiry occurs into whether the proposed opt-in class is, indeed, similarly situated[;]” and “[t]hus, we will reevaluate any dissimilarities in work description in the second stage of class certification, when the impact or scope of the alleged policy is more complete.”); *Frye*, 2008 WL 6653632, at *6-7; *Goldman v. RadioShack Corp.*, No. Civ.A. 2:03-CV-0032, 2003 WL 21250571, at *8 (E.D. Pa. Apr. 16, 2003) (Vanantwerpen, J.) (finding individual inquiries inappropriate until the second-tier inquiry); *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1168 (D. Kan. 2006); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109-JTM, 2005 WL 2648054, at *3-4 (D. Kan. Oct. 17, 2005); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004). Further, defendant can move to dismiss anyone not similarly situated to named plaintiffs after discovery. *Gordon*, 2009 WL 3334784, at *4.

If plaintiffs were required to proceed with 180 separate, individual lawsuits, the resulting burden on the Court and the parties would be enormous, to say nothing of the difficulty of assembling juries for so many trials. The numbers speak for themselves; in this case, there are currently 180 opt-ins to this lawsuit. If one were to overly optimistically assume that each employee's case could be tried to verdict in only two days, then simply putting on all 180 individuals plaintiffs' cases would require 360 days or 72 weeks of trial.²¹ This estimate is based on the unrealistic assumption that the Court could dedicate its calendar entirely to this case and work on no other matters for more than a year and a half.²²

That is why a majority of courts, including those in this district, have concluded that Rule 23 class actions and FLSA collective actions are the most efficient means of adjudicating the claims of similarly situated individuals, instead of resorting to costly and time-intensive individualized treatment of those claims. *See, e.g., McGrath v. City of Phila.*, Civ. A. 92-4570, 1994 WL 45162, *2-3 (E.D. Pa. Feb. 10, 1994); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66-69 (2d Cir. 1997); *Harold Levinson Assocs., Inc. v. Chao*, 37 Fed. Appx. 19, 20-21 (2d Cir. 2002); *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995); *Adkins v. Mid-American Growers, Inc.*, 143 F.R.D. 171, 174 (N.D. Ill. 1992); *Smith v. Lowe's Home Ctrs., Inc.*, 236 F.R.D. 354, 357 (S.D. Ohio 2006); *Barrus v. Dick's Sporting Goods, Inc.*, 465 F. Supp. 2d 224, 231-32 (W.D.N.Y. 2006); *Cranney v. Carriage Servs., Inc.*, No. 2:07-cv-01587-RLH-PAL, 2008 WL 2457912, at *3 (D. Nev. June 16, 2008); *In re Am. Family Mut. Ins. Co. Overtime Pay Litig.*, No. 06-cv-17430-WYD-CBS, 2009 WL 1120293, at *4 (D. Colo. Apr. 27, 2009); *Prentice v. Fund. for Pub. Interest Research, Inc.*, C-06-7776 SC, 2007 WL 2729187, at *5 (N.D.

²¹ 180 plaintiffs x 2 days of trial/plaintiff = 360 days of trial / 5 days/week = 72 weeks of trial.

²² 360 days trial / 200 working days/year = 1.8 years.

Cal. Sept. 18, 2007); *Falcon v. Starbucks*, 580 F. Supp. 2d 528, 533-534 (S.D. Tex. 2008); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 569-70 (E.D. La. 2008); *Bradford v. Bed Bath & Beyond, Inc.*, 184 F. Supp. 2d 1342 (N.D. Ga. 2002).

Through collective treatment of the claims presented in this case, the claims of all plaintiffs and class members can be handled effectively and efficiently without burdening the legal system with voluminous, duplicative litigation.

III. IRRELEVANT ISSUES DO NOT DEFEAT NOTICE

In an attempt to prevent employees from receiving a *Hoffmann-LaRoche* notice, defendants often raise a host of arguments on issues such as scope of the class, merits, or damages, but courts reject these arguments.

A. Merits Inquiries Are Irrelevant At The Conditional Certification Stage

Often defendants unsuccessfully try to prevent employees from learning about their rights by arguing that the merits need to be considered, for example, that individual inquiries will be needed on employees' lunch breaks to determine whether those breaks were compensable.

This Court has rejected such arguments. "The merits of Plaintiff's claims do not need to be evaluated at this stage in order for notice to be approved and sent out to proposed conditional collective action members; this Court evaluates only whether the Plaintiffs are similarly situated." *Pereira*, 2009 WL 2951028, at *4.

Class-wide notice is wise, even if the claims have no merit, or even if the plaintiffs will be placed into subclasses:

[W]e cannot ignore the simple truth that the effectiveness of class enforcement . . . would be vastly diminished if named plaintiffs were not allowed to notify those who may be similarly situated of their right to be included in the class through written consent.

Lusardi, 99 F.R.D. 89, 93; *see also Realite v. Ark Rest. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998) (Sotomayor, J.).

That is particularly true in this case in which the common issue on which the case will rise or fall is whether the defendants' *policy* was to ensure work was not being performed when the defendants chose to automatically deduct meal breaks. The plaintiffs are not challenging a particularized failure to pay for a meal break at a particular time or to a limited number of employees. *See Comesi*, 2009 WL 1361265, at *3-4 (“[a] plaintiff's burden at this preliminary stage is minimal,” and ‘when making [the notice determination,] *the court does not weigh the merits, resolve factual disputes, or make credibility determinations[.]*” (emphasis added by the court)(citations omitted)); *Kuznyetsov*, 2009 WL 1515175, at *1-2, 5; *Taylor*, 2009 WL 2003354, at *2-3; *Frye*, 2008 WL 6653632, at *4-5, 7; *Collozzi*, 595 F. Supp. 2d 200, 205; *Fengler*, 595 F. Supp. 2d 189, 194; *Hamelin*, 2009 WL 211512, at *4. Even a defendants' denial that an automatic deduction policy exists is not enough to prevent notice to the class. *Taylor*, 2009 WL 2003354, at *2.

This also means that issues related to damages do not factor into the decision whether to issue notice to employees. *See Comesi*, 2009 WL 1361265, at *4-5 (holding that inquiries into whether plaintiffs had worked more than 40 hours per week when they also experienced violations were premature at the notice stage); *Kuznyetsov*, 2009 WL 1515175, at *5 (rejecting defendants' argument that notice should not issue because employees had cancelled the automatic deduction, and thus been paid for their meal breaks, more than 400,000 times); *Taylor*, 2009 WL 2003354, at *4 (rejecting as premature defendants' objections to notice based on whether plaintiffs worked more than 40 hours in work weeks where they had meal break deductions). As such, damages issues, such as whether any plaintiffs and class

members were actually compensated for some of their missed and interrupted lunches, or whether employees and class members actually worked 40 hours during the weeks when they also had meal break violations, are issues that relate to the calculation of damages, and are thus irrelevant to the notice inquiry.

It is important to note that defendants' attempts to shift the burden for ensuring that their employees are not working during their unpaid meal breaks to their employees, *by itself*, violates the law. As such, damages issues do not provide or affect the basis for notice, instead they merely influence the final calculation of damages due to plaintiffs.

Discovery can also be conducted more efficiently if the notice is sent early, regardless of the potential merits of the claim or ultimate merits of the claim. *Rehwaldt v. Elec. Data Sys. Corp.*, No. 95-876, 1996 WL 947568, at *4 (W.D.N.Y. March 28, 1996) (citations omitted); *Realite*, 7 F. Supp. 2d 303, 308 (“I am not holding at this time that all members of the proposed class who will be sent notices are, in fact, similarly situated ... I may later decertify the class, or divide the class into subgroups ... However, at this early juncture ... principles of efficiency and judicial economy militate in favor of maintaining this action as a collective one, and waiting to see what the facts bear out.”) (Sotomayor, J.).

Even if the substantial caselaw on this point was ignored, as discussed above, the defendants' case is quite weak on the merits. In this case, the common issue is whether defendants' policy “ensured” that the employees did not work during meal breaks when the defendants were automatically deducting from the employees' pay. As noted above, the DOL has stated that employers must ensure employees are receiving the full meal break if they choose to take an automatic deduction. *See Wage and Hour Division, U.S. Dep't of Labor, Factsheet No. 53, The Health Care Industry and Hours Worked* (2008) (attached to the Cordello

Aff. as Exhibit D). Defendants have plainly violated the statute and regulation because they fail to ensure that employees receive the full meal break even though they automatically deduct 30 minutes.

Regardless of which party is correct on the merits, both parties will be free to argue the proper legal standard at the appropriate time in this case (e.g., on a motion for summary judgment after the completion of discovery) – now (before notice and prior to discovery) is not that time. Now is the time to ensure employees are notified about this case so they can decide whether to opt-in.

B. Alleged Differences Within Class Do Not Defeat Conditional Certification

Defendants in similar cases have also claimed that certain differences in the particular employment situations of plaintiff and class members, such as employees' individual managers or localized policies, employees' individual job titles, positions, and locations, or employees' union participation, should defeat notice. These arguments do, and should, fail.

1. Employees' Individual Managers/Localized Policies

Defendants often claim that their individual managers are responsible for ensuring that employees are paid for missed breaks, suggesting there are localized policies and that policies were not implemented and enforced centrally. Again, as this Court has made clear, this argument does not defeat notice. “Defendant contends that each assessment of off-the-clock work or unpaid overtime would be dependent on the employee him or herself, as well as the individual manager...Defendant's claim or defense that Plaintiffs' claims are too individualized to be litigated collectively are ‘relevant to determination of a stage two decertification issue after discovery has closed.’” *Pereira*, 2009 WL 2951028, at *6-8 (citing *Bishop v. AT & T Corp.*, 256 F.R.D. 503, 509 n. 7 (W.D. Pa. 2009)).

This argument is particularly inappropriate in this action because defendants must turn a blind eye to the source of the policy. Here, just as in *Camesi*, *Kuznyetsov*, *Berger*, and *Ohsann* the disputed policy emanates from defendants' timekeeping system which is programmed to automatically deduct one-half hour from each employee each day even when employees perform work during their meal breaks and failing to ensure that employees were paid when they performed work during their meal breaks. *Camesi*, 2009 WL 1361265, at *3-5; *Kuznyetsov*, 2009 WL 1515175, at *4-5; *Berger*, 2007 WL 2902907, at *2; *Ohsann*, 2008 WL 2468559, at *1-2. The actions of individual managers therefore make no difference, except potentially for damages – an irrelevant issue in this motion, as discussed below.

Second, even when defendants claim their operations are “decentralized,” this Court and others still put into effect the FLSA’s remedial machinery. *Pereira*, 2009 WL 2951028, at *6-8. Similarly, in *Frye*, the declarations submitted by the parties revealed that there was a wide divergence in the time reporting and exception log systems throughout the departments and facilities that composed the hospital system. *Frye*, 2008 WL 6653632, at *1-4. It was even revealed that defendants’ systems were so decentralized that numerous class members were not even subject to the automatic meal break deduction. *Id.* at 7. Nevertheless, the court held that “[a]lthough Defendant's arguments about the individualized nature of some of Plaintiff's claims may raise valid concerns, those arguments are better addressed at the second stage of the similarly situated inquiry.” *Id.* at 7.

Third, differences between particular managers do not matter because if the health system itself had mere constructive knowledge that employees were working, such time is compensable as overtime for employees. *See Camesi*, 2009 WL 1361265, at *4-5; *see also* 29 C.F.R. § 825.105(a) (applying the “suffer or permit” definition of “employ” under the FLSA

to the FMLA stating that “[m]ere knowledge by an employer of work done for the employer by another is sufficient to create” liability); 29 C.F.R. § 785.11 (if an “employer knows or has reason to believe [that an employee] is continuing to work...the time is working time”). Proof of constructive knowledge does not require analysis of managers’ personal knowledge. They are, after all, a health care system that requires its employees to work even during their breaks.

Perhaps most importantly, plaintiffs have already testified that their managers were not only constructively aware of their working during their unpaid meal breaks, but that they were directly and actually aware that plaintiffs were performing such work during their unpaid meal breaks.²³

As such, any purported differences between class members on the basis of individual employee’s managers and/or localized policies do not defeat notice.

2. Employees’ Individual Job Titles, Positions, and Locations are Irrelevant

Defendants often argue that the sheer number of employees’ job titles, positions and locations should defeat notice. However, this Court, like the others which have addressed these arguments have rejected them.

As in *Pereira*, courts in actions against healthcare systems alleging that all hourly employees had missed or interrupted meal breaks for which they were not compensated as a result of an automatic meal break deduction policy, consistently hold that all hourly employees should receive notice—the employment situations, job titles, locations or claims of

²³ Duncheskie Aff. ¶¶ 23-25; Read Aff. ¶¶ 23-25; Harris Aff. ¶¶ 22-24; Jackson Aff. ¶¶ 23-25; Rooney Aff. ¶¶ 23-25; Clark Aff. ¶¶ 23-25; George Aff. ¶¶ 23-25; Zetzer Aff. ¶¶ 23-25; Bloomfield Aff. ¶¶ 23-25; Canty Aff. ¶ 25.

the notified employees do not need to be the same.²⁴ *Camesi*, 2009 WL 1361265, at *5-6 (notification granted to all hourly employees, approximately 30,000 employees, subject to hospital system’s automatic meal deduction policy even though they worked at more than 1,000 different locations, and held many different job titles); *Kuznyetsov*, 2009 WL 1515175, at *4-6 (notification granted to all hourly employees subject to large hospital system’s automatic meal deduction policy even though they worked at many different locations, and held many different job titles); *Frye*, 2008 WL 6653632, at *7; *Ohsann*, 2008 WL 2468559, at *2.

For example, in *Pereira*, the defendants opposed notice because “the putative class members have a variety of different job descriptions and work in various capacities, under different managers at locations all over the country.” *Pereira*, 2009 WL 2951028, at *6-8. This Court, however, rejected that argument and ordered notice to all employees across the country. *Id.* at *11-12. Defendant in *Pereira*, and in other cases, have attempted to limit the locations to which notice is sent so fewer employees know of the action. As this Court held in *Pereira*, such arguments are without merit at Stage I certification. *Id.* at *6. Here, as in *Pereira*, “the time keeping system is uniform throughout the [locations]” and the employer has instituted an across-the-board automatic deduction system at the locations. *Id.* at *6. “Based on these components, Plaintiff has alleged a general policy that would have affected all non-exempt employees, regardless of their location or job title. Thus, we will reevaluate any dissimilarities in work description in the second stage of class certification, when the impact or scope of the alleged policy is more complete.” *Id.* at *6 (*citing Kuznyetsov*, 2009 WL

²⁴ Plaintiffs have submitted sufficient evidence that defendants’ Meal Break Deduction Policy was utilized at all of defendants’ location. However, should defendants seriously attempt to contest this issue, plaintiffs are fully prepared to submit additional affidavits of employees testifying to the existence of this uniform, common policy throughout defendants’ locations.

1515175, at *5-6). The Supreme Court is in full accord. *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (1989) (holding that class members in various locations did not invalidate a collective action.).

Here, because defendants' Meal Break Deduction Policy applies to *all* hourly employees *regardless* of position, those employees should receive notice – particular job titles, positions or locations are not at issue in this case. If an employee was not subject to the policy, she should not get notice regardless of job title, position or location. But the same is true in reverse: an employee who is subject to the challenged policy should receive notice regardless of job title or duties.

3. Employee's Union Participation

Defendants also often seek to present employees' union participation as a barrier to court-facilitated notice. They argue that if the proposed class contains both union and non-union workers, the employees are not similarly situated. This argument is also without merit. “[E]vidence [regarding employees' union status] is not considered at the notice stage, but on a fully developed record on a motion for decertification.” *Gordon*, 2009 WL 3334784, at *7; *see also Hinterberger*, 2009 WL 3464134, at *9. Accordingly, plaintiff and class member's unionization status is irrelevant on a motion for conditional certification.

4. Employee's Total Work Hours

Defendants sometimes argue that notice cannot issue to employees who worked less than 40 hours in the same weeks when they also had meal break violations. *See e.g. Camesi*, 2009 WL 1361265, at *4. This argument has been uniformly rejected. Courts have held that “resolving [such an argument at] the conditional certification stage would require delving too deeply into the merits of Plaintiffs' claims.” *Camesi*, 2009 WL 1361265, at *4-5; *see also*

Hinterberger, 2009 WL 3464134, at *7. As such, any argument by defendants regarding plaintiffs' total work hours should be disregarded as irrelevant on consideration of this motion for notice.

IV. PLAINTIFFS' PROPOSED COURT-AUTHORIZED NOTICE.

A collective action depends "on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche Inc.*, 493 U.S. 165, 170. The court-authorized notice prevents "misleading communications," such as is often unilaterally disseminated by defendants. *Id.* at 171. Plaintiffs' proposed notice meets these criteria. It provides notice of the pending action and opportunity to opt-in. *See Cordello Aff.*, Ex. A.

Plaintiffs' counsel modeled their proposed notice heavily on the examples provided on the Federal Judicial Center's ("FJC") website, found at (<http://www.fjc.gov/public/home.nsf>). The FJC is the education and research agency for the federal courts which was established by Congress in 1967, on the recommendation of the Judicial Conference of the United States. *See Cordello Aff.*, Ex. B. The FJC was requested to develop illustrative notices of proposed class action certifications and settlements by the Subcommittee on Class Actions of the U.S. Judicial Branch's Advisory Committee on the Federal Rules. In order to develop its illustrative notices, the FJC engaged in a careful study of the use of plain language in legal documents. *See Cordello Aff.*, Ex. B. After obtaining recommendations from a lawyer with a Ph.D. in linguistics and using multiple rounds of focus groups, testing and re-drafting to refine the notice to provide maximum comprehension for individuals reading the notice, the FJC finally posted, and re-posted, its illustrative notices for use by courts and attorneys. *See Cordello Aff.*, Ex. C (FJC Employment Discrimination Class Action-Full Notice). As a result

of this comprehensive research and analysis, the FJC's illustrative notices are the recognized leading models for notice in class actions. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2009 WL 1929873, at *1-2 (W.D. Pa. July 1, 2009); *see also Kuznyetsov v. West Penn Allegheny Health Sys., Inc.*, Civ. No 9-379, 2009 WL 2145297 (W.D. Pa. July 15, 2009) (approving form of notice modeled on the FJC's form notice); *Taylor v. Pittsburgh Mercy Health Sys., Inc.*, Civ. No. 09-377, 2009 WL 2003354 (W.D. Pa. July 7, 2009) (approving form of notice modeled on the FJC's form notice); *Grider v. Keystone Health Plan Cent., Inc.*, No. 2001-CV-05641, 2006 WL 3825178 (E.D. Pa. Dec. 20, 2006) (Gardner, J.); *Martsof v. JBC Legal Group, P.C.*, No. Civ.A. 1:04-CV-1346, 2005 WL 331544 (M.D. Pa. Feb. 7, 2005); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207 (D.N.J. 2005).

Plaintiffs' notice follows the content and form of the FJC models, including an introductory page that quickly informs class members about the case and how they are affected and detailed information separated by headings. *See Cordello Aff.*, Ex. A. Overall, plaintiffs' proposed notice is easy to read and written in plain English, informing class members of their rights and how they can elect to participate in the action. The notice also describes the legal effect of joining the suit; describes the legal effect of not joining the suit; notes that the Court expresses no opinion regarding the merits of plaintiffs' claims or defendants' liability; and accurately states the prohibition against retaliation or discrimination for participation in an FLSA action. *See* 29 U.S.C. § 215(a)(3) (anti-retaliation provision).

Plaintiffs propose that the notice and consent forms be mailed first-class to all of defendants' employees who are or have been subject to the Meal Break Deduction Policy. To

facilitate this notice, the Court should also order defendant to disclose the names and addresses of all potential plaintiffs.

Because the statute of limitations is daily destroying the injured employees' ability to collect damages, plaintiffs also request that defendants internally post the notice prominently on the lunch room bulletin boards and any time clocks used by hourly employees (or alternatively on the bulletin boards where job notices are posted), print the notice in five circulations of the company's newsletter and e-mail notices to employees. This Court has recently held that such notices need to be placed prominently at the employer's locations. *Pereira*, 2009 WL 2951028, at *9, 12. Courts have long required that notice be posted at company facilities, in addition to being mailed to employees' homes as well as ordering notice to be emailed to employees. *See, e.g., Cranney v. Carriage Servs., Inc.*, No. 2:07cv-1587-RLH-PAL, 2008 WL 608639, at *5 (ordering notice to be posted in defendants' locations, emailed to employees, publicized in employee newsletter as well as mailed to employees); *Collozzi*, 595 F. Supp. 2d 200, 212 (ordering notice to "be posted by the defendants conspicuously in approved areas where other labor and related notices are typically posted"); *Fengler*, 595 F. Supp. 2d 189, 200 (ordering notice to "be posted by the defendants conspicuously in approved areas where other labor and related notices are typically posted"); *Hamelin*, 2009 WL 211512, at *11 (ordering notice to "be posted by the defendants conspicuously in approved areas where other labor and related notices are typically posted"); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493 (E.D. Cal. 2006) (first class mail and posting at workplaces constituted "best notice practicable" to the class); *Johnson v. Am. Airlines, Inc.*, 531 F. Supp. 957, 964 (N.D. Tex. 1982) (notice ordered to be posted on employee bulletin

boards at defendant's flight bases); *Kane v. Gage Merch. Servs., Inc.*, 138 F. Supp. 2d 212, 216 (D. Mass. 2001)(requiring the provision of employee's e-mail address).

Plaintiffs have also requested the last four digits of employees' social security numbers. Courts regularly authorize the production of social security numbers in litigation, especially in the context of employment actions. *See Gieseke v. First Horizon Home Loan Corp.*, Civ. No, 04-2511-CM-GLR, 2007 WL 445202 (D. Kan. Feb. 7, 2007); *Rincon v. B.P. Sec. & Investigations, Inc.*, No. Civ. A. H-06-538, 2006 WL 3759872, at *3 (S.D. Tex. Dec. 19, 2006); *Rees v. Souza's Milk Transp., Co.*, No. 1:05-cv-00297 AWI TAG, 2006 WL 3251829, at *1 (E.D. Cal. Nov. 8, 2006).

The specific reason for this request is to aid plaintiffs' counsel in locating current and accurate addresses for putative plaintiffs when that the court notice sent to them is returned as undeliverable. *See* Affirmation of Sylvia M. Kraus-Lewicka, sworn to November 24, 2009 ("Kraus Aff."), ¶ 4. These notices are returned undeliverable to plaintiffs' counsel for multiple reasons, including putative plaintiffs who have moved, plaintiffs who have changed their name, etc. *See* Kraus Aff. ¶ 5. In plaintiffs' counsel's experience, proper contact information for putative plaintiffs often cannot be located without this vital piece of information. *See* Kraus Aff. ¶ 6.

Plaintiffs' counsel does not dispute the sensitive nature of the social security numbers and will take all necessary precautions to ensure the privacy of this confidential information. *See* Kraus Aff. ¶ 7. First, requesting only the last four digits of the social security number as opposed to the entire social security number will help protect privacy interests. *See* Kraus Aff. ¶ 8. Second, plaintiffs' counsel will only use the last four digits of the social security number for the limited purpose of locating current addresses for putative plaintiffs so that they are

given an opportunity to review this Court's notice. *See* Kraus Aff. ¶ 9. Finally, plaintiffs' counsel will destroy the last four digits of putative class members' social security numbers once the Court-ordered notices have been sent. *See* Kraus Aff. ¶ 10. Because class members' social security numbers will be protected and only used for a limited purpose, potential privacy concerns are outweighed by the need to provide notice to potential class members.

Plaintiffs' counsel can also take steps in addition to the court-approved notice to inform plaintiffs of their rights. For instance, counsel may send additional written notices to affected employees, provided the written communication is accurate and not misleading. *See Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Gulf Oil Co. v. Bernard* 452 U.S. 89 (1981). To ascertain the facts and gather evidence, plaintiffs' counsel may initiate phone contact with potential witnesses, provided those individuals are not represented by counsel. These measures are important, and plaintiffs' counsel will utilize them as needed. However, as courts have repeatedly held, the best way to insure that employees' rights do not continue to "die daily" is for this Court to approve the notice proposed by plaintiffs; order its expedited dissemination; and forbid any future retaliation.

As set forth above, this case requires immediate and effective FLSA notification. Defendants have every reason to delay this process in any way possible – every day that goes by removes large amounts of liability from their books. Therefore, every effort must be made to stop the valid claims of defendants' employees from continuing to "die daily."

Therefore, it is appropriate to send notice to all potentially affected employees.

V. APPOINTMENT OF CLASS COUNSEL.

Plaintiffs respectfully request that the law firm of Thomas & Solomon LLP ("TS") be appointed class counsel in this matter. Courts appoint class counsel in FLSA cases, and in

fact, TS has already been appointed class counsel in two similar suits. *See Kuznyetsov*, 2009 WL 1515175, at *7; *Camesi v. Univ. of Pittsburgh Med. Ctr.*, Civ. No. 09-85J, 2009 WL 3032590 (W.D. Pa. Sept. 17, 2009) ("Implicit in [the *Kuznyetsov*] ruling [appointing TS as class counsel] was Judge Ambrose's conclusion that Plaintiffs' counsel were qualified and could appropriately represent the plaintiffs in the conditionally certified collective action...[t]he Court finds the same here.").

TS should be appointed class counsel in this case for several reasons. First, TS has both identified the claims in this case and thoroughly investigated those claims. Perhaps the best evidence of TS's efforts is the number of employees who have decided to opt into this case – already, more than 180 employees of defendants have found out about this case and decided to join the action. Further, through its investigation, TS discovered the illegal policies at issue and the millions of dollars of wages being denied to defendants' employees.

Second, TS focuses its practice on employment law, and is currently litigating a number of lawsuits against large healthcare systems with regard to similar violations as those alleged in this case. *See, e.g., Camesi v. Univ. of Pittsburgh Med. Ctr.*, Civ. No. 09-85J, 2009 WL 1361265 (W.D. Pa. May 14, 2009); *Kuznyetsov v. West Penn Allegheny Health Sys., Inc.*, Civ. No. 09-cv-379, 2009 WL 1515175 (W.D. Pa. June 1, 2009); *Hinterberger v. Catholic Health Sys.*, No. 08-CV-380S, 2009 WL 3464134 (W.D.N.Y. Oct. 21, 2009); *Gordon v. Kaleida Health*; No. 08-CV-378S, 2009 WL 3334784 (W.D.N.Y. Oct. 14, 2009); *Colozzi v. St. Joseph's Hosp. Health Ctr.*, 595 F. Supp. 2d 200 (N.D.N.Y. 2009); *Hamelin v. Faxton-St. Luke's Healthcare*, No. 6:08-CV-1219 (DNH/DEP), 2009 WL 211512 (N.D.N.Y. Jan. 26, 2009); *Fengler v. Crouse Health Found., Inc.*, 595 F. Supp. 2d 189 (N.D.N.Y. 2009).

Third, TS is currently handling a number of other wage and hour class actions throughout the country, in addition to other complex employment litigation and has resolved a number of such cases in the past. *See, e.g., Cranney*, 2008 WL 608639; *Parks v. Dick's Sporting Goods, Inc.*, No. 05-CV-6590 CJS, 2007 WL 913927 (W.D.N.Y. Mar. 23, 2007); *Barrus*, 465 F. Supp. 2d 224; *Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005); *see generally* *Prise v. Alderwoods Group, Inc.*, No. 06-1641 (W.D. Pa.); *Stickle v. SCI Western Market Support Ctr., L.P.*, No. 08-cv-83 (D. Az.); *Rubery v. Buth-Na-Bodhaige, Inc.*, No. 04-CV-6337 (W.D.N.Y.); *Poletta v. JP Morgan Chase & Co.*, No. 06-CV-6237 (W.D.N.Y.); *Tracy v. NVR, Inc.*, No. 04-CV-6541 (W.D.N.Y.).

Fourth, TS is well-versed in wage and hour law. “[TS] is experienced in class action lawsuits, having participated in similar actions in the past. Further, counsel has extensive experience in employment litigation, and particular expertise with the FLSA.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 189 (W.D.N.Y. 2005). In addition to prosecuting a large number of wage and hour cases both presently and in the past, TS’s lawyers are also recognized leaders on the subject, serving on committees and lecturing on the subject to various groups. For example, Nelson Thomas, one of the firm’s founding partners, and counsel on this case, currently sits on the American Bar Association’s editorial board for the Fair Labor Standards Act treatise. *See* *Cordello Aff.*, ¶ 22. Further, Mr. Thomas is a recognized speaker nationally on class actions, for example, recently chairing an annual national conference of prominent defense and plaintiffs’ attorneys sponsored by the American Conference Institute on wage and hour class actions. *See* *Cordello Aff.*, ¶ 23. He was also recently asked to speak on wage and hour class actions by the New York section of

the National Employment Lawyer's Association on the white collar exemptions under the FLSA. *See Cordello Aff.*, ¶ 23.

Fifth, the appointment of class counsel provides important benefits to the Court and defendants as well as to the plaintiffs and class members. Such appointment formally identifies one firm as the centralized clearinghouse for all matters related to the pending litigation, including the organized and accurate dissemination of information and advice. Additionally, the use of that firm to handle class issues assists in making the class discovery process manageable. It is hard to envision having multiple firms handling the identical class issues whether at discovery or at trial. Further, it prevents defense counsel from striking sweetheart deals with the least capable plaintiffs' counsel. As such, as implicitly recognized in *Camesi* and *Kuznyetsov* the appointment of class counsel sets the groundwork for efficient and organized litigation—a result that is in the interest of all those involved in this litigation.

Last, TS is committed to litigating this case to conclusion and will dedicate the resources necessary to vindicate the rights of the class members.

Thus, TS should be appointed class counsel in this case.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court issue an Order:

1. requiring the issuance of an expedited notice as set forth in Exhibit A to the affirmation of Justin M. Cordello to all current and former hourly employees of the defendants whose pay was subject to an automatic deduction even when employees performed compensable work;
2. requiring defendants to provide to plaintiffs' counsel a list both electronically (in an Excel spreadsheet) and with each item of the employee's name, current or last known address, phone number, last four digits of their social security number, location of employment, dates of employment, date of birth and e-mail address designated as a separate field and by hard copy, of all current and former employees who are/were subject to the Meal Break Deduction Policy within 15 days of the issuance of the order;

3. requiring defendants to post notices and opt-in forms in a conspicuous place (such as break rooms and next to all time clocks used by hourly employees) at defendants' locations where employees can see such notices during the pendency of the lawsuit;
4. requiring defendants to e-mail such notices and opt-in forms to employees;
5. requiring defendants to publicize such notice five times in defendants' employee newsletter or other employee communications;
6. appointing Thomas & Solomon LLP as Class Counsel; and
7. for such other relief as this Court deems just and proper.

Dated: November 24, 2009

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