SEYFARTH SHAW

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Workplace Class Action Litigation Report

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Seyfarth Shaw LLP

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Dear Clients:

The last few years have seen a transformation in class action and collective action litigation involving workplace issues. This came to a head in 2014 and 2015 with several major class action rulings from the U.S. Supreme Court. Likewise, the present economic climate is likely to fuel even more lawsuits. The stakes in these types of employment lawsuits can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace. It is a legal exposure which keeps corporate counsel and business executives awake at night.

Defense of corporations in complex, high-stakes workplace litigation is one of the hallmarks of Seyfarth Shaw's practice. Through that work, our attorneys are on the forefront of the myriad of issues confronting employers in class action litigation.

In order to assist our clients in understanding and avoiding such litigation, we are pleased to present the 2016 Edition of the *Seyfarth Shaw Annual Workplace Class Action Litigation Report*. This edition, authored by the class action attorneys in our Labor & Employment Department, contains a circuit-by-circuit and state-by-state review of significant class action rulings rendered in 2015, and analyzes the most significant settlements over the past twelve months in class actions and collective actions. We hope this Annual Report will assist our clients in understanding class action and collective action exposures and the developing case law under both federal and state law.

Very truly yours,

J. Stephen Poor
Chairman, Seyfarth Shaw LLP

Author's Note

Our Annual Report analyzes the leading class action and collective action decisions of 2015 involving claims against employers brought in federal courts under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Fair Labor Standards Act ("FLSA"), the Employee Retirement Income Security Act ("ERISA"), and a host of other federal statutes applicable to workplace issues. The Report also analyzes class action and collective action rulings involving claims brought against employers in all 50 state court systems, including decisions pertaining to employment laws, wage & hour laws, and breach of employment contract actions. The key class action and collective action settlements over the past year are also analyzed, both in terms of gross settlement dollars in private plaintiff and government-initiated lawsuits as well as injunctive relief provisions in consent decrees. Finally, the Report also discusses important federal and state court rulings in non-workplace cases which are significant in their impact on the defense of workplace class action litigation. In total, there are 1,314 decisions analyzed in the Report.

The cases decided in 2015 foreshadow the direction of class action litigation in the coming year. One certain conclusion is that employment law class action and collective action litigation is becoming ever more sophisticated and will continue to be a source of significant financial exposure to employers well into the future. Employers also can expect that class action and collective action lawsuits increasingly will combine claims under multiple statutes, thereby requiring the defense bar to have a cross-disciplinary understanding of substantive employment law as well as the procedural peculiarities of opt-out classes under Rule 23 of the Federal Rules of Civil Procedure and the opt-in procedures in FLSA and ADEA collective actions.

This report represents the collective contributions of a significant number of our colleagues at Seyfarth Shaw LLP. We wish to thank and acknowledge those contributions by Richard L. Alfred, Lorie Almon, Raymond C. Baldwin, Brett C. Bartlett, Edward W. Bergmann, Holger Besch, Daniel Blouin, Michael J. Burns, Robert J. Carty, Jr., Mark A. Casciari, John L. Collins, Ariel Cudkowicz, Catherine M. Dacre, Joseph R. Damato, Christopher J. DeGroff, Rebecca DeGroff, Pamela Devata, Ada Dolph, Alex Drummond, William F. Dugan, Noah A. Finkel, Timothy F. Haley, Heather Havette, Eric Janson, David D. Kadue, Lynn Kappelman, Raymond R. Kepner, Daniel B. Klein, Mary Kay Klimesh, Ronald J. Kramer, Richard B. Lapp, Richard P. McArdle, Jon Meer, Ian H. Morrison, Camille A. Olson, Andrew Paley, Katherine E. Perrelli, Kyle Peterson, Thomas J. Piskorski, Jennifer Riley, David Ross, Jeffrey K. Ross, David J. Rowland, Frederick T. Smith, Amanda Sonneborn, Diana Tabacopoulos, Joseph S. Turner, Annette Tyman, Peter A. Walker, Timothy M. Watson, Robert S. Whitman, Tom Wybenga, and Kenwood C. Youmans.

Our goal is for this Report to guide clients through the thicket of class action and collective action decisional law, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find the *Seyfarth Shaw Annual Workplace Class Action Litigation Report* to be useful.

Gerald L. Maatman, Jr./General Editor
Co-Chair, Class Action Litigation Practice Group of
Seyfarth Shaw LLP

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Guide To Citation Formats

As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (*e.g.*, *Brown, et al. v. Nucor Corp.*, 785 F.3d 895 (4th Cir. May 11, 2015)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (*e.g.*, *Chen-Oster, et al. v. Goldman, Sachs & Co.*, 2014 U.S. Dist. LEXIS 29813 (S.D.N.Y. Mar. 10, 2015)), and if a LEXIS cite is not available, then to a Westlaw cite from its electronic database (*e.g.*, *Harris, et al. v. Amgen, Inc.*, 2015 WL 3372373 (9th Cir. May 26, 2015)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *Lehman, et al. v. Warner Nelson*, Case No. 13-CV-1835 (W.D. Wash. April 24, 2015)).

Search Functionality

This Report is fully searchable. Case names, Rule 23 terms, and class action topics can be searched by selecting Edit and then Find (or Ctrl+F), and then by typing in the word or phrase to be searched, and then either selecting Next or hitting Enter.

eBook Features

The *2016 Workplace Class Action Litigation Report* is also available as an eBook. The downloaded eBook is accessible via freely available eBook reader apps like iBook, Kobo, Aldiko, etc. The eBook provides a rich and immersive reading experience to the users.

Some of the notable features include:

1. The eBook is completely searchable.
2. Users can increase or decrease the font sizes.
3. Active links are set for the table of contents to their respective sections.
4. Bookmarking is offered for notable pages.
5. Readers can drag to navigate through various pages.

A Note On Class Action And Collective Action Terms And Laws

References are made to Rule 23 of the Federal Rules of Civil Procedure and 29 U.S.C. § 216(b) throughout this Report. These are the two main statutory sources for class action and collective action decisional law. Both are procedural devices used in federal courts for determining the rights and remedies of litigants whose cases involve common questions of law and fact. The following summary provides a brief overview of Rule 23 and § 216(b).

Class Action Terms

The Report uses the term *class action* to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition includes a case in which a class was formally approved by a judge (a *certified* class action), as well as a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly-situated).

Although certified class actions may receive considerable attention if they are reported publicly, defendants also must confront putative class actions that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly-situated. Even if such cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

Rule 23

Rule 23 governs class actions in federal courts, and typically involves lawsuits that affect potential class members in different states or that have a nexus with federal law. Rule 23 requires a party seeking class certification to satisfy the four requirements of section (a) of the rule and at least one of three conditions of section (b) of the rule. Under U.S. Supreme Court precedent, a district court must undertake a "rigorous analysis of Rule 23 prerequisites" before certifying a class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). More often than not, plaintiffs will support their motion for class certification with deposition testimony, declarations of putative class members, and expert opinions in the form of affidavits of expert witnesses. Courts often observe that the appropriate analysis in reviewing this evidence is not equivalent to an examination of the merits or a battle between the parties' experts. Rather, the salient issue is whether plaintiffs' legal theories and factual materials satisfy the Rule 23 requirements.

The Rule 23(a) requirements include:

- Numerosity – The individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
- Commonality – There must be questions of law and fact common to the proposed class.
- Typicality – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.

- Adequacy of Representation – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.

The standards for analyzing the commonality requirement of Rule 23(a)(2) were tightened in 2011 with the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011). As a result, a "common" issue is one that is "capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 2551.

Once a plaintiff establishes the four requirements of Rule 23(a), he or she must satisfy one of the three requirements of Rule 23(b). In practice, a plaintiff typically establishes the propriety of class certification under either Rule 23(b)(2) or Rule 23(b)(3) in an employment-related case.

Because application of each rule depends on the nature of the injuries alleged and the relief sought, and imposes different certification standards on the class, the differences between Rule 23(b)(2) and (b)(3) are critical in employment-related class action litigation. In the words of the rule, a class may be certified under Rule 23(b)(2) if the party opposing the class "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In other words, plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature. Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit.

Rule 23(b)(3) is designed for circumstances in which class action treatment is not as clearly called for as in Rule 23(b)(1) and Rule 23(b)(2) situations, when a class action may nevertheless be convenient and desirable. A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pertinent considerations include the interest of the members of the class in individually controlling the prosecution of separate actions; the extent and nature of any litigation concerning the controversy already commenced by members of the class; the desirability of concentrating the litigation of the claims in one particular forum; and the difficulties likely to be encountered in the management of a class action.

To qualify for certification under Rule 23(b)(3), therefore, a class must meet not only the requirements of Rule 23(a), but also two additional requirements: "(1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Products, Inc. v. Windso*r, 521 U.S. 591, 615 (1997). While the common question requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) overlap, the predominance requirement is more stringent than the common question requirement. Thus, even though a case may present common questions of law or fact, those questions may not always predominate and class certification would be inappropriate.

Rule 23(b)(3) applies to cases where the primary relief sought is money damages. The Supreme Court has determined – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) – that unlike in Rule 23(b)(2) class actions, each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. Accordingly, Rule 23(c)(2) guarantees those rights for each member of a

class certified under Rule 23(b)(3). There are no comparable procedural guarantees for class members under Rule 23(b)(2).

Finally, two recent decisions of the U.S. Supreme Court have established a gloss on the Rule 23 requirements that play out in class certification proceedings in a significant manner, including: (i) *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011), as referenced above, which tightened commonality standards under Rule 23(a)(2); and (ii) *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which interpreted Rule 23(b)(3) – that requires "questions of law or fact common to class members predominate over any questions affecting only individual members" – to mandate that plaintiffs' proposed damages model show damages on a class-wide basis. In *Wal-Mart* and *Comcast*, the Supreme Court reaffirmed that lower federal courts must undertake a "rigorous analysis" of whether a putative class satisfies the predominance criterion set forth in Rule 23(b)(3), even if that analysis overlaps with the merits of the underlying claims.

29 U.S.C. § 216(b)

This statute governs multi-plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs and other "non-party" individuals may not proceed collectively until they establish that that they should be permitted to do so as a class. Under § 216(b), courts have held that "similarly-situated" individuals may proceed collectively as a class. The federal circuits have not agreed on the standard according to which such a class should be certified. Two competing standards for certification are recognized.

The first approach adopts the view that the "similarly-situated" inquiry is coextensive with the procedure used in class actions brought pursuant to Rule 23. Using this methodology, the court analyzes the putative class for factors including numerosity, commonality, typicality, and adequacy of representation. This typically occurs after some discovery has taken place. This approach is unusual and is not favored.

The second approach is a two-tiered approach involving a first stage conditioned certification process and a second stage potential decertification process. It is more commonly used and is the prevailing test in federal courts. In practice, it tends to be a "plaintiff-friendly" standard.

In the context of the first stage of conditional certification, plaintiffs typically move for conditional certification and permission to send notices to prospective class members. This generally occurs at an early stage of the case, and often before discovery even commences. Courts have held that a plaintiff's burden at this stage is minimal. A ruling at this stage of the litigation often is based upon allegations in the complaint and any affidavits submitted in favor of or in objection to conditional certification.

Courts have not clearly defined the qualitative or quantitative standards of evidence that should be applied at this stage. Courts are often reluctant to grant or deny certification on the merits of a plaintiff's case. This frustrates defendants with clearly meritorious arguments in defense of the litigation, such as those based on compelling proof that would establish the exempt status of the plaintiffs and other employees alleged to be similarly-situated.

Instead, courts appear to find the most convincing proof that certification is improper based on evidence that putative class members perform different jobs in different locations or facilities,

under different supervisors, and potentially pursuant to differing policies and practices. Courts also have held that certification is inappropriate when individualized inquiries into applicable defenses are required, such as when the employer asserts that the relevant employees are exempt.

Where conditional certification is granted, a defendant has the opportunity to request that the class be decertified after discovery is wholly or partially completed in the subsequent, second stage of decertification. Courts engage in a more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the decertification stage. The scrutiny is based upon a more developed, if not entirely complete, record of evidence. Upon an employer's motion for decertification, a court assesses the issue of similarity more critically and may revisit questions concerning the locations where employees work, the employees' supervisors, their employment histories, the policies and practices according to which they perform work and are paid, and the distinct defenses that may require individualized analyses.

Opt-In/Opt-Out Procedures

Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b). Under Rule 23(b)(2), a court's order binds the class; under Rule 23(b)(3), however, a class member must opt-out of the class action (after receiving a class action notice). If he or she does not do so, they are bound by the judgment. Conversely, under § 216(b), a class member must opt-in to the lawsuit before he or she will be bound. While at or near 100% of class members are effectively bound by a Rule 23 order, opt-in rates in most § 216(b) collective actions typically range from 5% to 40%.

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A. Executive Summary

Workplace class action litigation often poses unique "bet-the-company" risks for employers. An adverse judgment in a class action has the potential to bankrupt a business. Likewise, the on-going defense of a class action can drain corporate resources long before the case reaches a decision point. Companies that do business in multiple states are also susceptible to "copy-cat" class actions, whereby plaintiffs' lawyers create a domino effect of litigation filings that challenge corporate policies and practices. Hence, workplace class actions can adversely impact a corporation's market share, jeopardize or end the careers of senior management, and cost millions of dollars in defense fees. For these reasons, workplace class action litigation risks are at the top of the list of problems that keep business leaders up at night.

Skilled plaintiffs' class action lawyers and governmental enforcement litigators are not making that challenge any easier. They are continuing to develop new theories and approaches to prosecuting complex employment litigation. In turn, the events of the past year in the workplace class action world demonstrate that the array of litigation issues facing businesses are continuing to accelerate while also undergoing significant change. Governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and the U.S. Department of Labor ("DOL") also manifests an aggressive "push-the-envelope" agenda of two activist agencies, with regulatory oversight of workplace issues continuing as a high priority. The combination of these factors are challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures. These challenges are especially acute for businesses in the context of complex workplace litigation.

B. Key Trends Of 2015

An overview of workplace class action litigation developments in 2015 reveals five key trends.

First, class action dynamics increasingly have been shaped and influenced by recent rulings of the U.S. Supreme Court. Over the past several years, the Supreme Court has accepted more cases for review – and issued more rulings – than ever before that have impacted the prosecution and defense of class actions and government enforcement litigation. The past year continued that trend, with several key decisions on complex employment litigation issues, and more cases accepted for review that are posed for rulings in 2016. While the Supreme Court led by Chief Justice John Roberts is often thought to be pro-business, the array of its key rulings impacting class action workplace issues is anything but one-dimensional. Some decisions may be viewed as hostile to the expansive use of Rule 23, while others are hospitable and strengthen the availability of class actions. Further, the Supreme Court has declined several opportunities to impose more restraints on class actions, and by often deciding cases on narrow grounds, it has left many gaps to be filled in by – and thereby fueled disagreements arising amongst – lower federal courts. Suffice it to say, the range of rulings form a complex tapestry that precludes an overarching generalization that the Supreme Court is pro-business or pro-worker on class actions.

Second, the monetary value of employment-related class action settlements reached an all-time high in 2015. The plaintiffs' employment class action bar and governmental enforcement litigators successfully translated their case filings into larger class-wide settlements at unprecedented levels. The top ten settlements in various employment-related categories totaled $2.48 billion over the past year as compared to $1.87 billion in 2014. As success in the class action litigation context often serves to encourage pursuit of more class actions by "copy-cat" litigants, 2016 is apt to see the filing of more class actions than in previous years.

Third, federal and state courts issued more favorable class certification rulings for the plaintiffs' bar in 2015 than in past years. In addition to converting their class certification rulings into class action settlements with higher values and pay-outs, plaintiffs' lawyers continued to craft refined and more successful class

certification theories to counter the more stringent Rule 23 certification requirements established in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In the areas of employment discrimination, wage & hour, and ERISA class actions, the plaintiffs' bar scored exceedingly well in securing class certification rulings in 2015. In sum, class actions continue to be certified in significant numbers and certain "magnet" jurisdictions continue to issue decisions that encourage – or, in effect, force – the resolution of large numbers of claims through class action mechanisms.

Fourth, complex employment-related litigation filings are up from past years, but by far and away, wage & hour class actions and collective actions are the leading type of "high stakes" lawsuits being pursued by the plaintiffs' bar. Case filing statistics for 2015 reflected that wage & hour litigation outpaced all other categories of lawsuits, and increased yet again over the past year, with no end in sight of the crest of the tidal wave of case filings. Additional factors set to coalesce in 2016 – including new FLSA regulations, the impact of digital technology, and increased scrutiny of independent contractor and joint employer relationships – are apt to drive these exposures even higher for Corporate America.

Fifth, government enforcement lawsuits brought by the DOL and EEOC continued the aggressive litigation programs of both agencies. Settlement numbers for government enforcement litigation in 2015 increased substantially over 2014, as did the litigation dockets of the DOL and the EEOC. This trend is critical to employers, as both agencies have a focus on "big impact" lawsuits against companies and "lead by example" in terms of areas that the private plaintiffs' bar aims to pursue.

C. Significant Trends In Workplace Class Action Litigation In 2015

(i) The Impact Of U.S. Supreme Court Rulings

Over the past decade, the U.S. Supreme Court – led by Chief Justice John Roberts – increasingly has shaped the contours of complex litigation exposures through its rulings on class action and governmental enforcement litigation issues. Many of these decisions have elucidated the requirements for pursuing employment-related class actions. The 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* and the 2013 decision in *Comcast Corp. v. Behrend* are the two most significant examples. Both of those rulings are at the core of class certification issues under Rule 23. To that end, federal and state courts cited *Wal-Mart* in 521 rulings in 2015; they cited *Comcast* 244 times in 2015.

In terms of direct decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2015, the Supreme Court decided six cases – four employment-related cases and two class action cases – that will influence complex employment-related litigation.

The rulings included two EEOC cases, two ERISA cases, and two cases on civil procedure issues.

– ***DirecTV, Inc. v. Imburgia, et al.*, 2015 U.S. LEXIS 7999 (U.S. Dec. 14, 2015)** – In *DirecTV*, the Supreme Court held that because the California Court of Appeal's interpretation of an agreement that included a binding arbitration provision with a class arbitration waiver – which specified that the entire arbitration provision was unenforceable if the "law of your state" made class arbitration waivers unenforceable, but also declared that the arbitration clause was governed by the Federal Arbitration Act – was preempted by the Federal Arbitration Act, such an arbitration agreement is enforceable. As a result, the decision continues the trend of pro-arbitration Supreme Court precedents that arm corporations with the ability to use arbitration agreements to manage class actions risks.

– ***EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015)** – In *Abercrombie & Fitch*, the Supreme Court held that to prevail in a disparate treatment claim of religious

discrimination under Title VII of the Civil Rights Act of 1964, the EEOC need only establish that an applicant's need for an accommodation was a motivating factor in the employer's decision, not that the employer actually knew of the applicant's need. The decision largely favored the EEOC's position, and makes it easier for the Commission and plaintiffs to prevail in religious discrimination lawsuits.

– ***EEOC v. Mach Mining, LLC*, 135 S. Ct. 1645 (2015)** – In *Mach Mining,* the Supreme Court held that a district court may review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit; at the same time, because the EEOC has extensive discretion to determine what kind and amount of communication with an employer is appropriate in any given case, the scope of that review is narrow. The decision rejected the EEOC's position that its pre-lawsuit conciliation conduct was beyond judicial review.

– ***Gelboim, et al. v. Bank of America*, 135 S. Ct. 897 (2015)** – In *Gelboim*, the Supreme Court held that when a district court dismisses the only claim in a case that has been consolidated with other actions for pre-trial proceedings in multidistrict litigation ("MDL"), the district court's order is a final and appealable order, even if claims remained in other actions included in the MDL. The impact of the decision is to allow more immediate appeals in high stakes, multi-district class actions.

– ***M & G Plymers USA, LLC v. Tackett, et al.*, 135 S. Ct. 926 (2015)** – In *Tackett*, the Supreme Court held that to determine whether retiree health-care benefits survive the expiration of a collective bargaining agreement, federal courts should apply ordinary contract principles. Those principles do not include the longstanding principle from *International Union, United Auto, Aerospace, & Agricultural Implement Workers of Am. v. Yard-Man, Inc*., 716 F. 2d 1476 (6th Cir. 1983), which created an inference that, in the absence of evidence to the contrary, collective bargaining agreements intend to vest retirees with lifetime benefits. In rejecting the Sixth Circuit's application of its own three-decade-old decision in *Yard-Man*, in finding that the *Yard-Man* presumption and its progeny were out of step with contract law, the Supreme Court's decision placed its thumb on the legal scale in favor of finding vested retiree benefits in high-stakes ERISA litigation.

– ***Tibble, et al. v. Edison International*, 135 S. Ct. 1823 (2015)** – In *Tibble*, the Supreme Court held that because a fiduciary normally has a continuing duty to monitor investments and remove imprudent ones, a plaintiff may allege that a fiduciary breached a duty of prudence by failing to properly monitor investments and remove imprudent ones. The Supreme Court determined that such a claim is timely under the ERISA as long it is filed within six years of the alleged breach of continuing duty. The Supreme Court's decision in *Tibble* – that an ERISA plan fiduciary has a continuing duty to monitor investments – has long been recognized to be an essential tenet of trust law. The more significant impact of *Tibble* may involve what the Supreme Court did not say and what it did not decide, but instead left open for the lower courts to consider, *i.e.*, at what point, and under what circumstances, will an ERISA plan fiduciary be considered to have violated that "continuing duty"? Obviously recognizing that the "devil is in the details," by declining to provide guidance or guidelines, the Supreme Court in *Tibble* simply left it for the lower courts to examine the details, and identify the devils in those details. This has the potential to be a time-consuming and expensive one, where each case will turn on its particular facts, and it will take time before reliable standards emerge.

Equally important for the coming year, the Supreme Court accepted four additional cases for review in 2015 – that are likely to be decided in 2016 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers. Those cases include two employment lawsuits and two class action cases. The Supreme Court undertook oral argument on three of the cases in 2015; the other will have oral arguments in 2016. The corporate defendants in each case have sought rulings seeking to limit the use of class actions or control government enforcement lawsuits.

– ***Spokeo v. Robins,*** **No. 13-1339** – Widely considered the most important class action of the current Supreme Court term, the *Spokeo* case concerns whether people without an injury can still file class actions. The Supreme Court heard argument on the case in November of 2015 about whether a job applicant should be able to bring complaints against credit reporting firms under the Fair Credit Reporting Act ("FCRA"), where the plaintiff alleged that a people search engine violated the FCRA when it reported he was wealthy and had a graduate degree; in reality, he was struggling to find work. The defense is looking to overturn the Ninth Circuit's revival of the suit. Among the issues in the case is whether an applicant without a pocket book injury has standing to prosecute a class action and whether a company can defend itself by pointing to FCRA-compliant processes it has in place, even if they did not fully prevent the publication of misinformation.

– ***Campbell-Ewald v. Gomez,*** **No. 14-857** – The *Campbell-Ewald* case concerns whether a company can moot and defeat a class action by offering a settlement, and what happens to potential class actions when such deals are accepted. The Supreme Court heard argument on the case in October of 2015. If the Supreme Court were to find that the offer of a settlement makes a lawsuit moot and kills off potential class actions, it could allow companies to attempt to cut off such cases with quick-strike settlements. The Supreme Court also may decide whether, in order for the strategy to work, defendants have to make the offer before class certification, according to Gottlieb.

– ***Tyson Foods v. Bouaphakeo,*** **Case No. 14-1146** – The *Tyson Foods* case involves review of an Eighth Circuit ruling where workers sued for unpaid work and overtime for time spent putting on and taking off hard hats, work boots, hair nets, aprons, gloves and earplugs; a jury awarded the workers $2.89 million, which turned into $5.8 million with liquidated damages, which the Eighth Circuit upheld. The Supreme Court heard argument in November of 2015. The case presents an opportunity for the Supreme Court to allow or forbid class actions that rely on a composite or "average plaintiff" or "average class member" for damages purposes, also sometimes dubbed as "trial by formula." At issue is whether the Supreme Court will determine that differences between class members essentially prohibit class treatment or that averaging and aggregation are permissible. Further, the Supreme Court may pronounce any new standards for the use of statistics for dealing with damages in class actions, or limit the use of statistical proof to demonstrate Rule 23(b)(3) factors or proving class-wide damages.

– ***CRST Van Expedited Inc. v. EEOC,*** **Case No. 14-1375** – This case concerns the largest fee sanction award – approximately $4.7 million – ever issued against the Commission. It arose from a systemic sexual harassment lawsuit that the agency lost for failing to meet pre-suit obligations relative to the claims of 67 claimants over whom the EEOC sued but failed to investigate before filing suit. The dispute over legal fees arose when the employer subsequently secured a fee award for its expenditures in fighting the claims. The Eighth Circuit subsequently upended that award on the basis that the district court improperly ruled that it had to determine on an individual basis whether each of the

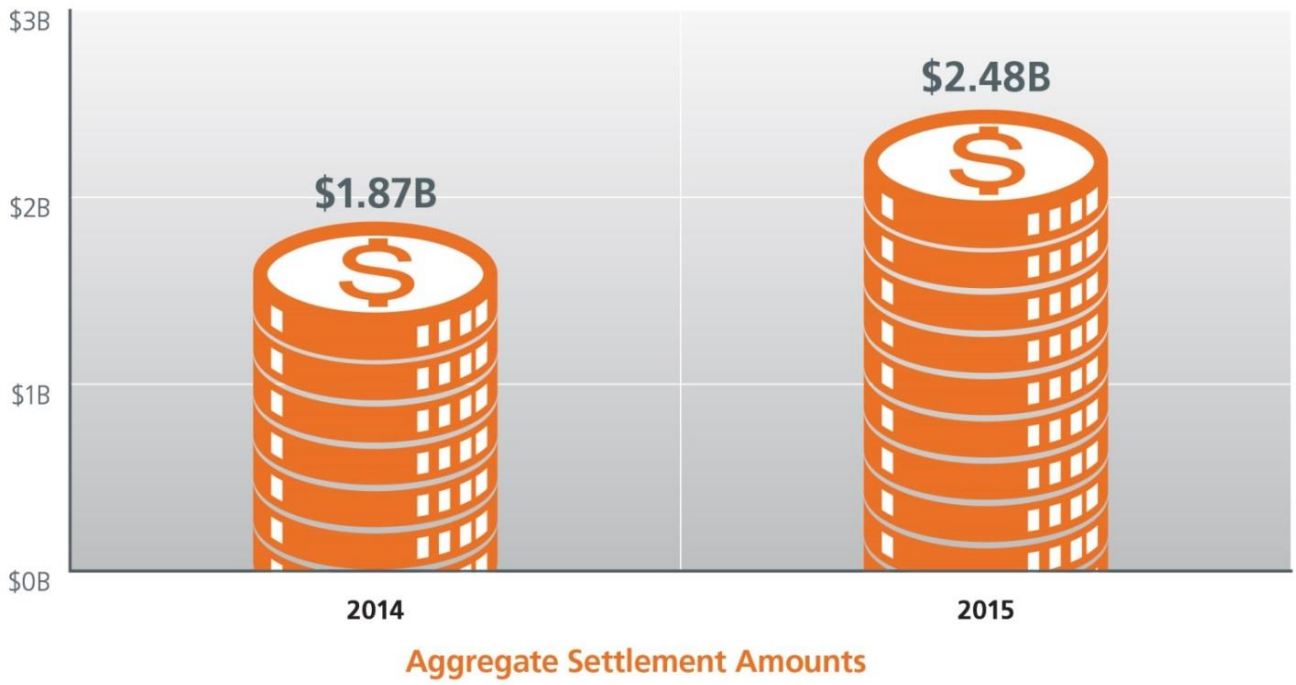
67 claims in question were frivolous or groundless. The Supreme Court accepted the case for review in December 2015. The Supreme Court is likely to determine the obligations of the Commission in prosecuting systemic lawsuits and the grounds on which it may be sanctioned for inappropriate litigation.

The decisions in *Spokeo, Campbell-Ewald, Tyson Foods*, and *CRST Van Expedited* are expected to be issued by June of 2016, and are sure to shape and influence class action litigation in a profound manner.

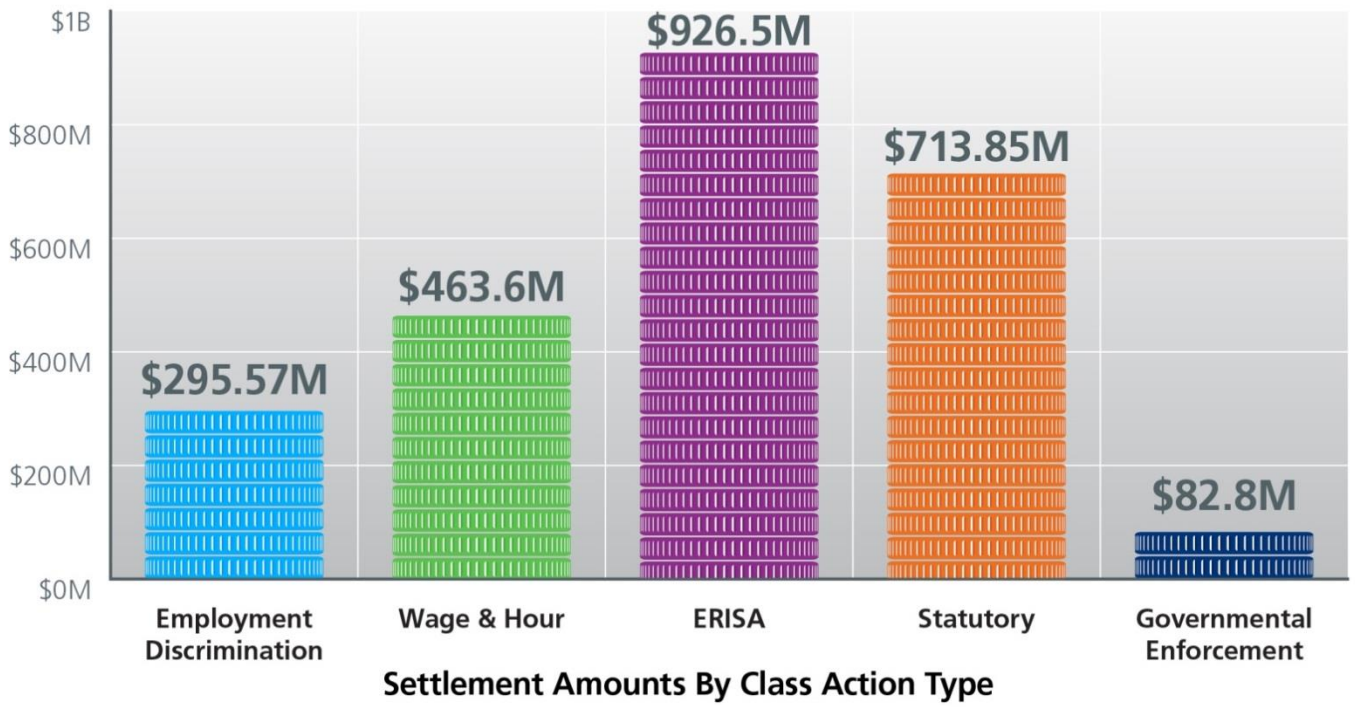
(ii) Higher Class Action Settlement Numbers In 2015

As measured by the top ten largest case resolutions in various workplace class action categories, settlement numbers increased to record high levels in 2015. This reversed a trend that began with the U.S. Supreme Court's decision in *Wal-Mart* in 2011. By tightening Rule 23 standards and raising the bar for class certification, *Wal-Mart* made it more difficult for plaintiffs to convert their class action filings into substantial settlements.

The statistics for 2015 showed a reversal of this trend. This manifests a maturing of case architecture considerations, whereby plaintiffs' lawyers have "re-booted" their strategic approaches to take account of *Wal-Mart*, and crafted and refined class certification theories with better chances of success. Considering all types of workplace class actions, settlement numbers in 2015 were at an all-time high of $2.48 billion. This represented a significant increase over 2014 levels, when the aggregate settlement numbers totaled $1.87 billion.

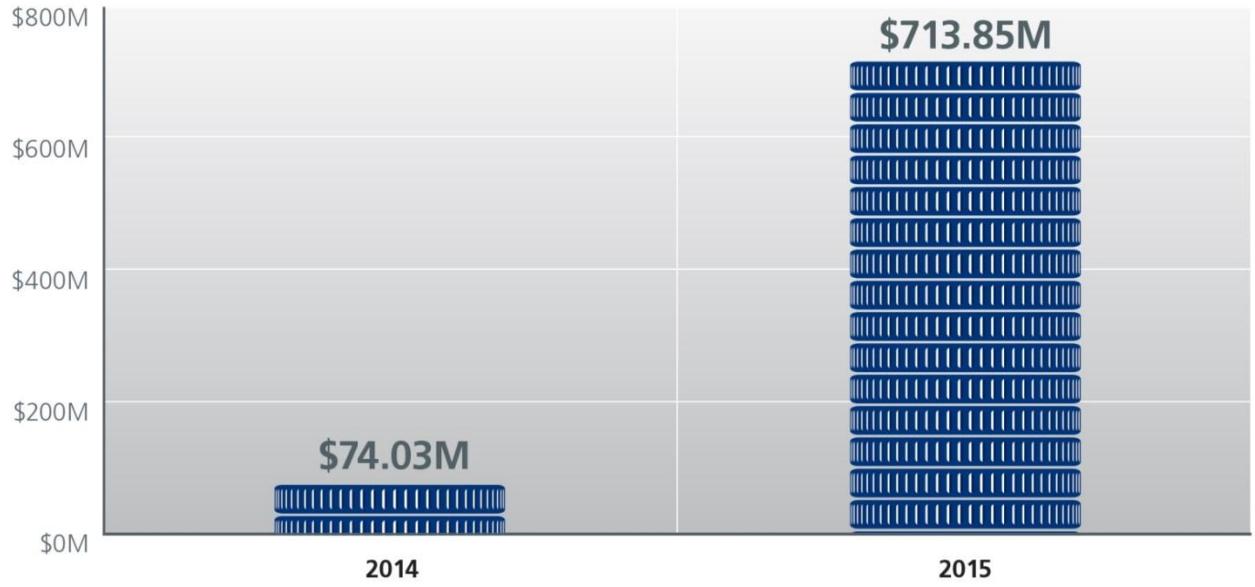


In terms of the upward trend, breakouts by type of workplace class action are instructive. There was an upward trend in each area except ERISA class actions, which decreased slightly but still accounted for a massive aggregate total. This is shown by the following chart:



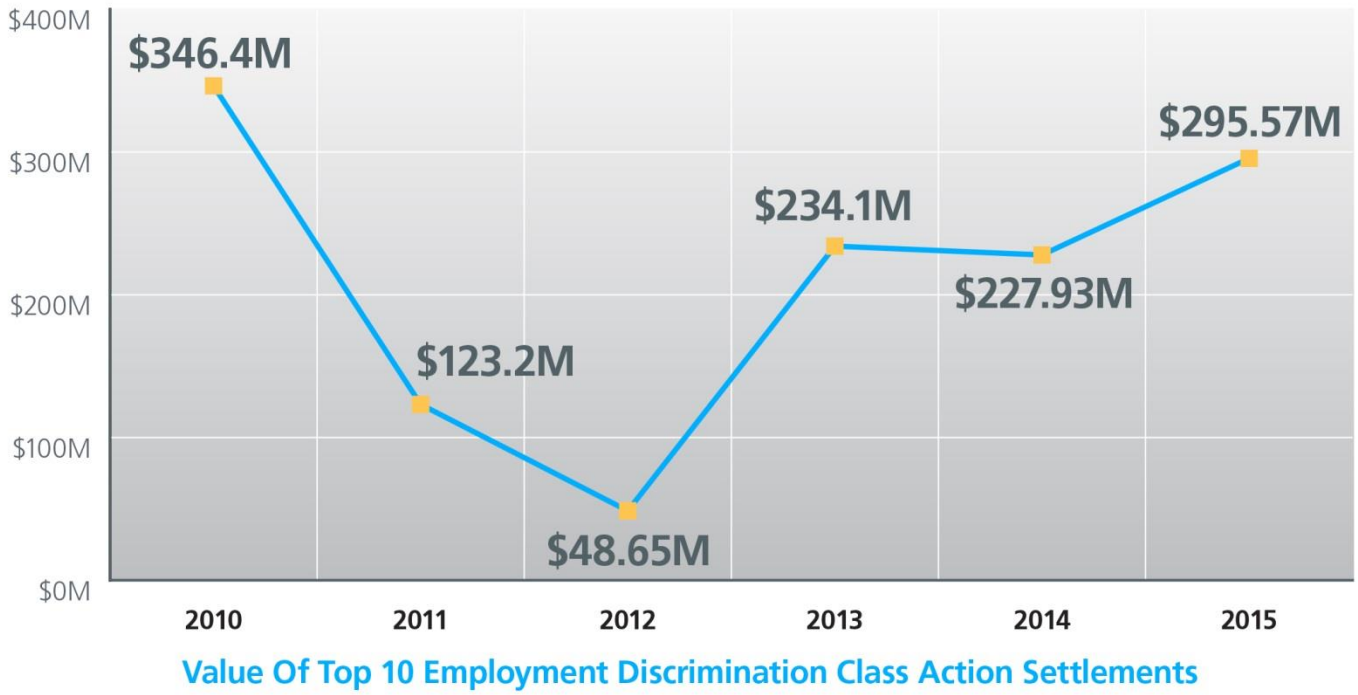
Settlement Amounts By Class Action Type

By type of case, settlements in private plaintiff statutory workplace class actions experienced the most significant increase. They increased to $713.85 million in 2015 from $74.03 million in 2014. The following chart shows this nearly ten-fold increase:



Value of Top 10 Private Statutory Workplace Class Action Settlements

Most telling, however, the reversal of the "*Wal-Mart* effect" is shown by the pattern for employment discrimination class action settlements in 2015. This trend is illustrated in the following chart:



Value Of Top 10 Employment Discrimination Class Action Settlements

Thus, in 2015, the value of the top ten largest employment discrimination class action settlements was the highest since 2010,[1] and reversed the downward trend that started in 2011 and depressed settlement amounts over a 3-year period.

The trend is even more pronounced with wage & hour class action settlements. In 2015, the value of the top ten wage & hour settlements increased after two years of declining numbers; in fact, the value of those settlements more than doubled.[2] *Wal-Mart* has had far less of an impact in this substantive legal area, as FLSA settlements are not explicitly tied to the concepts on class certification addressed in *Wal-Mart* (and instead, are based on the standards under 29 U.S.C.§ 216(b)). This trend is illustrated by the following chart:

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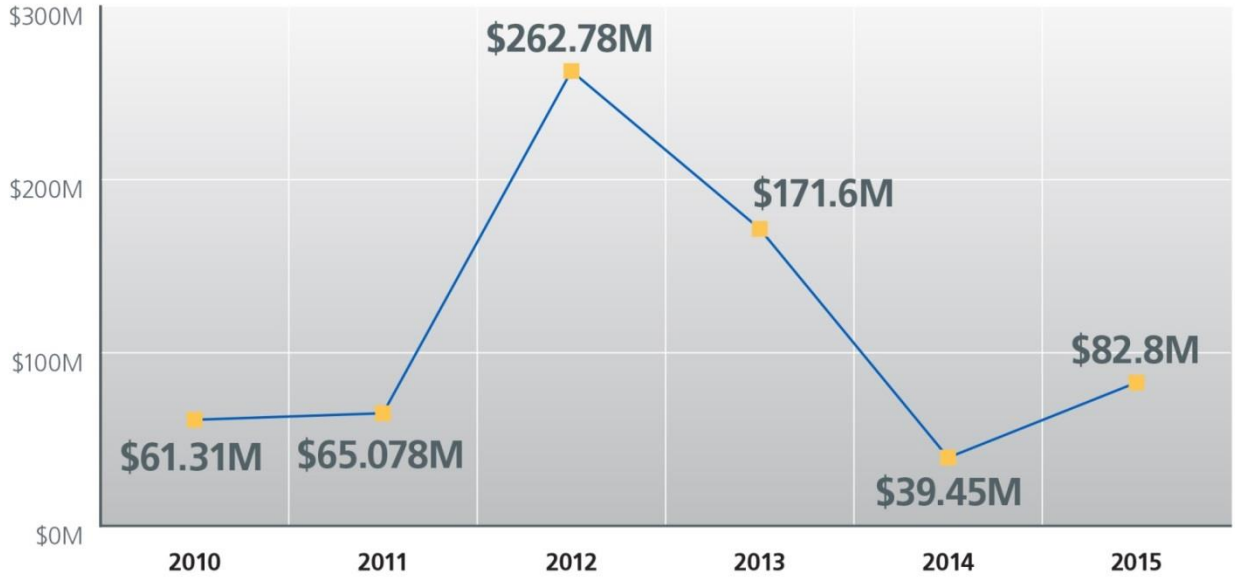
[1] An analysis of settlement activity is set forth in Chapter II of this Report. The total of $295.57 million for the top ten largest employment discrimination class action settlements in 2015 is the second highest total since 2006; the figures for each year were as follows: 2014 – $227.93 million; 2013 – $234.1 million; 2012 – $48.6 million; 2011 – $123.2 million; 2010 – $346.4 million; 2009 – $86.2 million; 2008 – $118.36 million; 2007 – $282.1 million; and 2006 – $91 million. With the issuance of the *Wal-Mart* decision in June of 2011, settlements were decidedly lower in 2012, and relatively depressed in 2013 and 2014. A chart of the all-time largest employment discrimination class action settlements is set out at Appendix II of the Report.

[2] The total for the top ten wage & hour class action settlements in 2015 was $463.6 million, compared to $215.3 million in 2014 and $248.45 million in 2013.

Value Of Top 10 Wage & Hour Class Action Settlements

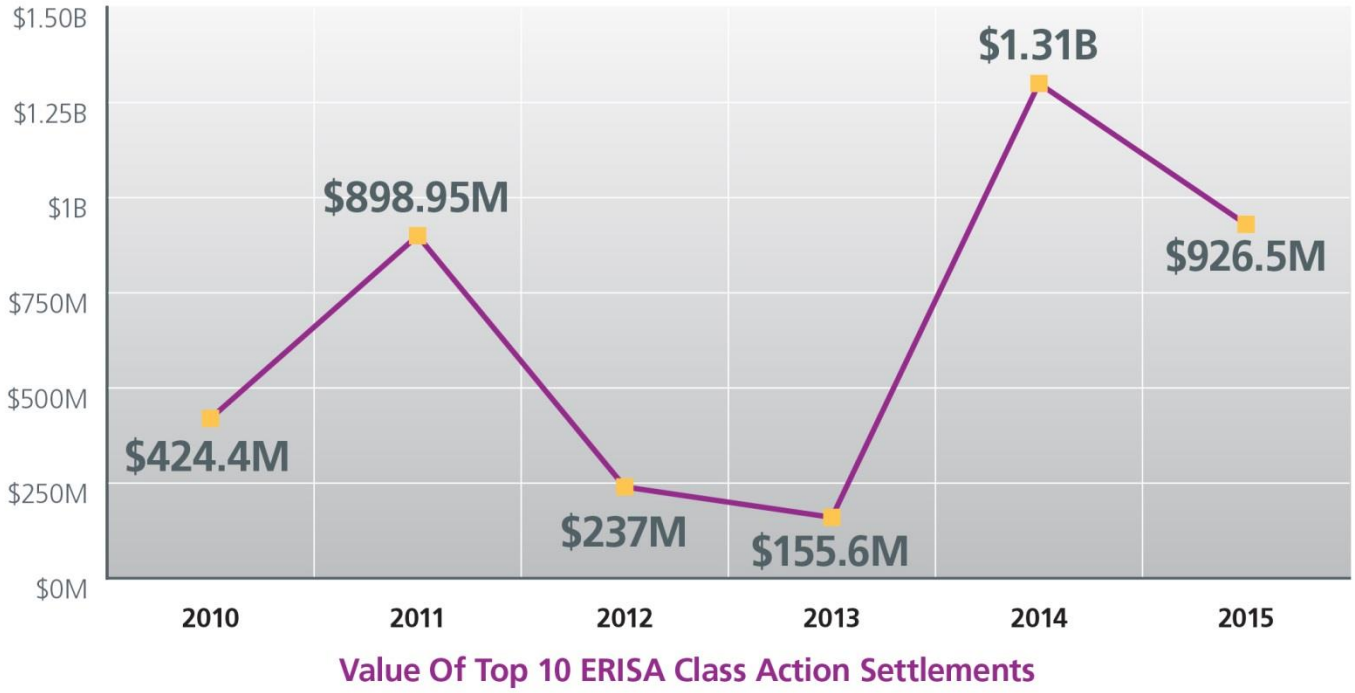
Relatedly, government enforcement litigation also followed this trend, and settlements in 2015 increased over 2014, when settlements hit their lowest point in the last eight years.[3] This trend is illustrated by the following chart:



Value Of Top 10 Government Enforcement Litigation Settlements

[3] The total for the top ten government enforcement litigation settlements was $82.8 million, compared to $39.45 million in 2014, $171.6 million in 2013 and $262.78 million in 2012.

In contrast, ERISA class action settlements topped $926.5 million in 2015. While this aggregate number was nearly ten times greater than in 2013,[4] it represented a slight decrease from 2014 (when settlements were $1.31 billion). Nonetheless, ERISA class action settlements this past year were fueled by several mega-settlements. This trend is illustrated by the following chart:



Value Of Top 10 ERISA Class Action Settlements

(iii) Class Certification Certification Trends In 2015

Anecdotally, surveys of corporate counsel confirm that complex workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies. The prime concern in that array of risks is now indisputably wage & hour litigation exposures.

While plaintiffs continued to achieve initial conditional certification of wage & hour collective actions in 2015, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.[5] It is expected that the vigorous pursuit of nationwide FLSA collective actions by the plaintiffs' bar will continue in 2016, and that the pace of wage & hour filings will increase yet again over the next year.

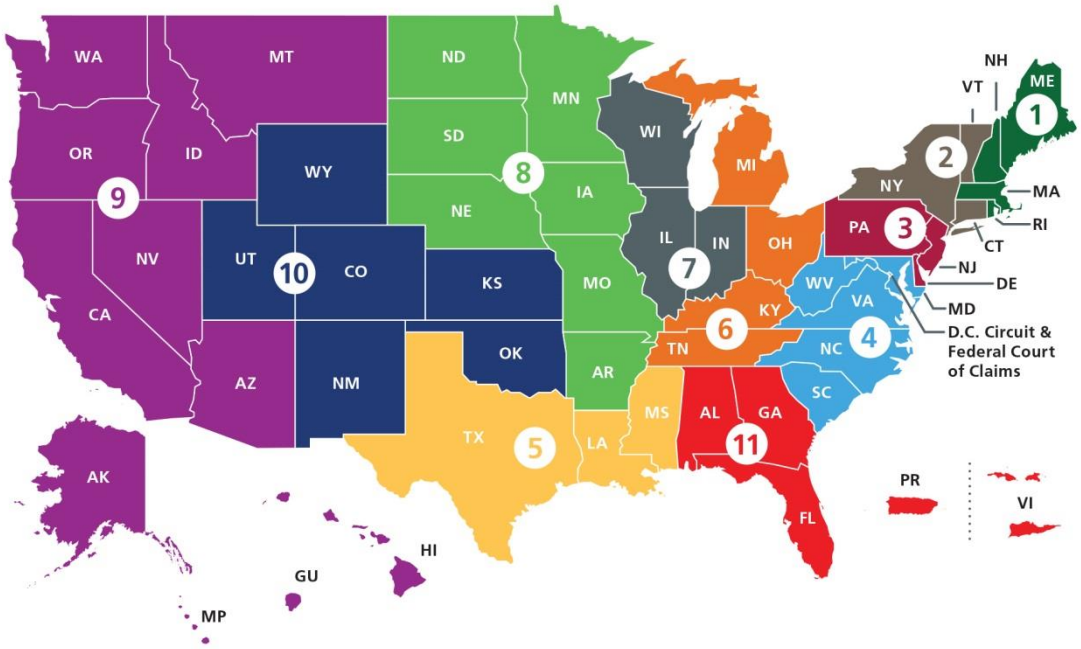
An increase in FLSA filings likewise caused the issuance of more FLSA certification rulings than in any other substantive area of complex employment litigation. The analysis of these rulings – discussed in Chapter V of this Report – shows that more cases are brought against employers in more plaintiff-friendly

[4] The total for the top ten ERISA class action settlements in 2015 was $926.5 million compared to $1.31 billion in 2014 and $155.6 million in 2013.

[5] An analysis of FLSA collective actions in 2015 is set forth in Chapter V, and analysis of state law wage & hour class action rulings in 2015 is set forth in Chapter VII.

jurisdictions such as the judicial districts within the Second and Ninth Circuits. This trend is shown by the following map:

U.S. Courts Of Appeal – Analysis Of FLSA Certification Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	3	18	7	9	9	3	10	7	35	7	7	0
Conditional Certification Motions Denied	1	10	2	0	3	2	8	2	8	0	2	0
Decertification Motions Granted	0	1	0	0	0	1	1	1	3	0	1	0
Decertification Motions Denied	0	0	0	1	1	1	1	3	4	0	3	0

Total: 115 Conditional Certifications Granted / 38 Conditional Certifications Denied
8 Decertification Motions Granted / 14 Decertification Motions Denied

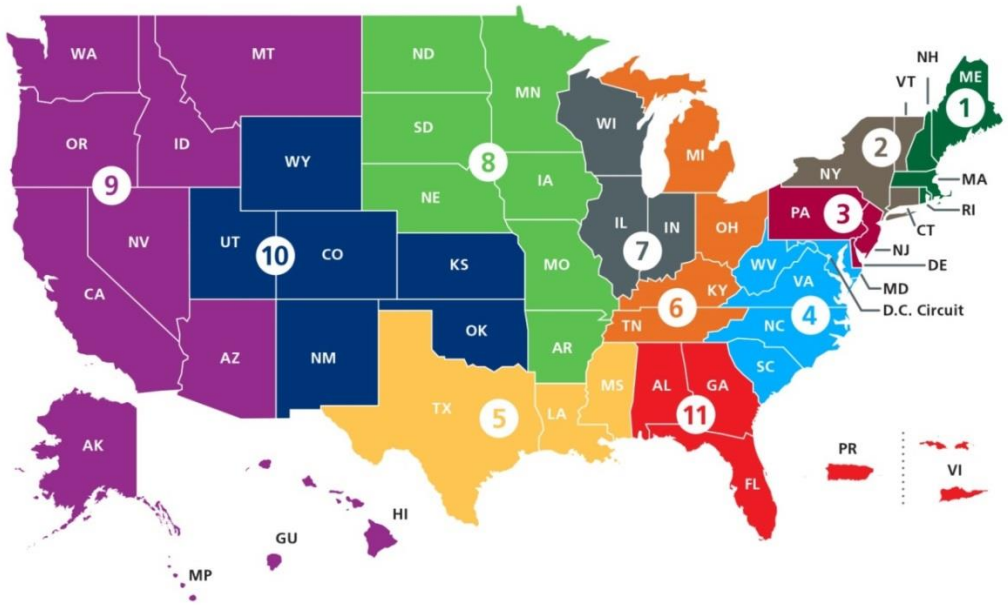
The map of FLSA certification rulings is telling. First, it substantiates that the district courts within the Ninth Circuit and the Second Circuit are the epicenters of wage & hour litigation. More cases were prosecuted and conditionally certified – 35 certification orders in the Ninth Circuit and 18 certification orders in the Second Circuit – in the district courts in those circuits than in any other areas of the country. The district courts in the Seventh, Fourth, and Fifth Circuits were not far behind, with 10, 9, and 9 certification orders respectively in those jurisdictions.

Second, as the burdens of proof reflect under 29 U.S.C. § 216(b), plaintiffs won the overwhelming majority of "first stage" conditional certification motions (115 of 153 rulings, or approximately 75%); in terms of "second stage" decertification motions, plaintiffs also prevailed in a majority of those cases (14 of 22 rulings, or approximately 64% of the time). These certification statistics are more favorable to the plaintiffs' bar than 2014, when they won 70% of "first stage" conditional certification motions, and beat "second stage" decertification motions in 52% of the cases.

Third, it reflects that there has been an on-going migration of skilled plaintiffs' class action lawyers into the wage & hour litigation space. Securing initial "first stage" conditional certification – and foisting settlement pressure on an employer – can be done quickly (almost right after the case is filed), with a minimal monetary investment in the case (*e.g.*, no expert is needed unlike the situation when certification is sought in an employment discrimination class action), and without having to conduct significant discovery (per the case law that has developed under 29 U.S.C. § 216(b)). As a result, to the extent litigation of class actions by plaintiffs' lawyers is viewed as an investment, prosecution of wage & hour lawsuits is a relatively low cost investment, without significant barriers to entry, and with the prospect of immediate returns as compared to other types of workplace class action litigation.

At the same time, the rulings in *Wal-Mart* and *Comcast* also fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2015. The Supreme Court's two Rule 23 decisions has had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[6] It is clear that the playbook on Rule 23 strategies is undergoing an overhaul. Filings of "smaller" employment discrimination class actions have increased due to a strategy whereby state or regional-type classes are asserted rather than nationwide mega-cases. In essence, the plaintiffs' playbook is more akin to a strategy of "aim small, miss small." In turn, employment-related class certification rulings outside of the wage & hour area were a mixed bag or tantamount to a "jump ball" in 2015, as 3 of 7 were granted (and 4 were denied). The following map illustrates this array of certification rulings:

U.S. Courts Of Appeal – Analysis Of Employment Discrimination Decisions



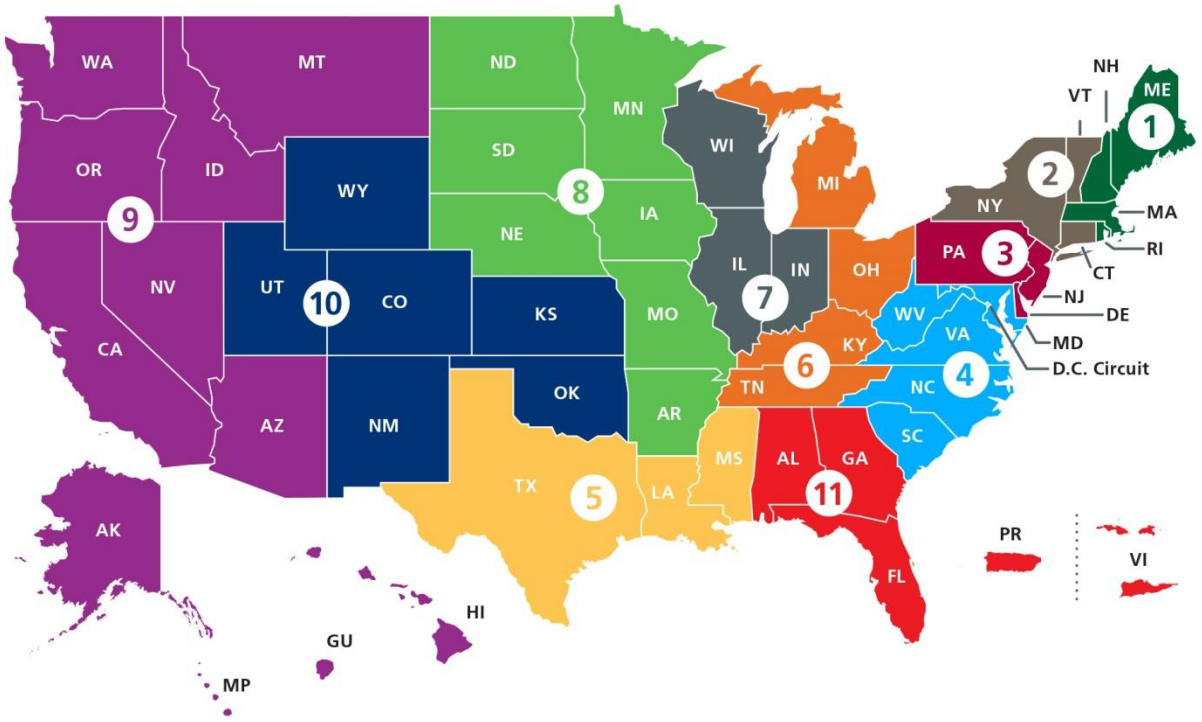
	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Certification Motions Granted	0	0	0	1	0	0	2	0	0	0	0	0
Certification Motions Denied	0	1	0	0	1	0	1	0	0	0	0	1

Total: 3 Granted / 4 Denied

[6] An analysis of rulings in employment discrimination class actions in 2015 is set forth in Chapter III. An analysis of non-workplace class action rulings that impact employment-related cases is set forth in Chapter IX.

In terms of the ERISA class action litigation scene in 2015,[7] the focus continued to rest on the U.S. Supreme Court as it shaped and refined the scope of potential liability and defenses in ERISA cases. The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification. The decisions in 2015 show that class certification motions have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent. Nonetheless, plaintiffs were more successful than defendants, winning 5 of 7 certification rulings. A map illustrating these trends is shown below:

U.S. Courts Of Appeal – Analysis Of ERISA Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Certification Motions Granted	0	1	0	0	0	1	1	1	1	0	0	0
Certification Motions Denied	0	0	0	0	0	0	0	0	2	0	0	0

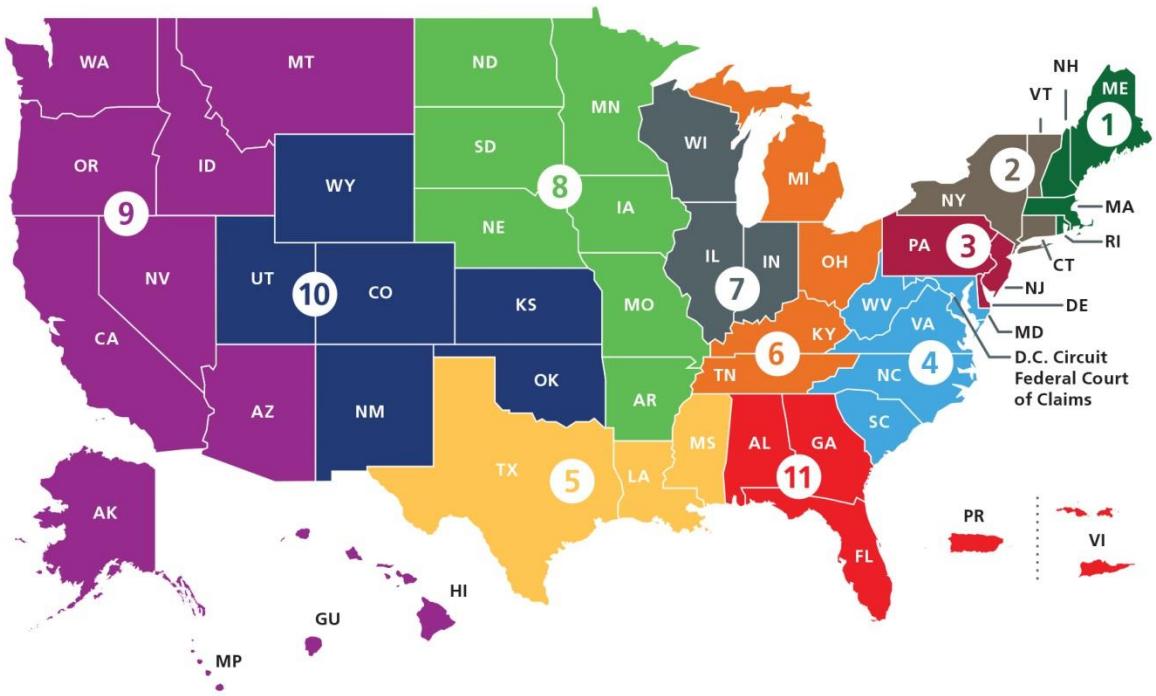
Total: 5 Granted / 2 Denied

So what conclusions overall can be drawn on class certification trends in 2015? In the areas of employment discrimination, wage & hour, and ERISA, the plaintiffs' bar is converting their case filings into certification of classes at a high rate. Whereas class certification was a coin toss for employment discrimination cases (3 granted and 4 denied in 2015), class certification is easier in ERISA cases (5 granted and 2 denied in 2015), but most prevalent in wage & hour litigation (with 115 conditional certification orders granted and 38 denied, as well as 8 decertification motions granted and 14 denied).

[7] An analysis of rulings in ERISA class actions in 2015 is set forth in Chapter VI.

The following map depicts this array of rulings:

U.S. Circuit Courts Of Appeal



Analysis Of Decisions By Circuit Court

Circuit Court	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Employment Discrimination Decisions												
Certification Motions Granted	0	0	0	1	0	0	2	0	0	0	0	0
Certification Motions Denied	0	1	0	0	1	0	1	0	0	0	0	1
Sub-Total:	**3 Granted / 4 Denied**											
ERISA Decisions												
Certification Motions Granted	0	1	0	0	0	1	1	1	1	0	0	0
Certification Motions Denied	0	0	0	0	0	0	0	0	2	0	0	0
Sub-Total:	**5 Granted / 2 Denied**											
FLSA Certification Decisions												
Conditional Certification Motions Granted	3	18	7	9	9	3	10	7	35	7	7	0
Conditional Certification Motions Denied	1	10	2	0	3	2	8	2	8	0	2	0
Decertification Motions Granted	0	1	0	0	0	1	1	1	3	0	1	0
Decertification Motions Denied	0	0	0	1	1	1	1	3	4	0	3	0
Sub-Total:	**115 Conditional Certifications Granted / 38 Conditional Certifications Denied** **8 Decertification Motions Granted / 14 Decertification Motions Denied**											
Total:	**123 Total Certification Motions Granted / 44 Total Certification Motions Denied** **8 Decertification Motions Granted / 14 Decertification Motions Denied**											

The lessons to be drawn from these trends of 2015 are multi-faceted.

First, while *Wal-Mart* undoubtedly heightened commonality standards under Rule 23(a)(2) starting in 2011, and *Comcast* tightened the predominance factors at least for damages under Rule 23(b) in 2013, the plaintiffs' bar has crafted theories and "work arounds" to maintain or increase their chances of successfully securing certification orders. In 2015, their certification numbers were up and their settlement figures were at record levels.

Second, the defense-minded decisions in *Wal-Mart* and *Comcast* have not taken hold in any significant respect in the context of FLSA certification decisions for wage & hour cases. Efforts by the defense bar to use the commonality standards from *Wal-Mart* and the predominance analysis from *Comcast* have not impacted the ability of the plaintiffs' bar to secure certification orders under 29 U.S.C. § 216(b).

Third, while monetary relief in a Rule 23(b)(2) context is severely limited, certification is the "holy grail" in class actions, and certification of any type of class – even a non-monetary injunctive relief class claim – often drives settlement decisions. This is especially true for employment discrimination, ERISA, and wage & hour class actions, as plaintiffs' lawyers can recover awards of attorneys' fees under fee-shifting statutes in an employment litigation context.

Fourth, at the certification stage, courts are now more willing than ever before to assess facts that overlap both certification and merits issues, and to apply a more practical assessment of the Rule 23(b) requirement of predominance, which focuses on the utility and superiority of a preclusive class-wide trial of common issues. Courts are also more willing to apply a heightened degree of scrutiny to expert opinions offered to establish proof of the Rule 23 requirements. Notwithstanding these shifts in proof standards and the contours of judicial decision-making, the likelihood of class certification rulings favoring plaintiffs are "alive and well" in the post-*Wal-Mart* and *Comcast* era.

(iv) Complex Employment-Related Litigation Trends In 2015

While shareholder and securities class action filings witnessed an increase in 2015, employment-related class action filings remained relatively stable, but with a pronounced increase in certain categories, especially wage & hour lawsuits.

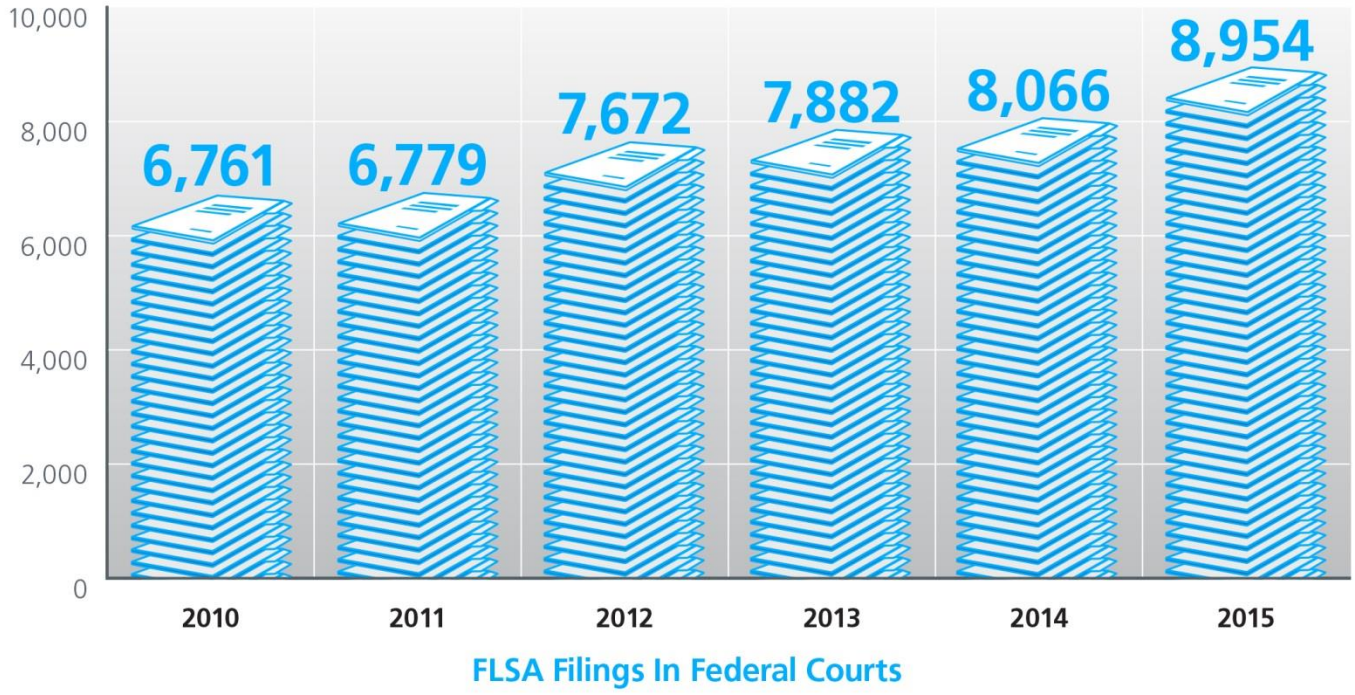
By the numbers, filings for employment discrimination and ERISA claims were down slightly over the past year, while the volume of wage & hour cases increased substantially. By the close of the year, ERISA lawsuits totaled 6,925 (down slightly as compared to 7,163 in 2014), FLSA lawsuits totaled 8,954 (up significantly as compared to 8,066 in 2014), and employment discrimination filings totaled 11,550 lawsuits (a decrease from 11,867 in 2014). In terms of employment discrimination cases, however, employers can expect a significant jump in the coming year, as the charge number totals at the EEOC in 2014 and 2015 were among the highest in the 48-year history of the Commission; due to the time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC's inventory will become ripe for initiation of lawsuits in 2016.

By the numbers, FLSA collective action litigation increased again in 2015 and far outpaced other types of employment-related class action filings. These filings represented another year-after-year increase in wage & hour litigation filed in federal courts since 2000; statistically, wage & hour filings have increased by over 450% in the last 15 years. Given this trend, employers can expect to see record-breaking FLSA filings in 2016. Various factors are contributing to the fueling of these lawsuits, including new FLSA regulations on overtime exemptions in 2016, minimum wage hikes in many states, and the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context. Layered on top of those issues is the difficulty of applying a New Deal piece of legislation to the realities of the digital workplace that no lawmakers could have contemplated in 1938. The compromises

that led to the passage of the legislation in the New Deal meant that ambiguities, omitted terms, and unanswered questions abound under the FLSA (something as basic as the definition of the word "work" does not exist in the statute), and the plaintiffs' bar is suing over those issues at a record pace.

Virtually all FLSA lawsuits are filed as collective actions, so these filings represent the most significant exposure to employers in terms of any workplace laws. By industry, retail and hospitality companies experienced a deluge of wage & hour class actions in 2015.

This trend is illustrated by the following chart:



The story behind these numbers is indicative of how the plaintiffs' class action bar chooses cases to litigate. It has a diminished appetite to invest in long-term cases that are fought for years, and where the chance of a plaintiffs' victory is fraught with challenges either as to certification or on the merits. Hence, this reflects the various differences in success factors in bringing employment discrimination and ERISA class actions, as compared to FLSA collective actions. Obtaining a "first stage" conditional certification order is possible without a "front end" investment in the case (*e.g.*, no expert is needed unlike the situation when certification is sought in an ERISA or employment discrimination class action) and without conducting significant discovery due to the certification standards under 29 U.S.C. § 216(b). Certification can be achieved in a shorter period of time (in 2 to 6 months after the filing of the lawsuit) and with little expenditure of attorneys' efforts on time-consuming discovery or with the costs of an expert. As a result, to the extent litigation of class actions by plaintiffs' lawyers are viewed as an investment, prosecution of wage & hour lawsuits is a relatively low cost investment without significant barriers to entry relative to other types of workplace class action litigation. As compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult or protracted, and more cost-effective and predictable. In terms of their "rate of return," the plaintiffs' bar can convert their case filings more readily into certification orders, and create the conditions for opportunistic settlements over shorter periods of time.

An increasing phenomenon in the growth of wage & hour litigation is worker awareness. Wage & hour laws are usually the domain of specialists, but in 2015 wage & hour issues made front-page news. The widespread public attention to how employees are paid almost certainly contributed to the sheer number of suits. Big verdicts and record settlements also played a part, as success typically begets copy-cats and litigation is no exception. Yet, the pervasive influence of technology is also helping to fuel this litigation trend. Technology has opened the doors for unprecedented levels of marketing and advertising by the plaintiffs' bar – either through direct soliciting of putative class members or in advancing the overall cause of lawsuits. Technology allows for the virtual commercialization of wage & hour cases through the Internet and social media.

Against this backdrop, wage & hour class actions filed in state court also represented an increasingly important part of this trend. Most pronounced in this respect were filings in the state courts of California, Florida, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania. California, in particular, continued its status in 2015 as a breeding ground for wage & hour class action litigation due to laxer class certification standards under state law, exceedingly generous damages remedies for workers, and more plaintiff-friendly approaches to class certification as well as wage & hour issues under the California Labor Code. For the third year out of the last four, the American Tort Reform Association ("ATRA") selected California as the nation's number one "judicial hellhole" as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.[8] Calling California the "worst of the worst" jurisdictions, the ATRA described the Golden State as home to "irrepressibly plaintiff-friendly lawmakers and judges," with "its often preposterous lawsuits and sometimes incredible court decisions that only encourage still litigation …"[9]

(v) Governmental Enforcement Litigation Trends In 2015

Meanwhile, on the governmental enforcement front, both the EEOC and the DOL expanded and intensified their administrative enforcement activities and litigation filings in 2015. At the same time, recoveries by settlement – measured by the top 10 settlements in government enforcement litigation – were more than double the level in 2014.

The EEOC marked important milestones in 2015, including the 50th anniversary of its founding, the 25th anniversary of the passage of the Americans With Disabilities Act, and the issuance of two Supreme Court decisions on key litigation issues for the Commission. The EEOC continued to follow through on the enforcement and litigation strategy plan it announced in April of 2006; that plan centers on the government bringing more systemic discrimination cases affecting large numbers of workers. As 2015 demonstrated, the EEOC's prosecution of pattern or practice lawsuits is now an agency-wide priority. Many of the high-level investigations started in the last three years mushroomed into the institution of EEOC pattern or practice lawsuits in 2015. Under the Obama Administration, increases in funding expanded the number of investigators.

The Commission's 2015 Annual Report[10] also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to systemic pattern or practice lawsuits

[8] The ATR Foundation's 2015 Report is available at http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2015.pdf

[9] *Id.* at 5. The "ten worst" jurisdictions according to the ATRA report are: (1) California, (2) New York, (3) Florida, (4) Missouri, (5) Illinois, (6) Louisiana, (7) Texas, (8) Virginia, (9) West Virginia, (10) Pennsyvania, and (11) New Jersey.

[10] The EEOC's 2015 Annual Report is published at http://www.eeoc.gov/eeoc/plan/index.cfm.

on behalf of larger groups of workers. The EEOC's FY 2015 Annual Report detailed the EEOC's activities from October 1, 2014 to September 30, 2015. The EEOC's Report indicated that:

- The Commission completed work on 268 systemic investigations in FY 2015, which resulted in 26 settlements or conciliation agreements that yielded a total recovery of $33.5 million for systemic claims; six of the settlements involved 50 alleged victims or more, and 13 settlements included 20 or more alleged victims. The FY 2015 recoveries represent an increase over recoveries in FY 2014 when the Commission netted only $13 million based on resolution of 78 systemic investigations.
- The EEOC recovered $356.6 million for alleged victims of employment discrimination in FY 2015 through mediation, conciliation, and settlements. This represented an increase of $60.5 million over FY 2014, when the Commission garnered $296.1 million for its enforcement efforts.
- For its lawsuits, the EEOC secured $65.3 million in recoveries in FY 2015. This figure was up more than $42.8 million as compared to the FY 2014 recoveries of $22.5 million. However, the EEOC resolved fewer lawsuits than it did last year, and recovered less money from those cases. Specifically, the EEOC resolved 155 lawsuits during FY 2015 for a total recovery of $65.3 million.
- The EEOC filed 142 lawsuits in 2015 (up slightly from the 133 lawsuits it filed in 2014), of which 16 cases involved claims of systemic discrimination on behalf of more than 20 workers, and 26 cases involved multiple alleged discrimination victims of up to 20 individuals. The EEOC had 218 cases on its active lawsuit docket by year end, of which 40% involved multiple aggrieved parties and 25% involved challenges to alleged systemic discrimination. Overall, this represented increases in these categories in terms of the make-up of the Commission's litigation being tilted toward systemic cases.
- The EEOC also received 89,385 administrative charges of discrimination, which was slightly up from the FY 2014 total of 88,778 charges. Thus, charge activity was one of the heaviest in the 52 year history of the Commission.
- More than in any other time in its history, the EEOC encountered significant criticism in the manner in which it enforced anti-discrimination laws. This criticism took various forms in terms of judicial sanctions, suits against the Commission by private litigants and States, and questioning by Congress over the EEOC's alleged lack of transparency.

Against this back-drop, 2015 saw modest recovery numbers in recent years on the part of the EEOC.

While the inevitable by-product of these governmental enforcement efforts is that employers are likely to face even more such claims in 2016, the EEOC's systemic litigation program is not without its detractors. Several federal judges entered significant sanctions against the EEOC – some in excess of seven figures – for its pursuit of pattern or practice cases that were deemed to be without a good faith basis in fact or law.[11] The U.S. Supreme Court accepted for review in December 2015 the largest fee sanction ever leveled against the Commission – the $4.7 million fee award in *CRST Van Expedited v. EEOC* – and a ruling on the case is expected in 2016. Nonetheless, until then, the EEOC shows no signs of adjusting its litigation strategy in light of those sanction rulings, and employers can expect that the coming year will entail aggressive "push-the-envelope" litigation filings and prosecutions by the EEOC, as well as the filing of larger systemic cases.

[11] An analysis of rulings in EEOC cases in 2015 is set forth in Chapter III, Section B.

Fiscal year 2015 marks another year in the EEOC's 2012-2016 Strategic Enforcement Plan ("SEP"). The SEP was created in 2012 as a blueprint to guide the EEOC's enforcement activity. Its most controversial and perhaps most far-reaching effect on the agency's activity is the priority it gives to systemic cases: those pattern or practice, policy, or class-like cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area. Systemic cases have been the main driver of EEOC litigation over the past few years, and likely will be well into the future. The EEOC is now fighting challenges to its power to bring those cases on a number of fronts. Among other things, it is aggressively challenging any court's ability to review how it conducts certain statutorily-mandated procedures before bringing suit, including how it investigates its cases and tries to conciliate those cases with employers. If successful in those efforts, the EEOC will have greatly eased its path to pursuing systemic cases.

The EEOC is not only expanding its reach in procedural terms, but also it is attempting to broaden the scope of its authority through an expansion of the scope of anti-discrimination laws themselves. In a number of recent cases, the EEOC has advanced novel legal theories that would, among other things, expand anti-discrimination protections to cover transgender employees and require employers to reasonably accommodate pregnant employees, even those who are experiencing normal pregnancies. The EEOC continues to push the edge of the envelope in any way it can, viewing itself as an agency that not only enforces the law, but one that expands the scope of those laws as well.

For this and other reasons, the agency has come under increasing scrutiny and criticism by Republican members of Congress. Such criticism is unlikely to stem the tide of systemic cases or deter the EEOC from continuing to try to expand its enforcement powers. There is still one year left to go in the 2012 SEP. Employers can expect the EEOC will use the next year to continue to push for expansion of its procedural and substantive limits.

The DOL also undertook aggressive enforcement activities in 2015. Over the past several years, the DOL's Wage & Hour Division ("WHD") fundamentally changed the way in which it pursues its investigations. Suffice to say, the investigations are more searching and extensive, and often result in higher monetary penalties for employers. According to the DOL, since early 2009, the WHD has closed 172,000 cases nationwide, resulting in more than $1.246 billion in back wages for over 250,000 workers. In FY 2015, the WHD collected more than $246 million in back wages, an increase of $6 million over the past year. Hence, in 2015, employers finally saw the impact of these changes on the WHD's enforcement priorities, and 2016 is apt to bring much of the same. With new DOL leadership in place, employers can expect the WHD to find renewed vigor in its enforcement program.

The DOL also focused its activities on wage & hour enforcement on what it terms "24/7." The WHD's new Administrator, Dr. David Weil, is an architect of the WHD's fissured industry initiative. This initiative focuses on several priority industries, including food services (both limited service/full service establishments), hotel/motel, residential construction, janitorial services, moving companies/logistics providers, agricultural products, landscaping/horticultural services, healthcare services, home healthcare services, grocery stores, and retail trade. In FY 2015, the WHD assessed nearly $4 million in civil penalties to sub-groups within these fissured industries, representing an increase of $1 million over the previous year.

In 2016, the WHD is likely to continue its pursuit of strategies that focus at the top of industry structures – the companies that affect how markets operate. Employers can expect the WHD to engage in coordinated investigation procedures, focus on related business entities (*e.g.*, franchisees, sub-contractors, staffing companies, etc.), rather than individual workplaces. As part of those investigations, the WHD will use its full spectrum of enforcement tools, including persuasion, education, penalties, hot goods provisions, and other legal tools.

On the ERISA enforcement front, the DOL's Employee Benefits Security Administration ("EBSA") recovered $696.3 million in benefits for direct payments to plans, participants, and beneficiaries. These enforcement efforts included 2,441 civil investigations and 89 lawsuits in FY 2015.

Not to be outdone, the National Labor Relations Board ("NLRB") undertook an ambitious agenda in 2015 too. It reconsidered well-settled NLRB principles on joint employer rules and representative elections, entertained the possibility of extending the protections of the National Labor Relations Act ("NLRA") to college athletes, and litigated novel claims seeking to hold franchisors liable for the personnel decisions of franchisees. More than any other area impacting workplace litigation, the NLRB also remained steadfast in its view that workplace arbitration agreements limiting class or collective claims are void under § 7 of the NLRA.

D. Trends For The Future Of Workplace Class Actions

The developing trends in workplace class action litigation are continuing to evolve. These trends require corporate counsel to plan and re-order their compliance strategies to stay ahead of and mitigate these risks and exposures.

So, what can corporate counsel expect in 2016?

Based on the developing trends, we anticipate significant developments in the coming year relative to certification rulings in employment discrimination and ERISA class actions; aggressive governmental enforcement litigation prosecutions; continuing growth in wage & hour litigation (fueled by new overtime regulations, local minimum wage legislation, challenges to independent contractor status and the "gig" business model, and litigation seeking to expand joint employer concepts); and more litigation over class action waivers in arbitration agreements.

Employment Discrimination Class Action Litigation – Both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC, employers can expect this area to remain "white hot" in 2016. On the employment discrimination front, corporate counsel can expect to see the following developments:

- The plaintiffs' bar will continue the process of refining the architecture of employment discrimination class actions to increase their chances to secure class certification in the post *Wal-Mart* and *Comcast* era. Their focus is likely to be on smaller class cases (*e.g.*, confined to a single corporate facility or operations in one state) as opposed to nationwide, mega-class action cases, as well as cases confined to a discrete practice – such as a hiring screen (*e.g.*, a criminal background check) – that impacts all workers in a similar fashion.
- In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3), as well as a range of partial "issues certification" theories under Rule 23(c)(4). The take-away from this strategy is an effort to "aim small" in order to certify a piece of the litigation, and use fee-shifting statutes on attorneys' fees to pressure employers into class-wide settlements.
- Plaintiffs are also likely to pursue certification of liability-only classes, while deferring damages issues and determinations, and pressuring employers to settle due to the transaction costs of individualized mini-trials on damages. In effect, this tactic is an end-run around the limitations on Rule 23(b)(3) articulated in *Comcast.*

Government Enforcement Litigation – At least until there is a potential change of the political party in control of the White House, employers can anticipate agressive enforcement of employment-related laws and regulations by the EEOC, DOL, and NLRB.

- In 2015, the EEOC continued to push its agenda through high-profile systemic cases. Employers can expect more of the same in 2016. The EEOC defines such cases as those that address policies or patterns or practices that have a broad impact on a region, industry, or an entire class of employees or job applicants. The EEOC has stated that it believes that those cases are key to its enforcement mission because they impact a large number of employees directly, and because they can drive change in company policies and industry standards.
- The EEOC's systemic litigation program therefore is expected to expand in 2016, with more filings, larger cases, and bigger monetary demands as the agency continues its aggressive enforcement activities. Corporate counsel also can expect to see more systemic administrative investigations relative to hiring issues (e.g., use of criminal histories in background checks) and those based on challenges to pay and promotions practices based on disparate impact theories due to alleged gender or race discrimination.
- Despite harsh criticism from employer groups and Republican members of Congress, as well as a series of courtroom setbacks for the EEOC in 2015 (with federal judges entering significant sanctions and fee awards against the Commission, which the government has uniformly appealed), it is expected that these rulings will embolden rather than damper the EEOC's aggressive enforcement of workplace bias laws. Additionally, the Supreme Court's future decision on the fee sanction award in the CRST Van Expedited case may well impact the EEOC's future philosophy in litigating pattern or practice lawsuits.
- The DOL, the NLRB, and the EEOC are likely to continue to "push the legal envelope" on joint employer, franchisor/franchisee, and the propriety of arbitration/class waiver issues.
- As the WHD seeks to put its imprimatur on DOL regulations and interpretations, it is apt to continue its aggressive enforcement activities. The WHD is posed to continue its focus on what it calls "fissured" industries, including restaurants, hotels, construction, janitorial services, healthcare, home healthcare, grocery, and retail. In its investigations, an increasing number of which appear to have been coordinated at higher levels of the agency, the WHD has been using its full assortment of enforcement tools, including the assessment of liquidated damages and civil money penalties, investigations spanning the three-year period for willful violations, and the use of media to influence the behavior of employers.

ERISA Class Action Litigation – The coming year in ERISA litigation promises to be yet another year of change and new rulings, with the U.S. Supreme Court expected to issue at least two ERISA decisions, one on equitable remedies, and another on ERISA preemption. On the ERISA front, corporate counsel can expect to see the following developments:

- *Wal-Mart* continues to play a central role in the certification of ERISA class actions, although it remains to be seen how much plaintiffs are able to make use of issue certification under Rule 23(c)(4) and sub-class certification to avoid commonality defenses.
- Following the Supreme Court's recent decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), more ERISA "stock drop" class actions are apt to be filed, after years of success by the defense bar in beating back these cases.

Wage & Hour Class Action Litigation – On the wage & hour front, the deluge of FLSA filings – making wage & hour claims the most predominant type of workplace class action pursued against corporate America – is expected to continue with no end in sight. The wave of wage & hour filings has yet to crest. Corporate counsel, therefore, can expect to see a consistent level of significant litigation activity. Key areas to watch include:

- In terms of novel litigation theories, employers can expect an increase in off-the-clock litigation brought by non-exempt employees, fueled by new theories attacking employer rounding practices, and increased off-duty use of PDA's and other mobile electronic devices vis-à-vis the application of the continuous workday rule.
- Increased litigation also is expected over issues in independent contractor misclassification and joint employer liability cases, as well as off-the-clock work (including donning and doffing cases), unpaid overtime, missed or late meal and rest breaks, time-shaving, and improper tip pooling.

Proposed Overtime Regulations – In July of 2015, the WHD proposed the most significant change to federal wage & hour law in decades to effectuate revolutionary revisions to the "Section 541" regulations that define the "white-collar" exemptions to the FLSA. The bottom-line effect of the proposed regulations would be to disqualify millions of employees from the FLSA's overtime exemptions. In summary, the DOL proposes to more than double the salary level necessary to qualify for the executive, administrative, and professional exemptions, and to increase substantially the threshold salary level for the highly compensated employee exemption. It also suggested that its final rule would provide for automatic annual increases, indexed to one of two metrics discussed in the DOL's notice of proposed rule-making. If adopted, such indexing would surely raise minimum salary levels much higher in the future. Finally, the DOL suggested that the new regulations might include changes to the definitions of duties that qualify an employee as exempt. Not surprisingly, the proposed regulations have been widely publicized and debated. While the DOL has not provided any clear indication of when the final rules will be issued, a plausible estimate is summer or fall of 2016, with an effective date 90 days later.

Movement For Dramatic Local Minimum Wage Increases – The past year also saw major gains for the movement to increase the minimum wage to $15 per hour. While only a few major cities (*e.g.*, Los Angeles, San Francisco and Seattle) have actually adopted ordinances that will raise the minimum wage to that level, the organized labor-backed push has received widespread media attention and a number of other cities and some states are considering similar proposals. As a result, employers can expect more local minimum wage increases in 2016.

Challenges To Treatment Of Service Providers As Independent Contractors – Another major substantive development has been a push to require businesses to treat more workers as employees, and therefore subject to wage & hour laws, rather than independent contractors whose compensation is unregulated. In July 2015, the WHD issued an "Administrator's Interpretation," in which it puts an aggressive spin on court decisions that distinguish employees from independent contractors and seeks to expand the DOL test applicable to the FLSA for determining employment – as opposed to independent contractor – status. Almost all service providers, the WHD intends to argue, must be treated as employees. As a result, employers can expect significant litigation in 2016 challenging independent contractor classification of large groups of workers.

Spill-Over Effect Of The DOL's Focus – Plaintiffs' wage & hour lawyers increasingly share the WHD's focus on challenging the use of independent contractors. This trend may be intensified by several large settlements in 2015 involving this issue, including FedEx's class action settlement of $228 million to California-based delivery drivers who claimed that their classification as independent contractors was improper. As success by the plaintiffs' class action bar often serves to encourage "copy-cat" lawsuits, employers are apt to see an increase in private party class actions in this context.

Challenges To The "On Demand/Gig" Business Model – Increased scrutiny of independent contractors is also on a collision course with the growth of the "on-demand" marketplace, or "gig" economy, where the use of independent contractors is at the heart of many businesses' operating models. Most prominently, Uber faces a class action claiming that it must treat its drivers as employees instead of independent contractors; the case is set for trial in June of 2016. The outcome of this closely watched case could have

far-reaching consequences and a profound impact on the viability of many other new-economy businesses. It might also deprive individuals of the informal work arrangements that are often available to independent contractors but incompatible with the highly regulated nature of an employment relationship.

Expansion Of Joint Employment Liability – The past year also saw significant steps by government enforcement litigators to expand the "joint employment" doctrine, which could impose additional wage & hour liabilities on many "upstream" businesses. In 2016, employers also can expect the EEOC and the private plaintiffs' bar to push for expansion of joint employment status in government enforcement lawsuits and employment discrimination class actions. In its widely discussed *Browning Ferris* decision in 2015, the NLRB ruled that even indirect, unexercised ability to affect working conditions of a group of workers may be sufficient to make a company a joint employer of the workers, even if they are employees of a different entity. The WHD has promised an Administrator's Interpretation, expected in 2016, advocating a similarly broad concept of joint employment in the FLSA context. Businesses that could be vulnerable to joint employer claims in 2016 include suppliers, contractors, lessors, private equity and venture capital investors, companies that outsource work, staffing agencies, franchisors, creditors, and parent entities that have subsidiary businesses.

Workplace Arbitration – In response to these substantive developments and the continued torrent of wage & hour cases, employers have looked for additional defenses. One continued bright spot was arbitration. As a result, the trend toward enforcing agreements to submit employment disputes, including wage & hour claims, to arbitration – and specifically to individual, non-class arbitration – continued. While the NLRB continues to insist that agreements to arbitrate on an individual basis violate the National Labor Relations Act, federal courts overwhelmingly continue reject this argument. Further, courts have increasingly ruled that the question of whether an arbitration agreement calls for class rather than individual arbitration is within the province of judges, not arbitrators. This development is important because courts have been far less willing than arbitrators to interpret arbitration agreements as authorizing class arbitration even when the agreements do not mention class arbitration at all. The Supreme Court also has made clear, most recently in its *DirecTV* decision, that it will not allow courts to engage in creative interpretation of arbitration agreements so as to allow class arbitration. Notwithstanding the FAA and the supremacy clause of the U.S. Constitution, California courts continued to bridle at enforcing arbitration agreements as written. In 2014, the California Supreme Court ruled in *Iskanian, et al. v. CLS Transportation,* 59 Cal. 4th 349 (2014), that the right to pursue state-wide penalties under the California's Private Attorney General Act ("PAGA") is non-waivable and therefore that an arbitration clause cannot limit an employee to seeking recovery based on his or her own personal harm. In 2015, the U.S. Supreme Court declined to review both *Iskanian* and *Fowler, et al. v. Carmax, Inc.,* 2015 Cal. App. Unpub. LEXIS 559 (Cal. App. 2d Dist. Jan. 28, 2015), a California appellate decision following it. Employers continue to ask the U.S. Supreme Court to review the *Iskanian* rule, as applied in new cases, in hopes of gaining even greater assurance that they can agree with their employees to resolve disputes through ordinary bilateral arbitration without being forced into arbitration on a class, collective, or other representative basis. Finally, despite the cases that continue to uphold class action waivers in arbitration agreements, employers still seem reluctant to implement arbitration programs or revise their current arbitration agreements. The debate about the scope of class action waivers seems to be an obstacle, and there is still no "prevailing wisdom" as to whether to use class action waivers for all claims or to limit them to wage and hour disputes. Plaintiffs' attorneys were diligent in 2015, however, in their efforts to remain the veritable thorn in employers' collective sides by accepting as fact that class waivers are enforceable and that their class and collective actions are likely to be decertified, even if certified – or conditionally certified – earlier in a case. A number of those plaintiffs' class action firms willingly, and almost gleefully, pursued claims in arbitration or in court on behalf of individual claimants or plaintiffs. Because of their zeal, in 2015 a number of employers faced hundreds of individual claims in arbitration after compelling several away from the courts where a sole litigant or several plaintiffs sought class or collective action relief. Other employers faced a similar surge of individual or multi-plaintiff cases filed in separate courts by former class or putative class members across multiple jurisdictions after convincing a court to decertify or refuse to certify a class that would otherwise have contained them. The

plaintiffs' lawyers' mantra seems to have been that they will give employers the arbitrations and decertification they desire, followed by the scourge of numerous individual actions (and the concomitant pressure to settle due to the cost of defense). In sum, these conditions add up to a litigation environment where arbitration defenses are apt to spawn various new and varied litigation approaches by both the plaintiffs' class action bar and the defense bar. Employers can expect these litigation strategies to play out in earnest in 2016.

Certification Standards – The standards for certifying a class action under Rule 23, and for permitting employees to opt-in to would-be collective actions, remain important battlegrounds. Employers have enjoyed increasing success in preventing certification or moving for decertification, but plaintiffs' counsel have responded by seeking certification of class actions as to specific issues, attempting – sometimes successfully – to expand the applicability of Rule 23(c)(4). When a class action or collective action has been decertified, some plaintiffs' counsel – hoping to replicate the settlement pressure of a class or collective action – have filed individual wage & hour suits by many of the employees who were class or collective action members. The strategy appears to be to "win" a single plaintiff case and then seek multiple settlements on behalf of other individual plaintiffs. Some plaintiffs' counsel have stated that their initial class action was filed primarily to obtain discovery and a class list of contact information, so that they can locate multiple individual plaintiffs for multiple individual lawsuits. Employer strategies to counter these efforts were sometimes successful in 2015, but plaintiffs' counsel are likely to continue to try this tactic. Employers also have high hopes that the U.S. Supreme Court will limit the use of statistical sampling based in putative or certified class or collective actions, in which large numbers of employees each assert small-dollar claims. In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court agreed to consider whether plaintiffs can use statistical averages as proof that that a class of employees was denied overtime pay; and whether an overtime class action can include employees who did not actually suffer any lost overtime pay. At oral argument in November of 2015, however, the Supreme Court focused, instead, on the far narrower question of whether plaintiffs can rely on the burden-shifting rule of a 1947 opinion – *Andersen v. Mt. Clemens Pottery Co.* – to prove that a wage & hour violation occurred. It remains to be seen how this issue will play out in 2016.

Use Of Rule 68 To Counter Class Actions – The Supreme Court also agreed in 2015 to consider the circumstances in which a defendant might be able to block a class action from proceeding by making a Rule 68 offer of judgment for the full value of the named plaintiffs' individual claims. A decision in the case – *Campbell-Ewald Co. v. Gomez* – expected in 2016, and is likely to have an important effect on employers' ability to avoid wage & hour class or collective actions by mooting the named plaintiffs' claims.

E. Conclusion

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2015 was a year of great change in the landscape of Rule 23. As these issues play out in 2016, additional chapters in the class action playbook will be written.

The lesson to draw from 2015 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2016 in bringing class action and collective action litigation against employers.

These novel challenges demand a shift of thinking in the way companies formulate their strategies. As class actions and collective actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel. Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel's priorities list for 2016.

II. Significant Class Action Settlements In 2015

By any measure, 2015 was a year of blockbuster class action settlements. The plaintiffs' bar and government enforcement attorneys obtained many significant settlements over the last year. Particularly in the areas of employment discrimination class actions, wage & hour collective actions, and governmental enforcement lawsuits, the settlements were for record amounts.

For employment discrimination, wage & hour, and government enforcement litigation, the settlement values represented increases over settlements obtained in 2014. Conversely, the value of ERISA settlements declined slightly. This Chapter evaluates the top ten private plaintiff-initiated monetary settlements, government-initiated monetary settlements, and noteworthy injunctive relief provisions in class action settlements.

A. Top Ten Private Plaintiff-Initiated Monetary Settlements

Plaintiffs' lawyers secured many large settlements in 2015 for employment discrimination, wage & hour, and ERISA class actions. The top ten settlements from these categories totaled $1.77 billion in 2015. This represented a significant increase from 2014, when the top ten settlements in these categories totaled $1.67 billion; by further comparison, in 2013 the top ten settlements in these categories totaled $638.15 million.

The plaintiffs' bar also pursued a myriad of other statutory workplace class actions. In recognition of the growing exposure these claims present to employers, this Chapter has been expanded to include a section analyzing the top ten settlements in this area. These cases involve class actions for violations of workplace antitrust laws, the Fair Credit Reporting Act, the Worker Adjustment and Retraining Notification Act, and other workplace-related statutory laws. The top ten settlements in this category totaled $713.85 million in 2015. This represented nearly a ten-fold increase over 2014, when the top ten settlements were $74.03 million.

In sum, based on all categories, the top ten aggregate settlement numbers in 2015 reached an all-time high of $2.48 billion as compared to $1.87 billion in 2014.

Settlements In Private Plaintiff Employment Discrimination Class Action Lawsuits

For employment discrimination class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2015 totaled $295.57 million. This represented a significant increase from the prior year. By comparison, the top ten settlements in 2014 totaled $227.93 million, while in 2013 they totaled $234.1 million.

1. $128 million – City Of New York
2. $76.3 million – City Of New York
3. $37 million – Lawrence Livermore National Security, LLC
4. $22 million – Signal International LLC
5. $8.2 million – Daiichi Sankyo, Inc.
6. $8 million – Novartis AG
7. $7.8 million – City Of Chicago
8. $3 million – BAE Systems Norfolk Ship Repair, Inc.
9. $2.87 million – Publicas Group

10. $2.4 million – Daimler Trucks North America LLC

The biggest settlements involved pay and promotions class actions. By category, there were four gender and four race discrimination class actions, as well as two class actions based on age and national origin discrimination.

1. **$128 million –*The Vulcan Society, Inc., et al. v. City Of New York*, Case No. 07-CV-2067 (E.D.N.Y. Mar. 11, 2015)** (final approval granted for a class action settlement to resolve claims alleging that certain aspects of the City's policies of the pass-fail and rank ordering used on written exams had an unlawful disparate impact on African-American and Hispanic candidates for entry-level firefighters positions).

2. **$76.3 million – *Andrews, et al. v. City Of New York*, Case No. 10-CV-2426 (S.D.N.Y. Mar. 26, 2015)** (final approval granted for a class action settlement for female school safety agents suing over the City's alleged violations of the Equal Pay Act, Title VII, and the New York Human Rights Law, claiming that they were paid less than male counterparts, including $33 million in back pay and $43.3 million in retroactive raises).

3. **$37 million – *Andrews, et al. v. Lawrence Livermore National Security, LLC*, Case No. RG09453596 (Cal. Super. Ct. Sept. 30, 2015)** (settlement of an employment discrimination class action involving 129 workers who claimed the company discriminated against them on the basis of age in a workforce restructuring).

4. **$22 million – *David, et al. v. Signal International, LLC*, Case No. 08-CV-1220 (E.D. La. July 12, 2015)** (settlement through bankruptcy of class action claims of 500 foreign-based workers who alleged discrimination under 42 U.S.C. § 1981 due to their national origin in terms of their recruitment and treatment at oil-rig repair and construction sites in Mississippi and Texas).

5. **$8.2 million – *Wellens, et al. v. Daiichi Sankyo, Inc.*, Case No. 13-CV-581 (N.D. Cal. Oct. 16, 2015)** (preliminary approval granted for a class action settlement involving gender pay discrimination allegations of 1,400 female employees who claimed the company paid them less than their male peers).

6. **$8 million – *Dickerson, et al. v. Novartis AG*, Case No. 15-CV-1980 (S.D.N.Y. Dec. 23, 2015)** (request for settlement approval for class action and collective action claims by female employees alleging gender discrimination relative to pay and promotions).

7. **$7.8 million – *Godfrey, et al. v. City Of Chicago*, Case No. 12-CV-8601 (N.D. Ill. May 28, 2015)** (final approval granted for a class action settlement brought by female African-American applicants against the Chicago Fire Department alleging discrimination on account of physical strength and other testing).

8. **$3 million – *Aviles, et al. v. BAE Systems Norfolk Ship Repair, Inc.*, Case No. 13-CV-00418 (E.D. Va. Sept. 28, 2015)** (preliminary approval granted for a class action settlement for gender discrimination claims involving 177 female workers who asserted they were victims of discrimination while working in the shipyard).

9. **$2.87 million – *Da Silva Moore, et al. v. Publicis Group, SA*, Case No. 11-CV-1279 (S.D.N.Y. Oct. 13, 2015)** (request for settlement approval for class action relative to gender discrimination claims of former female public relations executives regarding pay and pregnancy leave).

10. **$2.4 million – *Avakian, et al. v. Daimler Trucks North America LLC*, Case No. EEEMRC140925-11355 (Oregon Bureau of Labor and Industries Jan. 27, 2015)** (conciliation

agreement for settlement of the complaints of minority workers alleging threats and slurs at the company's truck manufacturing plant.)

Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top ten private settlements entered into or paid in 2015 totaled $463.6 million. This is a significant increase – more than double – from the value of the top ten settlements in 2014, which totaled $215 million, and in 2013, which totaled $248.45 million.

1. $225 million – Fed Ex Ground Package System, Inc.
2. $80 million – U.S. Indian Health Services
3. $36 million – Bank Of America Corp.
4. $30 million – Publix Super Markets, Inc.
5. $28 million – Schneider National Carriers, Inc.
6. $16.5 million – Bob Evans Farms, Inc.
7. $15 million – RCI Hospitality Holdings, Inc.
8. $13.1 million – Southeastern Pennsylvania Transportation Authority
9. $10 million – Source Refrigeration & HVAC, Inc.
10. $10 million – Dick's Sporting Goods, Inc.

The top ten settlements were split evenly between nationwide and state-specific claims, and all but three of the top ten settlements involved wage & hour lawsuits pending in either federal or state courts in New York and California.

1. **$225 million – *Alexander, et al. v. Fed Ex Ground Package System, Inc.*, Case No. 05-CV-38 (N.D. Cal. Oct. 15, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims of drivers asserting that they were misclassified as independent contractors and deprived of benefits and wages accorded to employees).

2. **$80 million – *Labors' International Union Of North America, et al. v. U.S. Indian Health Services* (HHSD May 26, 2015)** (resolving multiple grievances, the U.S. Indian Health Services agreed to settle class action claims by employees for overtime on extended shifts at healthcare facilities, as well as for off-the-clock work and uncompensated travel time).

3. **$36 million – *Boyd, et al. v. Bank Of America Corp.*, Case No. 13-CV-561 (C.D. Cal. Aug. 24, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims involving misclassification of residential real estate appraisers as exempt from overtime).

4. **$30 million – *Ott, et al. v. Publix Super Markets, Inc.*, Case No. 12-CV-486 (M.D. Tenn. Feb. 3, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims alleging a failure to pay the required amount of overtime to department managers and assistant department managers who were paid overtime base on a "fluctuating workweek" calculation method).

5. **$28 million – *Bickley, et al. v. Schneider National Carriers, Inc.*, Case No. 08-CV-5806 (N.D. Cal. Sept. 15, 2015)** (request for settlement approval for class action regarding wage & hour claims

involving California-based truckers who alleged their employer failed to provide meal and rest breaks).

6. **$16.5 million – *Snodgrass, et al. v. Bob Evans Farms, Inc.*, Case No. 12-CV-768 (S.D. Ohio Oct. 23, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims involving 2,500 assistant managers who allegedly were misclassified as exempt from overtime).

7. **$15 million – *Hart, et al. v. RCI Hospitality Holdings, Inc.*, Case No. 09-CV-3043 (S.D.N.Y. Sept. 22, 2015)** (final approval granted for a class action settlement of wage & hour claims brought by exotic dancers accusing an adult night club operator of misclassification of the dancers as independent contractors and refusing to pay minimum and overtime wages).

8. **$13.1 million – *Bell, et al. v. Southeastern Pennsylvania Transportation Authority*, Case No. 11-CV-4047 (E.D. Penn. Aug. 24, 2015)** (approval granted for a FLSA collective action settlement involving claims that the transit agency failed to pay drivers for pre-shift work).

9. **$10 million – *Galeener, et al. v. Source Refrigeration & HVAC, Inc.*, Case No. 13-CV-4960 (N.D. Cal. Dec. 11, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims against a refrigeration company, which alleged a failure to pay technicians for attending meetings and miscalculating their overtime rates).

10. **$10 million – *Lapan, et al. v. Dick's Sporting Goods, Inc.*, Case No. 13-CV-11390 (D. Mass. Dec. 11, 2015)** (preliminary approval granted for a class action settlement of wage & hour claims involving allegations of shorting employees of wages and overtime pay by misclassifying them).

Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top ten private settlements entered into or paid in 2015 totaled $926.5 million. This amount was down slightly from 2014, when the total monetary value of the top ten private settlements reached $1.31 billion; in 2013, by comparison, the top ten settlements totaled $155.6 million.

1. $354.5 million – United Automobile Aerospace And Agricultural Implement Workers Of America
2. $140 million – Nationwide Life Insurance Co.
3. $90 million – The Boeing Co.
4. $82 million – Meriter Health Services Employee Retirement Plan
5. $62 million – Lockheed Martin Corp.
6. $57 million – The Boeing Co.
7. $40 million –American International Group, Inc.
8. $36 million – Northern Trust Investments N.A.
9. $33 million – FreightCar America, Inc.
10. $32 million – Novant Health, Inc.

The largest ERISA class action settlements involved disputes over breach of fiduciary duty, use of revenue sharing agreements, reduction of retiree benefits, and/or investing pension or 401(k) assets into company stock.

1. **$354.5 million – *Office And Professional Employees International Union, Local Union 494, et al. v. United Automobile Aerospace And Agricultural Implement Workers Of America, International Union*, Case No. 14-CV-14868 (E.D. Mich. Nov. 6, 2015)** (final approval granted for settlement of an ERISA class action resolving claims that the labor union made unauthorized changes to the employees' health plan and allegedly violated its collective bargaining obligations).

2. **$140 million – *Haddock, et al. v. Nationwide Life Insurance Co.*, Case No. 01-CV-1552 (D. Conn. April 9, 2015)** (final approval granted for settlement of an ERISA class action involving various claims over Nationwide's collection of undisclosed revenue sharing payments from non-proprietary mutual funds).

3. **$90 million – *Society For Professional Engineering Employees In Aerospace, IFPTE Local 2001, et al. v. The Boeing Co.*, Case No. 05-CV-1251 (D. Kan. Sept. 28, 2015)** (final approval granted for settlement of an ERISA class action filed by several unions that contended that employees who lost their jobs following the 2005 sale of a Kansas commercial aircraft facility were entitled to retirement benefits).

4. **$82 million – *Johnson, et al. v. Meriter Health Services Employee Retirement Plan*, Case No. 10-CV-426 (W.D. Wis. Jan. 5, 2015)** (final approval granted for settlement of an ERISA class action relative to claims by employees alleging that pension payments were improperly calculated).

5. **$62 million – *Abbott, et al. v. Lockheed Martin Corp.*, Case No. 06-CV-701 (S.D. Ill. July 20, 2015)** (final approval granted for settlement of an ERISA class action alleging mismanagement of workers' 401(k) retirement plan).

6. **$57 million – *Spane, et al. v. The Boeing Co.*, Case No. 06-CV-743 (S.D. Ill. Nov. 17, 2015)** (preliminary approval granted for settlement of an ERISA class action relative to breach of fiduciary duties over payment of excessive pension administration fees).

7. **$40 million – *In Re American International Group, Inc., ERISA Litigation II*, Case No. 08-CV-5722 (S.D.N.Y. Sept. 18, 2015)** (final approval granted for settlement of an ERISA class action alleging that employee pension plans improperly invested in the company's own ineffectively performing stock following the 2008 mortgage crisis).

8. **$36 million – *Diebold, et al. v. Northern Trust Investments N.A.*, Case No. 09-CV-1934 (N.D. Ill. Aug. 8, 2015)** (final approval granted for settlement of an ERISA class action that alleged Northern Trust breached its duties to retirement plans and their participants and beneficiaries).

9. **$33 million – *Zanghi, et al. v. FreightCar America, Inc.*, Case No. 13-CV-146 (W.D. Pa. Sept. 21, 2015)** (final approval granted for settlement of an ERISA class action over the company's termination of retiree medical and life insurance benefits).

10. **$32 million – Kruger, et al. v. Novant Health, Inc., Case No. 14-CV-208 (M.D.N.C. Nov. 9, 2015)** (preliminary approval granted for settlement of an ERISA class action relative to breach of fiduciary duties in overpaying fees for fund investments).

Settlements In Private Plaintiff Statutory Workplace Class Actions

Plaintiffs' lawyers also pursued a myriad of statutory claims in workplace class actions brought against employers (outside of the areas of employment discrimination, wage & hour, and ERISA class actions).

These cases involved statutory claims for workplace antitrust violations, Worker Adjustment and Retraining Notification Act ("WARN") violations, Fair Credit Reporting Act ("FCRA") violations, and other federal and state statutory law violations. The top ten settlements in this category increased exponentially, as they totaled $713.85 million in 2015; in contrast, they totaled $74.03 million in 2014.

1. $415 million – Google, Inc.
2. $125 million – State Of Connecticut
3. $75 million – City Of New Orleans
4. $42 million – VHS Of Michigan, Inc.
5. $18 million – Fulton County, Georgia
6. $10.1 million – Orange County Attorneys Association
7. $9 million – District Of Columbia
8. $8 million – Sony Pictures Entertainment, Inc.
9. $7 million – American Managed Care, LLC
10. $4.75 million – Sterling Infosystems, Inc.

The top 10 biggest settlements involved five contract/civil service class actions, two workplace antitrust class actions, as well as one class action for FCRA claims, one WARN Act class action, and one workplace data breach class action.

1. **$415 million – *In Re High-Tech Employee Antitrust Litigation*, Case No. 11-CV-2509 (N.D. Cal. Sept. 2, 2015)** (final approval granted for settlement of a workplace antitrust class action over claims accusing Google Inc., Apple Inc., and others of illegally agreeing not to poach each other's engineers).

2. **$125 million – *State Employees Bargaining Agent Coalition, et al. v. State Of Connecticut*, Case No. 03-CV-221 (D. Conn. April 28, 2015)** (final approval granted for a class action settlement involving claims that state officials violated labor organizations' and state employees' First Amendment rights to freedom of association by discriminatorily laying-off only union members when reducing the state's workforce).

3. **$75 million – *New Orleans Firefighters Local 632, et al. v. City Of New Orleans*, Case No. 81-11108 (La. Civil Dist. Ct. Oct. 15, 2015)** (settlement of a class action by city firefighters over civil service and pension entitlements).

4. **$42 million – *Cason-Merenda, et al. v. VHS Of Michigan, Inc.*, Case No. 06-CV-15601 (E.D. Mich. Sept. 11, 2015)** (preliminary approval granted for settlement of a workplace antitrust class action brought by 24,000 nurses accusing eight Detroit-area hospitals of conspiring to keep their wages low).

5. **$18 million – *Andrews, et al. v. Fulton County, Georgia*, Case No. 2012-CV-223498 (Ga. Super. Ct. Nov. 18, 2015)** (settlement of a class action brought by municipal employees over premium pay, civil service, and pension issues).

6. **$10.1 million – *Orange County v. Orange County Attorneys Association*, Case No. 30-2013-638110 (Cal. Super. Ct. May 12, 2015)** (final approval granted for settlement of a class action relative to union's allegations against Orange County supervisors who illegally imposed changes to the labor terms of county attorneys).

7. **$9 million – *Jones, et al. v. District Of Columbia*, Case No. 07-CV-1206 (D.D.C. Oct. 14, 2015)** (preliminary approval granted for a class action settlement alleging improprieties in the Disability Compensation Program administered by the District of Columbia for employees).

8. **$8 million – *Corona, et al. v. Sony Pictures Entertainment Inc.*, Case No. 14-CV-9600 (C.D. Cal. Nov. 16, 2015)** (preliminary approval granted for a class action settlement of claims for breach of privacy of employees whose personal information was hacked and stolen off the company's IT systems).

9. **$7 million – *Universal Health Care Group, Inc. v. American Managed Care, LLC*, Case No. 13-BK-1520 (M.D. Fla. Mar. 19, 2015)** (final approval granted for a class action settlement of claims brought by former employees of health care company claiming violations of the WARN).

10. **$4.75 million – *Ernst, et al. v. Sterling Infosystems, Inc.*, Case No. 12-CV-8794 (S.D.N.Y. Nov. 13, 2015)** (final approval granted for a class action settlement alleging violations of the FCRA on behalf of job applicants).

B. Top Ten Government-Initiated Monetary Settlements

The EEOC and the U.S. Department of Labor ("DOL") aggressively litigated government enforcement actions in 2015.

Based on preliminary figures for the U.S. Government's 2015 fiscal year,[12] the EEOC filed 142 new merits lawsuits, including 26 non-systemic multi-party suits and 16 systemic pattern or practice lawsuits. In 2015, the EEOC resolved 155 pending lawsuits and secured $65.3 million in settlements for allegedly injured victims of job bias, an increase of $42.8 million as compared to the previous year. The EEOC also received a total of 89,385 private sector charges of discrimination, which were approximately 600 more charges than the previous year (and one of the highest totals in any year since 1964). In addition, the EEOC's docket of systemic pattern or practice cases grew to over 20% of the Commission's case load.

The DOL was equally aggressive in 2015.[13] It recovered $246.8 million in back wages for 240,340 workers, an increase of $6.8 million in recoveries over 2014. The back wages collected in 2015 stemmed primarily from FLSA enforcement, as $137.7 million was for overtime violations and $37.8 million was for minimum wage violations. For enforcement of the ERISA, recoveries were $837.5 million.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2015 totaled $82.8 million. This entailed a significant increase over 2014, when the top ten settlements totaled $39.45 million, but was lower than the top ten settlements in 2013, which totaled $171.6 million.

1. $18.3 million – Halliburton, Inc.

2. $14.5 million – Patterson-UTI Drilling Company, LLC

[12] The EEOC's 2015 Annual Report is published at http://www.eeoc.gov/eeoc/plan/upload/2015.pdf.

[13] The DOL's 2015 Annual Report is published at http://www.dol.gov/esba/newsroom/fsfyagencyresults.html.

3. $13 million – General Information Services, Inc.

4. $12.7 million – Local 28, Sheet Metal Workers' International Association

5. $5 million – National Consolidated Couriers, Inc.

6. $5 million – Signal International LLC

7. $4 million – Hillshire Brands Co.

8. $3.8 million – Consolidated Edison Co. Of New York

9. $3.5 million – Masse Contracting

10. $3 million – Stanford Yellow Taxi Cab

Five of the settlements involved EEOC pattern or practice lawsuits, four settlements involved federal DOL enforcement actions, and one settlement involved a CFPB action.

Settlements Of Government-Initiated Enforcement Actions And Pattern Or Practice Lawsuits

1. **$18.3 million – *U.S. Department Of Labor v. Halliburton, Inc.*, Case No. 1724773 (DOL Sept. 22, 2015)** (approval of a settlement granted for overtime wages involving an oil and gas service provider that allegedly misclassified employees as exempt from overtime pay).

2. **$14.5 million – *EEOC v. Patterson-UTI Drilling Company, LLC*, Case No. 15-CV-600 (D. Colo. April 17, 2015)** (consent decree approved in an EEOC pattern or practice lawsuit alleging race discrimination).

3. **$13 million – *In Re General Information Services, Inc.*, Case No. 2015-CFPB-28 (Oct. 29, 2015)** (settlement of violations of the Fair Credit Reporting Act in a consent order before the U.S. Consumer Financial Protection Bureau relative to the use of employment background screening reports issued to employers).

4. **$12.7 million – *EEOC v. Local 28, Sheet Metal Workers' International Association*, Case No. 71-CV-2877 (S.D.N.Y. Mar. 30, 2015)** (consent decree approved in an EEOC pattern or practice lawsuit involving claims of race discrimination on behalf of minority sheet metal workers).

5. **$5 million – *U.S. Department Of Labor v. National Consolidated Couriers, Inc.*, Case No. 15-CV-3224 (N.D. Cal. July 15, 2015)** (consent judgment entered in an FLSA action for unpaid wages and damages due to misclassification of more than 600 delivery drivers in California as independent contractors).

6. **$5 million – *EEOC v. Signal International LLC*, Case No. 12-CV-557 (E.D. La. Dec. 18, 2015)** (approval of consent decree through bankruptcy relative to the EEOC's pattern or practice claims of national origin discrimination for over 500 foreign-based workers due to their national origin).

7. **$4 million – *EEOC v. Hillshire Brands Co.*, Case No. 15-CV-1347 (E.D. Tex. Dec. 18, 2015)** (consent decree approved in an EEOC pattern or practice lawsuit alleging race discrimination and hostile environment claims).

8. **$3.8 million – *EEOC v. Consolidated Edison Co. Of New York*, Case No. 520-2007-03938 (EEOC Sept. 9, 2015)** (conciliation agreement between the EEOC and employer resolving

allegations of sexual harassment and discrimination against women in field positions between 2006 and 2015).

9. **$3.5 million – *U.S. Department Of Labor v. Masse Contracting*, Case No. 1701126 (DOL June 22, 2015)** (settlement of FLSA claims brought against six Gulf Coast staffing firms on behalf of 3,000 workers alleging violations of the FLSA due to payment of regular wages mislabeled as per diem payments to cheat workers out of correct overtime wages).

10. **$3 million – *U.S. Department Of Labor v. Stanford Yellow Taxi Cab*, Case No. 13-CV-4208 (N.D. Cal. May 13, 2015)** (approval of settlement of FLSA claims involving allegations that the employer misclassified drivers as independent contractors).

C. Noteworthy Injunctive Relief Provisions In Class Action Settlements

Generally, the types of relief obtained in settlements of employment discrimination class actions can be grouped into five categories, including modification of internal personnel practices and procedures; oversight and monitoring of corporate practices; mandatory training of supervisory personnel and employees; compensation for named plaintiffs and class members; and an award of attorneys' fees and costs for class counsel. In addition to substantial payments for overtime liability, settlements of FLSA collective actions often involve changes to payroll practices and procedures. In ERISA class action settlements, the terms typically include monetary payments along with injunctive orders barring fiduciaries and third-parties from serving as plan fiduciaries or managers.

Class action settlements involving private plaintiffs generally contain one or more of these items of non-monetary injunctive relief, but rarely contain all of them. Attorneys representing the U.S. Government in enforcement litigation actions also secured several settlements in 2015 that had noteworthy injunctive relief provisions. This reflects in some measure the significant "public interest" component of government-initiated enforcement litigation.

Among the more novel and/or onerous non-monetary relief requirements imposed on employers in 2015 were the following:

- Adopt and implement a language access program to ensure non-English speaking workers can obtain governmental services;
- Extend offers of employment to applicants who were allegedly denied positions due to their gender or race;
- Revise hiring procedures and recruitment policies to eliminate any requirement for hiring only U.S. citizens and/or including U.S. citizenship requirements in job postings and recruitment materials, including modification of the employer's on-line application software;
- Adopt reporting procedures to the EEOC to account for applicant flow and hiring data to enable the Commission to monitor compliance with affirmative hiring obligations;
- Perform a validation study on hiring and selection procedures to avoid discrimination in hiring, promotions, and terminations;
- Develop marketing and advertising materials to feature females in photographs in such materials, and engage in outreach recruitment to attract qualified females for job openings;
- Adopt new testing and evaluation procedures for hiring, promotion, and compensation; and,
- Adopt hiring goals for applicants based on their minority status.

The top ten settlements in 2015 involving significant injunctive relief provisions include:

1. ***U.S. Department of Labor v. Washington State Department Of Labor & Industries*, Case No. 12-WA-006 (DOL Oct. 1, 2015).** Based on a complaint of national origin and disability discrimination, the State of Washington agreed to a case resolution in which it will develop and implement a language access program to ensure non-English speaking workers are not impaired from obtaining governmental services.

2. ***U.S. Department Of Labor v. Fastenal Co.*, Case No. 1725248 (DOL Oct. 9, 2015).** Based on hiring discrimination claims, the company agreed to a case resolution in which it will hire 171 African-American and female applicants to fill future job openings.

3. ***EEOC v. AJ 3860, LLC*, Case No. 14-CV-1621 (M.D. Fla. Aug. 10, 2015).** The EEOC brought an action alleging that the employer discriminated against African-American employees and retaliated against a manager who objected to alleged workplace racism. The employer operated a series of clubs in Florida. Based on a default judgment, the Court enjoined Defendants from on-going discriminatory practices, and required the employer to report applicant flow and hiring data for African-American applicants to the EEOC so that the Commission could monitor compliance with the injunctive relief order.

4. ***Foster, et al. v. Pittsburgh Bureau Of Police*, Case No. 12-CV-127 (W.D. Pa. Nov. 18, 2015).** Plaintiffs sued the Pittsburgh Bureau Of Police alleging disparate treatment and disparate impact claims based on Title VII. Plaintiffs alleged that the City's hiring process operated as a pattern or practice of systemic discrimination with respect to African-American applicants, and had an adverse impact on those applicants. As part of the consent decree ordered by the Court, the Bureau of Police agreed to validate its hiring and selection procedures so as to eliminate any issues relative to disparate impact upon minority applicants.

5. ***EEOC v. Cintas Corp.*, Case No. 04-CV-40132 (E.D. Mich. Nov. 11, 2015).** The EEOC sued the employer for failing to recruit or hire females for the position of route sales driver/service sales representative. As part of a consent decree, the Court ordered Defendant to feature photographs of females in marketing and advertising materials, and engage in affirmative outreach recruitment to attract qualified females for job openings.

6. ***U.S. Department Of Labor v. Foreclosure Connection, Inc.*, Case No. 15-CV-653 (D. Utah Sept. 22, 2015).** The U.S. Department of Labor sued the employer alleging that it terminated, retaliated, and discriminated against current and former employees who had participated in the DOL's investigation of alleged payroll practices that violated the FLSA. The Court entered an injunction requiring Defendant to notify its workforce that employees have the right to speak to DOL investigators, as well as the employer's duty to avoid any behavior that could impede or retaliate against current or former employees. To that end, the Court ordered an officer of Defendant, in the presence of a representative of DOL, to read out loud in a workplace meeting of all employees – in both English and Spanish – a statement to workers informing them of the right to speak with representatives of the DOL free from retaliation or threats of retaliation or intimidation by Defendants.

7. ***Sims, et al. v. Pfizer, Inc.*, Case No. 10-CV-10743 (E.D. Mich. Nov. 13, 2015).** Plaintiffs sued an employer alleging that it violated the Labor-Management Relations Act, the ERISA, and applicable collective bargaining agreements by withdrawing healthcare benefits to retired workers. As part of a class action settlement, Defendant agreed to provide lifetime healthcare benefits to a group of retired workers for the rest of their lives.

8. ***EEOC v. United Airlines, Inc.*, Case No. 10-CV-1699 (N.D. Ill. June 8, 2015).** The EEOC sued an employer under the ADA on the grounds that it denied reasonable accommodations to disabled

employees by declining to reassign them to vacant positions for which they were qualified. As part of the consent decree ordered by the Court, the company agreed to adopt new personnel policies with regard to reassignments as a reasonable accommodation for employees with disabilities.

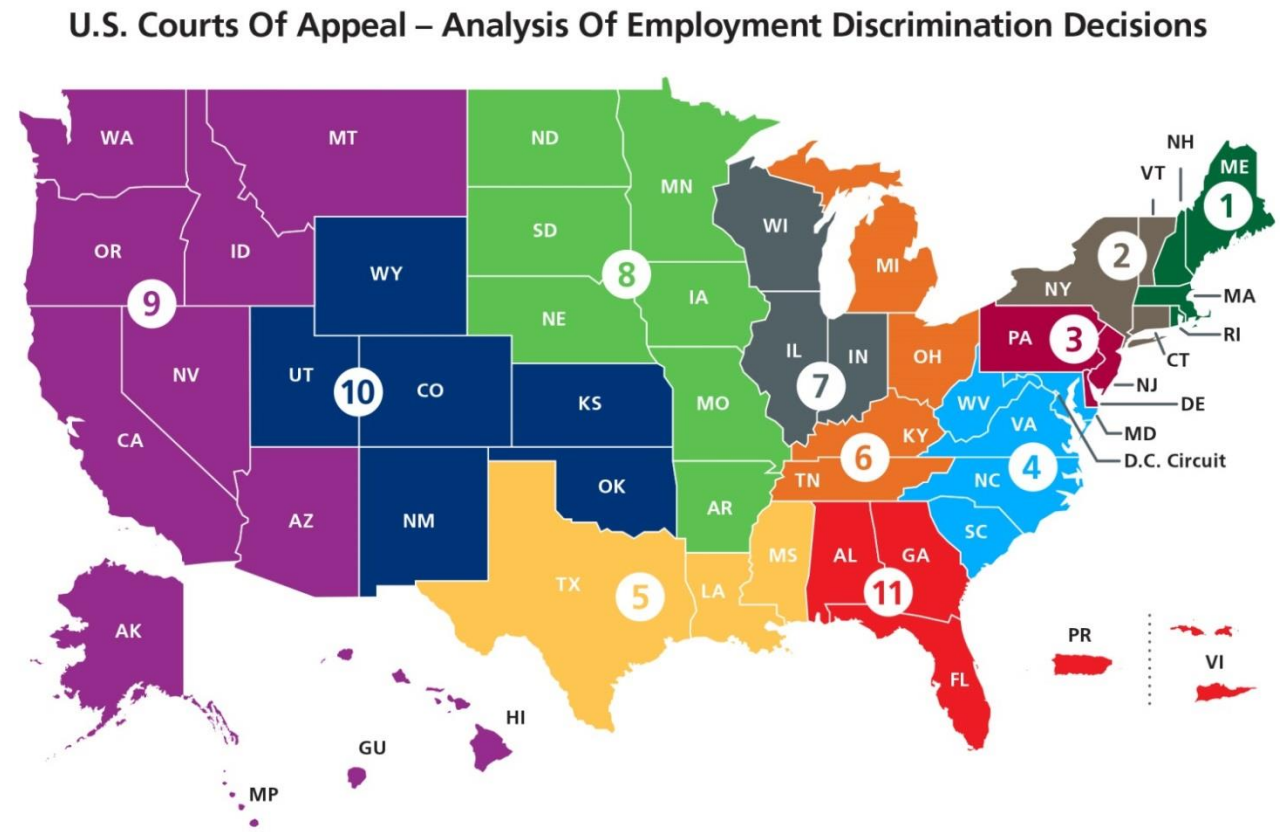
9. ***United States v. City Of Eugene*, *Oregon*, Case No. DJ-197-61-109 (DOJ Aug. 5, 2015).** The U.S. Department of Justice asserted citizenship discrimination claims against the Eugene Police Department for improperly restricting law enforcement positions to U.S. citizens at the time of hiring. The City's Police Department affirmatively asked applicants for employment about their citizenship and excluded any applicant who was not a U.S. citizen at the time of hire. As part of the resolution of the claim, the City agreed to train hiring officials about the anti-discrimination provisions of the Immigration and Nationality Act, to cease its practice of limiting hiring to U.S. citizens for law enforcement positions, and to modify its on-line application software to remove questions related to an applicant's citizenship status.

10. ***U.S. Department Of Labor v. G & K Services, Inc.* (DOL Nov. 17, 2015).** The DOL investigated the employer regarding hiring, promotion, and pay policies that allegedly caused racial and gender discrimination against applicants and employees throughout its locations in the United States. As part of the resolution of the DOL's claim, the employer agreed to extend offers of employment to female and African-American employees allegedly discriminated against during the hiring process. The employer also agreed to adopt written compensation guidelines and to revise its pay practices for general labor positions.

III. Significant Federal Employment Discrimination Class Action And EEOC Pattern Or Practice Rulings

This Chapter examines rulings in 2015 in employment discrimination class action cases arising under Title VII of the Civil Rights Act of 1964, as well as "pattern or practice" enforcement actions brought by the U.S. Equal Employment Opportunity Commission. Rulings are divided into these two substantive sections, and sub-divided into the federal circuits in which the appellate or district court rendered the decision.

The plaintiffs' bar had mixed success on Rule 23 motions in 2015, as illustrated by the following map:



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Certification Motions Granted	0	0	0	1	0	0	2	0	0	0	0	0
Certification Motions Denied	0	1	0	0	1	0	1	0	0	0	0	1

Total: 3 Granted / 4 Denied

A. Cases Certifying Or Refusing To Certify Employment Discrimination Class Actions Under Title VII Of The Civil Rights Act Of 1964

(i) First Circuit

No reported decisions.

(ii) Second Circuit

***Chen-Oster, et al. v. Goldman Sachs & Co.,* 2015 U.S. Dist. LEXIS 100852 (S.D.N.Y. Aug. 3, 2015).** Plaintiffs, a group of former female employees women, brought a putative class action alleging that Defendants discriminated against them by denying them equal compensation and opportunities for promotion on the basis of their gender in violation of Title VII of the Civil Rights Act of 1964 and New York City Human Rights Law. *Id.* at *2. Following the Magistrate Judge's recommendations to strike Plaintiffs' class allegations from their complaint, the Court held that persons not currently employed lacked standing to seek injunctive and declaratory relief and could not seek to certify a class under Rule 23(b)(2). *Id.* at *3. Although Plaintiffs later sought to amend the Court's ruling and to hold that the named Plaintiffs have standing to assert claims for injunctive relief, the Magistrate Judge found that the law of the case doctrine applied, and therefore, a class could not be certified under Rule 23(b)(2). *Id.* at *4-5. The Magistrate Judge also found that certification of a liability class under Rule 23(c)(4) was unwarranted in light of the unavailability of injunctive relief and the highly individualized causation and damages issues. *Id.* at *5. Plaintiffs subsequently sought reconsideration of the Magistrate Judge's recommendation that class certification under Rule 23(b)(2) should be denied to the extent it was predicated on the Court's holding that the named Plaintiffs lacked standing to seek injunctive relief. *Id.* at *6-7. Plaintiffs argued that the Magistrate Judge should not have applied the law of the case doctrine to a ruling on jurisdiction. *Id.* at *7. Denying reconsideration, the Magistrate Judge found that Plaintiffs misunderstood the applicability of the law of the case doctrine to jurisdictional determinations, which was applied here with full force. *Id.* at *7-9. The Magistrate Judge also held that Plaintiffs failed to offer any new controlling authority of facts or law for reconsideration that they did not already present in briefing the class certification motion. *Id.* at *9-10. The Magistrate Judge, therefore, denied Plaintiffs' motion for reconsideration. The Magistrate Judge, however, granted the motion to intervene two named Plaintiffs who purportedly had standing to request an injunction. The Magistrate Judge found that: (i) the motion to intervene was timely; (ii) the interveners shared common issues with Plaintiffs in this action; (iii) the parties would not be unduly prejudiced by the intervention, but the interveners would risk prejudice if denied the intervention; (iv) the interveners presented the same core legal and factual issues raised by Plaintiffs; (v) the case had not progressed to a point where intervention would be disruptive; and (vi) it would be more efficient to proceed with a single case. *Id.* at *31. Accordingly, the Magistrate Judge denied Plaintiffs' motion for reconsideration and granted two named Plaintiffs' motion to intervene.

(iii) Third Circuit

No reported decisions.

(iv) Fourth Circuit

***Brown, et al. v. Nucor Corp.,* 785 F.3d 895 (4th Cir. May 11, 2015).** Plaintiffs, a group of African-American steel workers, brought a class action alleging that Defendants discriminated against them on the basis of their race, denied them promotion and subjected them to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). *Id.* The District Court had originally denied class certification of both claims, which the Fourth Circuit had reversed (*"Brown I*"). On remand, the District Court revisited certification and decertified the promotions class in the light of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *Id.* Plaintiffs once again appealed, and the Fourth Circuit vacated the district court's decision in part and remanded for re-certification of the class. The Fourth Circuit noted that the promotions claim rested on alternative theories of liability under Title VII. *Id.* Plaintiffs' promotions claim first alleged a pattern or practice of disparate treatment, and secondly, charged that Defendants' neutral promotions policies and procedures had a disparate impact based on race. *Id*. at 899. The Fourth Circuit observed that both these theories were grounded in a statistical analysis of racial disparities in job promotions at the plant combined with anecdotal evidence of discrimination. The Fourth Circuit noted that the parties' central dispute concerned the data used to analyze the period from December 1999 to January 2001, when Defendants failed to retain actual bidding records. The Fourth Circuit opined that the critical question was not whether the data used was perfect, but instead, whether it was reliable and probative of discrimination. The District Court first questioned the assumption that the job changes on the 27 forms represented promotions, and relying on the dissent's finding in *Brown I*, found that the forms may represent

job changes unrelated to promotions. The Fourth Circuit, however, determined that 19 of the 27 change-of-status forms expressly stated that they were a promotion for a successful bidder on a higher position, or for a new position that was awarded or earned. *Id*. at 905. Two of the forms described changes in job classification accompanied by an increase in pay. *Id*. Accordingly, the Fourth Circuit concluded that the 27 forms were related to promotions. The District Court further ruled that the statistical and anecdotal evidence were insufficient for class certification insofar as the evidence did not demonstrate a uniform class-wide injury that spanned the entire plant. The District Court observed that *Wal-Mart* required Plaintiffs to present a common contention capable of being proven or disproven in "one-stroke" to satisfy commonality, and a claim based on discrimination in employment decisions without some glue holding the alleged reasons for all those decisions together that would make it impossible to say that examination of all the class members' claims for relief would produce a common answer to the critical question "why was I disfavored." *Id*. at 909. The Fourth Circuit reasoned that Plaintiffs presented two such common contentions capable of class-wide answers under Title VII. Under a disparate treatment theory, the common contention was that Defendants engaged in a pattern or practice of unlawful discrimination against black workers in promotions decisions. *Id*. Under the disparate impact theory, the common contention was that a facially neutral promotions policy resulted in a disparate impact based on race. *Id*. The Fourth Circuit observed that whereas there may have been many answers in *Wal-Mart* to the question of why any individual employee was disfavored, Plaintiffs had sufficiently alleged that there was only one answer to the question of why Defendants' black workers were consistently disfavored. *Id*. at 915. Accordingly, the Fourth Circuit vacated the District Court's decertification of Plaintiffs' promotions class and remanded the case with instructions to certify the class.

(v) Fifth Circuit

***Robinson, III, et al. v. General Motors Co.,* Case No. 15-CV-158 (N.D. Tex. Oct. 21, 2015).** Plaintiffs filed a putative class action against Defendant alleging that it violated Title VII of the Civil Rights Act of 1964 by denying Plaintiffs' religious accommodations of unpaid leave to observe their respective holy days, despite the availability of volunteers to cover their shifts. Plaintiffs demanded damages and a class-wide injunction ordering Defendant to allow unpaid leave on holy days, to inquire about the availability of volunteer coverage, and seek no-cost methods of allowing religious leave. *Id*. at 2-3. Plaintiffs alleged that, in 2008, two employees of Defendant's Arlington, Texas facility began making requests for unpaid leave to observe their respective religious holy days. Plaintiffs alleged that General Motors ("GM") employee James Robinson, III ("Robinson") requested and received unpaid leave for religious holy days, including Saturdays. *Id.* at 1-2. Plaintiffs alleged that GM employee Chris Scruggs ("Scruggs") requested but was denied unpaid leave for religious holy days until Defendant began granting his requests for unpaid leave in 2010. *Id.* at 2. Plaintiffs were of different faith communities; Robinson is a member of the Seventh Day Sabbatarian Community of Tyler Sabbath Fellowship, and Scruggs is a member of the Messianic Jewish Beth Yeshua Congregation. *Id.* at 1-2. Plaintiffs alleged that, in 2013, Defendant began denying Robinson's requests for unpaid leave to observe holy days and, once Robinson's attorney identified Scruggs as another employee being denied similar unpaid leave, Defendant resumed denial of Scruggs' requests for unpaid leave to observe holy days. *Id*. Plaintiffs sought certification of a class of "all General Motors workers within the United States subject to the 2011 UAW-GM National Agreement and who may seek unpaid leave for a holy day because of a religious belief." *Id*. at 5. Defendant opposed the motion by arguing that the class that Plaintiffs purported to represent incorporated an impermissible "hypothetical – *i.e.,* the *possibility* that GM employees may seek unpaid religious leave at some time in the future," and would require individualized inquiries not suited for class treatment. *Id*. Finding that the Plaintiffs' class definition "includes any GM employees who might request unpaid religious leave in the future," the Court determined that the class was not adequately defined or ascertainable. *Id.* at 6. Noting that the Court would be required to evaluate each class member's religion, that religion's holy days, and the days that each class member requested for leave, the Court determined that Plaintiffs failed to identify common questions of law or fact applicable to the class and failed to prove numerosity. *Id.* at 6. The Court observed that "[c]lass relief is most appropriate where the issues in the case turn on questions of law or fact 'applicable in the same manner to each member of the class.'" *Id.* Accordingly, the Court denied

Plaintiffs' motion for class certification, but allowed leave to Plaintiffs to file an amended complaint and to propose a definition of a more ascertainable class. *Id.* at 7.

(vi) Sixth Circuit

No reported decisions.

(vii) Seventh Circuit

***Brand, et al. v. Comcast Corp., Inc.,* 2015 U.S. Dist. LEXIS 153623 (N.D. Ill. Nov. 13, 2015).** Plaintiffs, a group of current and former African-American employees, brought a class action alleging that Defendant created a hostile work environment at its 112th Street facility in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Id*. at *2. Plaintiffs moved to certify five classes. The Court certified Plaintiffs' hostile work environment class and found that the other four classes lacked commonality. *Id*. at *4. Subsequently, the parties concluded their merits discovery and Plaintiffs moved to amend the Court's class certification order. Plaintiffs contended that three crucial facts came to light during discovery that warranted certifying a promotions class and a discipline class. *Id.* at *5. First, Plaintiffs claimed that through Defendant's performance improvement plan program, ("PIP program"), a much larger percentage of 112th Street technicians would be placed on PIP program than technicians in other areas. *Id.* Second, Plaintiffs argued that contrary to Defendant's representations, the PIP program applied to areas including 112th Street and Defendant did not fully discontinue the PIP program until the end of 2011. *Id.* at *6. Third, Plaintiffs claimed that during depositions, Defendant's representatives revealed that at the time the company set its performance metrics for technicians to qualify for advancement (known as "Qualify to Pursue" ("QTP")), Defendant was aware that only 2% of technicians in 112th Street's area would qualify. *Id.* Accordingly, Plaintiffs sought to certify a PIP class and a QTP class. The Court noted that Plaintiffs' PIP class was narrower than their proposed discipline class because instead of seeking to certify a class of African-American technicians subjected to discriminatory discipline, they sought certification of employees who were placed on PIP. *Id*. at *11. The Court observed that Seventh Circuit case law authority had repeatedly held that placing an employee on a PIP was not enough by itself to constitute actionable adverse employment action. *Id*. at *12. The Court found that Plaintiffs did not suggest that every worker at the 112th street who was placed on a PIP suffered the same type of injury. *Id*. at *13. In fact, the Court noted that Plaintiffs suggested in their first motion that some class members who were placed on PIP were disciplined while others were not, and some were terminated, while others were not. *Id*. at *14. The Court held that ascertaining injury would therefore require determining individual issues, and accordingly, declined to certify the PIP class. *Id*. at *14. Further, the Court observed that the QTP class was also a revision of the earlier promotion class. Plaintiffs defined the QTP class to consist of African-American technicians who failed to satisfy Defendant's performance metrics. *Id*. at *15. Plaintiffs contended that Defendant designed and implemented this metric even though it was fully aware that 112th Street technicians would disproportionately fail. *Id.* at *15. The Court found that even if Plaintiffs proved that Defendant set its performance metrics knowing that African-American employees at 112th Street would be disproportionately disciplined and denied promotion, the named Plaintiffs would need to prove that they were subjected to an adverse employment action as a result of intentional discrimination. *Id.* at *18. The Court held that simply proving that Defendant knew that 112th Street workers would struggle to meet its performance metrics would not be enough. *Id.* Thus, the Court determined that Plaintiffs' proposed common questions did not predominate over individual issues as required by Rule 23(b)(3). *Id.* Accordingly, the Court denied Plaintiffs' motion to amend the class certification order.

***Chicago Teachers Union, et al. v. Board Of Education Of The City Of Chicago,* 307 F.R.D. 475 (N.D. Ill. 2015).** Plaintiffs, three individual teachers and their union, brought a class action alleging that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII") by carrying out a series of large-scale lay-offs that resulted in the termination of employment of numerous African-American teachers and paraprofessionals. *Id.* at 477. Plaintiffs moved for certification of a class of all African-American employees whose employment as a tenured teacher or staff member was terminated pursuant to Defendant's lay-off policy in 2011. The Court granted Plaintiffs' motion for class certification. *Id.* at 487. The Court found that Plaintiffs met all the required elements of Rule 23. Plaintiffs met numerosity as the

proposed class, which included over 500 members, was sufficiently numerous. *Id.* at 479. Plaintiffs established commonality as Plaintiffs' claim clearly depended upon a common issue, *i.e.,* whether Defendant's policy of selective schools for lay-offs caused a disparate impact on African-American employees in violation of Title VII. *Id.* at 479-80. The Court found that Plaintiffs met typicality as all of the proposed class representatives based their claims on the same legal theory, *i.e.*, racial discrimination in violation of Title VII. *Id.* at 482. According to the Court, the fact that individual Plaintiffs were tenured teachers, while the class also included staff subjected to the collective bargaining agreement ("CBA") between the union, meant that Defendant did nothing to affect the typicality of the claims. *Id.* at 481. The Court opined that Plaintiffs met adequacy as there was nothing about the union *per se* to make it an inadequate representative of its members' interests, and Defendant pointed to no single conflict of interest that could impair the ability of any of the individual Plaintiffs to represent the interests of the class fairly and adequately. *Id.* at 482-83. The Court also found that certification under Rule 23(b)(2) would be proper as the injunctive relief sought would affect the class as a whole and would be final. *Id.* at 485. Plaintiffs sought two forms of injunctive relief, including an order enjoining Defendant from applying the policies that guided the 2011 lay-offs to any future lay-offs that might occur and a reinstatement order so that class members could return to their jobs. *Id.* at 484. Because a reinstatement order would be a single order that applied to all class members and any such order would be preceded by a class proceeding that determined the question of Defendant's liability as to all class members at once, the Court determined that certification under Rule 23(b)(2) would be proper. *Id.* at 485. Plaintiffs also sought class certification under Rule 23(b)(3) and the Court granted that request, finding that the central issue of liability predominated and significantly outweighed the individual issues. *Id.* at 486. Although damages would have to be calculated separately for each class member, Plaintiffs asserted that the precise level of each class member's lost earning could be ascertained based on the pre-determined wage levels by the CBA, and the Court agreed with Plaintiffs that this would make any potential damages award more likely amenable to class adjudication. *Id.* Accordingly, the Court granted Plaintiffs' motion for class certification. *Id.* at 487.

***Chicago Teachers Union, et al. v. Board Of Education Of The City Of Chicago,* 2015 U.S. App. LEXIS 13831 (7th Cir. Aug. 7, 2015).** Plaintiffs, three individual teachers and their union, brought an action alleging that Defendants violated Title VII of the Civil Rights Act by carrying out a series or large-scale lay-offs that resulted in the termination of numerous African-American teachers and paraprofessionals. Plaintiffs sought class certification, which the District Court denied, finding that Plaintiffs did not meet their burden of establishing a common issue by a preponderance of evidence. *Id*. at *9. On appeal, the Seventh Circuit reversed and remanded. Defendants argued that the facts of Plaintiffs' case aligned with those in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), that the decision to reconstitute the schools was not made pursuant to a central uniform policy or even by a single decision-maker, but rather was based on subjective, qualitative factors that were not uniformly applied. *Id*. at *14. The Seventh Circuit noted that the Chief Executive Office ("CEO") of Chicago Public Schools first identified all schools eligible by state law for reconstitution due to poor past performance. *Id*. Then the CEO reduced that list of 226 schools to 74 schools by removing those that met the objective criteria of a composite Illinois Standard Achievement Test ("ISAT") score above the network average for elementary schools, or a five-year graduation rate above network average for high schools. *Id*. In the third step, the CEO and the other high-level board members attended a series of meetings at which they discussed the types of information that the group would consider concerning schools eligible for reconstitution, and then analyzed that information. *Id*. The Seventh Circuit remarked that Plaintiffs alleged that the objective criteria in the first two steps narrowed the pool in such a way as to have a disparate impact on African-American teachers. *Id*. at *18. The Seventh Circuit opined that a subjective, discretionary decision could be the source of a common claim if it was, for example, the outcome of employment practices or policies controlled by higher-level directors, if all decision-makers exercised discretion in a common way because of a common policy or practice, or if all decision-makers acted together as one unit. *Id*. at *23. The Chicago Board of Education ("Board") maintained that no single criteria was used in the third step, *i.e.*, each of the 26 schools chosen for reconstitution was chosen after being considered individually. *Id*. at *24. The Board went on to describe the numerous factors considered in the various schools, and stated that there was a specific, unique rationale for each decision. *Id*. at *25, 28. The Seventh Circuit observed that the scenario in this case was different from that of *Wal-Mart*, where there was no way of knowing why each of the thousands of individual

managers made distinct decisions regarding promotions and pay in millions of employment decisions. *Id*. at *29. Accordingly, the Seventh Circuit concluded that Plaintiffs had demonstrated commonality by asserting that a uniform employment practice (*i.e.*, the set of criteria used to evaluate the school) used by the same decision-making body to evaluate schools was discriminatory. *Id*. at *31. As to Plaintiffs' request for certification under Rule 23(b)(2) on their claim for injunctive relief or corresponding declaratory relief, the Seventh Circuit noted that certification was appropriate because the class was requesting the same injunction and declaratory relief for all. *Id*. at *39. The Seventh Circuit explained that Plaintiffs sought a declaratory judgment that the Board's turnaround policies violated Title VII, and prospective injunctive relief including a moratorium on turnarounds and the appointment of a monitor to evaluate and oversee any new turnaround process. The Seventh Circuit concluded that the District Court erred because the proposed 23(b)(2) class did not seek individual relief, as it requested issuance of a declaration that the Board's practice violated Title VII. *Id*. at *35. Accordingly, the Seventh Circuit reversed and remanded.

(viii) Eighth Circuit

No reported decisions.

(ix) Ninth Circuit

No reported decisions.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

No reported decisions.

(xii) District Of Columbia Circuit

***Smith, et al. v. Ergo Solutions, LLC*, 306 F.R.D. 57 (D.D.C. 2015).** Plaintiffs brought a putative class action alleging that Defendants created a corporate and organizational culture where the environment promoted and perpetrated sexual harassment, in violation of both Title VII of the Civil Rights Act of 1964 ("title VII") and the District of Columbia Human Rights Act. *Id.* at 61. Specifically, Plaintiffs alleged that Ergo Solutions' CEO sent female employees a sexually explicit video, made sexual advances, touched them inappropriately, and attempted to initiate sex in the office. *Id*. at 60-61. Plaintiffs moved to certify the class, which the Court denied. *Id.* at 68. Defendants contended that Plaintiffs' motion for class certification was untimely because Local Civil Rule 23.1(b) provides that a motion for class certification shall be filed within 90 days after filing of a first complaint. *Id.* at 65. Plaintiffs filed the motion nearly five months after filing their initial complaint; thus, they argued that their error constituted excusable neglect. Given the procedural history, and Defendants' failure to point to any unfair prejudice they had suffered as a result of delay, as well as in the absence of any allegation of bad faith on the part of Plaintiffs, the Court concluded that the equities counseled against denying class certification on the basis of a relatively short delay alone. *Id.* at 66. The Court found, however, that Plaintiffs' allegations were too vague to make the necessary showings under Rule 23. *Id.* at 67. First, the Court remarked that Plaintiffs' estimation of the number of female employees and independent contractors affected – unsupported by any record evidence – did not affirmatively demonstrate that there were in fact sufficiently numerous parties. *Id.* The Court also determined that it could not ascertain whether Plaintiffs established commonality and typicality requirements from a bare list of alleged victims of discrimination and the generalized allegations of hostile work environment in the amended complaint. *Id.* Further, the Court remarked that Plaintiffs failed to submit any affidavits, deposition testimony, statistical evidence, or company documents to demonstrate the requisite commonality of questions of law or fact or typicality of claims or defenses among the purported class members. Moreover, the claims of female employees who experienced actual harassment were different from those who experienced only the allegedly hostile workplace environment. *Id.* The Court, however, opined that it could not take the allegations lightly. The Court noted that given that the alleged purveyors of the hostile environment were the owners of the company, Plaintiffs' plight might not be limited

to one division or sub-class of female employees. *Id.* at 67-68. The Court required, however, at least some information to determine whether Plaintiffs' experiences were indeed common or typical among Defendants' female employees more generally. *Id.* Accordingly, the Court denied class certification, but permitted additional pre-certification discovery. *Id.* at 68.

(xiii) U.S. Equal Employment Opportunity Commission

***Meyer, et al. v. Department Of State,* EEOC Case No. 0520140506 (EEOC Feb. 19, 2015).** A job applicant for the U.S. Foreign Service filed a complaint with the EEOC against the U.S. Department of State ("the Agency") alleging that the Agency discriminated against her on the basis of her disability due to its "worldwide availability" policy. *Id*. at 2. Complainant asserted that the worldwide availability requirement required every candidate to be able to work wherever the Foreign Service had a post, without the possibility of reasonable accommodation. Plaintiff alleged that the Agency's worldwide availability policy, as administered, disparately treated and impacted qualified individuals with disabilities who were over 40 years of age. Complainant sought to certify a class comprised of all applicants for career Foreign Service employment with a disability whom the Agency had denied employment since October 7, 2006, because the Agency's Office of Medical Services denied them "Class 1 – Unlimited Clearance for Worldwide Assignment" type clearance. *Id*. at 2. The EEOC Administrative Judge ("AJ") had certified the class, finding that the Agency's policy requiring worldwide availability affected all members of the purported class. The AJ had found that the centralized policy involved common questions of fact in that all applicants received conditional offers, but the Agency denied a position because of their actual, perceived, or record of disability. *Id*. The EEOC affirmed the AJ's class certification order, but stated that the class definition should include all qualified applicants to the Foreign Service for whom the Agency denied employment, or delayed employment pending application for and receipt of a waiver (because the Agency deemed them not "worldwide available" due to their disability). *Id*. The Agency requested reconsideration, and the EEOC denied the request. The Agency argued that the EEOC's legal finding of commonality and typicality was erroneous because it was based on an incorrect understanding of its medical clearance process. *Id*. at 3. Even if the EEOC did not overturn the class certification determination, the Agency requested that the class definition be modified to "all applicants for career Foreign Service employment who were denied employment since October 7, 2006 because the Agency deemed them not 'worldwide available' due to their disability." *Id*. The EEOC noted that a reconsideration request is an opportunity to demonstrate that the previous decision involved a clearly erroneous interpretation of material fact or law, or would have a substantial impact on the policies, practices, or operations of the Agency. *Id* at 4. Here, the EEOC found that the Agency's request failed to meet that criteria. The EEOC determined that the Agency had simply reiterated the arguments previously made to the AJ. While the Agency clearly disagreed with the decision, the EEOC reasoned that the Agency had not presented persuasive evidence that supported its contention that the decision was clearly erroneous. *Id*. Moreover, the EEOC noted that because the decision directed the Agency to continue processing the complaint, it could continue raising appropriate arguments and concerns to the AJ as the litigation progressed. Accordingly, the EEOC denied the Agency's request.

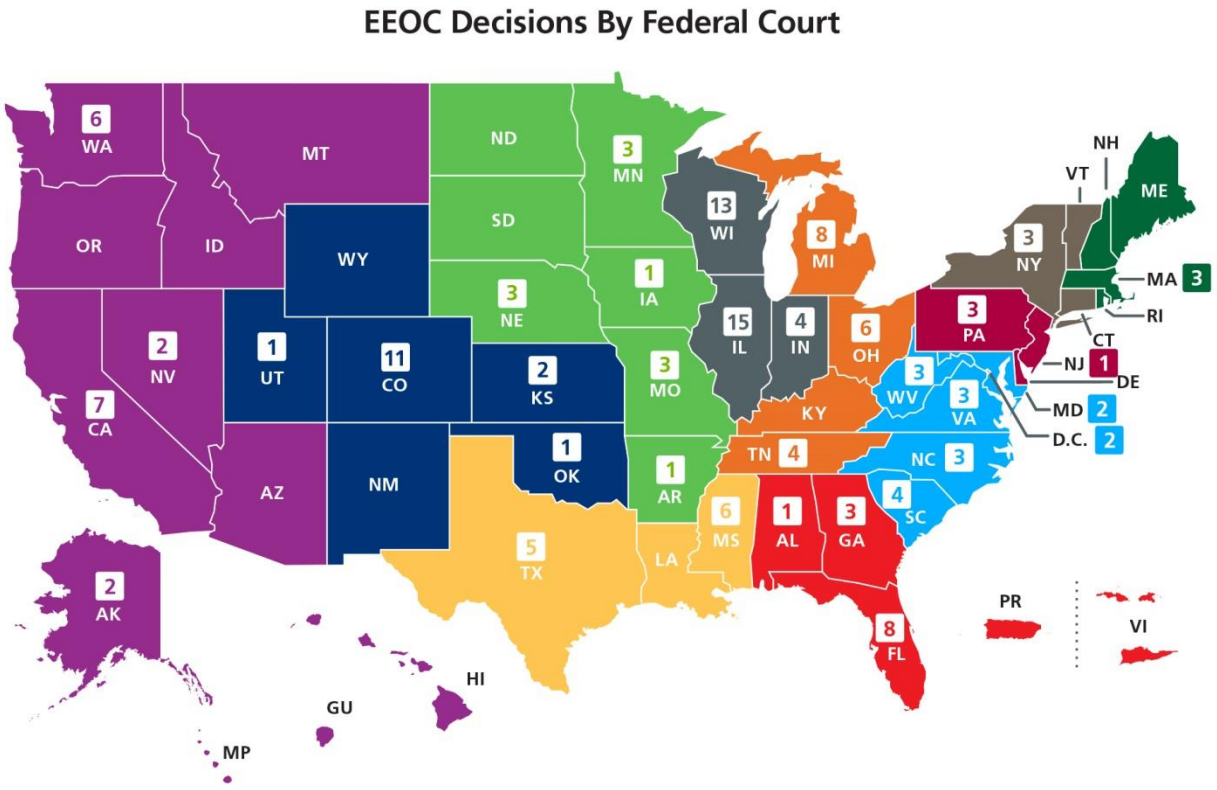
B. EEOC Pattern Or Practice Cases

"Pattern or practice" lawsuits brought by the U.S. Equal Employment Opportunity Commission are not governed by Rule 23. Instead, Title VII of the Civil Rights Act of 1964 governs these types of lawsuits. Under the statute, the EEOC need not satisfy the Rule 23 requirements in order to sue on behalf of a group of allegedly injured individuals. Instead, the EEOC must follow the framework established by the U.S. Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Nonetheless, EEOC pattern or practice cases tend to involve litigation issues similar to private party Rule 23 class actions.

The EEOC launched a new systemic litigation initiative in 2006. As a result, the volume of rulings in EEOC pattern or practice lawsuits increased significantly in 2015. The 143 rulings over the past year covered a wide gamut of issues, including the proper scope of an EEOC lawsuit based on the Commission's administrative investigation; motions for summary judgment in EEOC pattern or practice cases; defenses to

EEOC administrative enforcement proceedings; the proper scope of discovery in an EEOC lawsuit, both with respect to an employer's discovery as to the EEOC and the Commission's discovery relative to private employers; monetary sanctions against the EEOC for frivolous litigation; summary judgment on a class-wide basis in EEOC pattern or practice lawsuits; the scope of injunctive relief available as a remedy in EEOC litigation; the viability of various affirmative defenses to EEOC pattern or practice claims; the burdens of proof and discovery limits between § 706 and § 707 claims in an EEOC pattern or practice lawsuit; the standards for enforcement of EEOC administrative subpoenas; the appropriate statute of limitations for § 707 claims asserted by the EEOC; the availability of discovery against the EEOC relative to its own personnel practices; the propriety of late amendments to EEOC complaints; the scope of an employer's defense based on the EEOC's breach of its duty to engage in good faith conciliation prior to filing a lawsuit; and the interpretation of employer obligations in EEOC consent decrees.

In terms of geographic distribution of rulings on EEOC lawsuits, the following map illustrates that decision-making:



(i) First Circuit

***EEOC v. Chipotle Mexican Grill,* 2015 U.S. Dist. LEXIS 42187 (D. Mass. Mar. 30, 2015).** The EEOC brought an action alleging that Defendant terminated a worker, Amanda Connell, due to her disability in violation of the American With Disabilities Act. Defendant hired Connell, who suffered from cystic fibrosis, as a cashier and front-line worker at its restaurant. Each of the roles required substantial customer interactions. Defendant contended that it terminated Connell for a non-discriminatory reason that she treated a customer disrespectfully, as evidenced in video footage. *Id*. at *1. Defendant moved for summary judgment, arguing that the EEOC presented no direct or indirect evidence of discrimination; and the EEOC cross-moved for sanctions, contending that Defendant's failure to preserve the video footage constituted spoliation of evidence. The Court denied both the motions. First, in denying the EEOC's

motion for sanctions, the Court noted that the EEOC failed to demonstrate that the destruction occurred at a time when Defendant was on notice that the evidence might be relevant to potential litigation. *Id.* at *23. The Court opined that the video footage was not a "personnel or employment record" in any usual sense of the term, but rather evidence of an employee action on which Defendant based the employee's termination. *Id.* at *26. The Court therefore rejected the EEOC's argument that Defendant disregarded a preservation duty imposed by 29 C.F.R. § 1602.14. Moreover, the uncontroverted evidence indicated that the surveillance footage was erased automatically and not through any intentional act on the part of Defendant. *Id.* In the absence of clear authority requiring an employer to preserve such video footage, the Court held that there was no basis to conclude that Defendant allowed the footage to be destroyed in knowing or negligent dereliction of its obligations. *Id*. The Court therefore denied the EEOC's motion for sanctions based on spoliation of evidence. Further, the Court denied Defendant's motion for summary judgment, finding that the EEOC established a *prima facie* case of disability discrimination, and that there was substantial and undisputed evidence weighing against Defendant's explanation for Connell's termination. *Id.* at *45. Although it was undisputed that Defendant received multiple complaints during a short period of time about Connell's attitude and interaction with customers, it was also undisputed that the incident in question in which a customer complained occurred the day before Defendant learned about the existence of a medical procedure that Connell underwent as part of her treatment. *Id.* at *47-48. Considering the evidence as a whole, in combination with the timing of Connell's discharge, the Court concluded that the EEOC had adduced minimally sufficient evidence to permit a reasonable fact-finder to conclude that Defendant terminated Connell due to her disability. *Id.* at *48-49. Accordingly, the Court denied both the EEOC's motion for sanctions and Defendant's motion for summary judgement.

***EEOC v. Texas Roadhouse, Inc.,* Case No. 11-CV-11732 (D. Mass. April 3, 2015).** The EEOC brought an action against Defendant, a Kentucky-based restaurant chain, alleging that it engaged in a nationwide pattern or practice of age discrimination in hiring hourly front-of-the-house employees. Specifically, the EEOC alleged that since at least 2007, Defendant had been discriminating against a class of applicants for front-of-the-house and other public, visible positions, such as servers, hosts, and bartenders, by refusing to hire applicants 40 years of age and older. Moving to compel discovery, Defendant asked the Court to order the EEOC to produce information concerning the EEOC's hiring practices for its internship program positions, entry-level positions, and honor program positions. *Id.* at 2. This discovery included 52 requests for admissions, 20 requests for documents, and an interrogatory asking for detailed information about any request for admissions that the EEOC denied or did not respond to with an unqualified admission. *Id*. The time period of the requested information covered seven years, from January 2007 to December 2014, and Defendant also requested information from every part of the EEOC. *Id*. Defendant argued that the EEOC's own hiring practices were relevant to this case as they related to the legality of Defendant's hiring procedures, and to determine whether the EEOC was estopped from bringing this action. *Id.* at 6. The EEOC responded that Defendant based its request on a faulty logic. It contended that if it were found to have discriminated in hiring on the basis of age, that finding would not justify any private employer's age discrimination. *Id.* It also argued that ruling for Defendant on this point would require that in every case it brings, it would have to disclose its personnel practices on the issues raised in the case. *Id.* The Court agreed with the EEOC and denied Defendant's motion. First, the Court found that the cases cited by Defendant in its motion did not support its arguments. The Court noted that, while the EEOC, alleging disparate treatment, was seeking to prove that Defendant acted with deliberate, unlawful animus toward a class of workers, the issues in the cases cited by Defendant included whether the employers could establish, as a defense, that the neutral practice they engaged in had a discriminatory impact that was consistent with business necessity. *Id.* at 7. Defendant argued that if the EEOC used practices that were specifically designed to intentionally discriminate against older candidates, then the EEOC's own intentional use of these practices were all the more relevant in a disparate treatment case. *Id.* at 8. The Court, however, rejected Defendant's arguments. The Court noted that cases relied on by Defendant were inapposite and that they could be distinguished from this case for the reason that there was no defense of business necessity here, and the discovery sought could not be justified on this ground. *Id.* The Court also found that Defendant's requests were unduly burdensome. The Court referred to Defendant's attempt to equate its jobs to programs at the EEOC as "far-fetched," and held that the issue of whether Defendant engaged in a practice of discriminating against job applicants aged 40 and over who applied for front-of-

the-house positions had nothing to do with the EEOC's own policies. *Id.* at 8-9. Finally, the Court held that Defendant was not entitled to any discovery on the basis of an estoppel defense. Explaining that estoppel requires that a party must have relied on its adversary's conduct in such a manner as to change his position for the worse, and that the reliance must have been reasonable (in that the party claiming the estoppel did not know that the adversary's conduct was misleading), the Court found that Defendant made no showing that it relied on any policy of the EEOC in formulating its own hiring policies. *Id.* at 10-11. Accordingly, the Court denied Defendant's motion to compel discovery.

***EEOC v. Texas Roadhouse, Inc.,* Case No. 11-CV-11732 (D. Mass. Dec. 2, 2015).** The EEOC brought an action alleging that Defendant discriminated against job applicants on the basis of their age in violation of Age Discrimination in Employment Act ("ADEA"). The EEOC alleged that Defendants hired younger, less experienced applicants for jobs at its restaurants and avoided hiring works over the age of 40. During discovery, the EEOC found 19 e-mails that appeared to be from or copied to former counsel for Defendants. *Id.* at 1. Defendants notified the EEOC that it intend to "claw back" thousands of documents, and later accused the EEOC of violating the Court's order by looking at certain documents. *Id.* The Court ordered that the parties meet and confer concerning documents that were in dispute and ordered Defendants to provide the Court with a privilege log and any remaining documents claimed to be privileged for an *in camera* review. *Id.* Finding that 16 documents were still in dispute, Defendants filed an *ex parte* brief and submitted copies of the documents to the Court. After consideration of the applicable law, the Court found that certain e-mail chains that were the result of meetings between Defendant and the in-house counsel, the e-mails concerning request for information from counsel, review of attachments, and seeking legal advice were all privileged and protected attorney work-product. *Id.* at 7-8.

(ii) Second Circuit

***EEOC v. Local 28, Sheet Metal Workers International Association*, 2015 U.S. Dist. LEXIS 21341 (S.D.N.Y. Feb. 19, 2015).** In these three Title VII of the Civil Rights Act of 1964 racial discrimination actions, the Special Master, pursuant to Rule 53(g)(1), applied for an increase in the Special Master's court-approved hourly rate from $380 to $460. The Court granted the application. The Special Master has been serving in these lawsuits for more than three decades and the last raise he received was in 2008. The Special Master asserted that his office overhead costs had increased by approximately 32% over the seven years since his last pay boost. Further, the Special Master pointed out that the rates set over the years for other special masters in the Southern District and the Eastern District of New York had substantially exceeded his current rate, as well as exceeded even the modestly elevated rate that he sought. *Id.* at *5. The Court observed that the pertinent factors in considering an application for increase in such fees include the difficulty of the issues presented, the thoroughness of the Special Master's services, the time spent by the Special Master on the project, his or her ability and distinction, the importance of the matter involved, and the assistance that the Special Master has given to the final disposition of the issues that were referred to her or him. *Id.* at *6. The Court found that the Special Master continued to produce high-level work in a variety of complex labor-related disputes under the relevant civil rights laws, and because his decisions were rarely challenged, his efforts had saved the Court much time and effort. *Id.* The Court found that the Special Master's credentials were impeccable and his experience in this area were impressive. The Court also determined that the rate that the Special Master sought represented a significant discount from his commercial rate. *Id.* at *7. Accordingly, the Court approved the Special Master's hourly rate increase to $460.

***EEOC v. Mavis Discount Tire, Inc.*, 2015 U.S. Dist. LEXIS 121527 (S.D.N.Y. Sept. 11, 2015).** The EEOC brought an action alleging that Defendants engaged in a pattern or practice of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The EEOC alleged that Defendants discriminated against an applicant, Nicole Haywood, and other similarly-situated female applicants in favor of hiring less qualified men for positions in their branch stores. *Id*. at *7-11. The EEOC also argued that Defendants' record-keeping practices were not effective in retaining applicants' application forms. *Id*. at *12. Each of the unsuccessful female applicants identified by the EEOC testified that she submitted an application for employment, but Defendants were unable to locate all the application materials. *Id*. The EEOC filed a motion for summary judgment, which the Court denied. Defendants argued that the EEOC does not have

the authority to bring a pattern or practice claim under § 706 of Title VII. Defendants asserted that § 707, which explicitly references pattern or practice suits, provides the EEOC's only avenue for maintaining such a claim. *Id*. at *34. The Court observed that whether the EEOC could bring the pattern or practice claim under § 706 was significant because of the different burden-shifting frameworks between the two provisions, and the different remedies available. *Id*. Defendants argued that § 707 claims must proceed under the framework established in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), as opposed to § 706, which has to proceed under burden shifting framework of *McDonnell Douglas Corp*. *v. Green*, 411 U.S. 792 (1973). Defendants contended that the EEOC was attempting to avail itself of the more advantageous *Teamsters* burden-shifting framework applicable to § 707 in claiming compensatory and punitive damages, which are only available under § 706. *Id*. at *35. The Court noted that the Second Circuit has clarified that a pattern or practice case is not a separate and free-standing cause of action, but merely another method by which disparate treatment can be shown. *Id*. at *39. The Court explained that permitting the EEOC to bring pattern or practice cases under § 706 did not render § 707 meaningless or superfluous. The Court remarked that it did not view an interpretation that results in statutory overlap as running contrary to Congress' intent. *Id*. at *43. Further, the Court disagreed with Defendants' point that any unfairness inures to employers from the application of the *Teamsters* burden-shifting framework rather than the *McDonnell Douglas* framework. *Id*. Accordingly, the Court ruled that the EEOC may maintain a pattern or practice claim under § 706, as well as under § 707. The Court next noted that the EEOC moved for summary judgment on its pattern or practice claim, contending that its expert's findings – of Defendants' statistically significant hiring shortfalls of female employees, the presence of an "inexorable zero" of female hires, and the anecdotal evidence from female applicants – conclusively showed that Defendants engaged in a pattern or practice of discrimination against women in hiring. *Id*. at *47. The Court observed that the EEOC's statistical analysis was buttressed by the undisputed fact that Defendants hired zero female store managers, mechanics, or technicians during the relevant period. *Id*. at *52. The Court further remarked that the EEOC had bolstered its *prima facie* case with anecdotal evidence that Haywood was not hired for a position even though three of her male colleagues whom she had trained were hired. *Id*. at *55. The Court observed that Defendants failed to show in any categorical fashion that female applicants who were rejected were less qualified than the males they hired. *Id*. at *57. The Court, however, noted that Defendants challenged the probative nature of the statistical evidence in the EEOC's expert report because of their decentralized hiring system. *Id*. at *62. The Court opined that at the summary judgment stage, all that Defendants were required was to show that factual disputes existed. *Id*. at *63. The Court concluded that Defendants' challenge to the report's probative nature was sufficient to deny summary judgment to the EEOC on its pattern or practice claims. *Id*. The Court similarly denied summary judgment to the EEOC's record-keeping claims, finding that there triable issues to be determined by the jury. *Id*. at *70.

***EEOC v. Sterling Jewelers, Inc.,* 801 F.3d 96 (2d Cir. 2015).** The EEOC brought an action alleging that Defendant engaged in a nationwide pattern or practice of sex-based pay and promotion discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII"). After the EEOC initiated its investigation, the parties participated in a mediation and the EEOC entered into an agreement to suspend its investigation during mediation. *Id*. at 99. Under a confidentiality provision in the agreement, the EEOC agreed to not rely on information disclosed during the mediation. *Id*. When the mediation failed, the EEOC issued a letter of determination concluding that Defendant discriminated against female workers on a nationwide basis. The EEOC subsequently sued Defendant. Defendant moved for summary judgment after the EEOC investigators invoked the deliberative privilege and declined to answer numerous questions at their depositions about the investigation. The Magistrate Judge recommended granting summary judgment to Defendant, finding that the EEOC failed to conduct a pre-suit investigation of nationwide pay and promotional practices, and the District Court adopted the recommendation. On appeal, the Second Circuit reversed and vacated the order of summary judgment. At the outset, the Second Circuit found that Title VII does not define or prescribe the steps that the EEOC must take in conducting an investigation. *Id*. at 100. The Second Circuit also noted that the purpose of an EEOC investigation is to determine whether there is reasonable cause to believe that the charge is true, and its nature and extent is a matter within the sole discretion of the EEOC. *Id*. at 103. The Second Circuit found that the EEOC took multiple steps to investigate the claims against Defendant according to the investigative file and the testimony of the EEOC investigators. *Id*. at 102. Thus, the Second Circuit accepted the EEOC's argument that the Magistrate

Judge improperly reviewed the sufficiency of the investigation rather than whether or not there was a nationwide investigation. The Magistrate Judge had held that the investigation was not nationwide. The Second Circuit, however, remarked that the discrimination charges were from women in nine states across the country, and thus, the record was sufficient to establish that the investigation was nationwide. *Id*. at 103. Defendants also contended that EEOC could not introduce the labor economist's analysis (of an alleged pattern of nationwide discrimination) from the mediation as evidence of the scope of the EEOC's investigation. The Second Circuit found that the EEOC was not precluded from relying on the analysis to ascertain potential violations of Title VII. *Id*. at 104. Accordingly, the Second Circuit reversed and vacated the District Court's order granting summary judgment.

(iii) Third Circuit

***EEOC v. Allstate Insurance Co.*, 2015 U.S. App. LEXIS 2330 (3d Cir. Feb. 13, 2015).** The EEOC brought an action alleging that Defendant retaliated against its independent contractor sales agents by requiring them to sign a release of claims against Defendant in conjunction with a business reorganization. Pursuant to a reorganization program, Defendant shifted to an independent contractor model and terminated most of the employee agents. In connection with their termination, Defendant provided agents four options, including: (i) conversion to independent contractor status (the "conversion option"); (ii) $5,000 and an economic interest in their accounts, to be sold to buyers approved by Defendant (the "sale option"); (iii) severance pay equal to one year's salary (the "enhanced severance option"); or (iv) severance pay equal to 13 weeks' pay (the "base severance option"). *Id.* at *5. Those who selected any of the first three options had to sign a release of all legal claims against Defendant related to their employment or termination, which had accrued by the time the terminated employees signed it. *Id.* at *7. The release, however, did not bar them from filing charges with the EEOC. The EEOC alleged that Defendant illegally retaliated against its agents by allowing them to continue their careers only if they waived any discrimination claims. The District Court granted summary judgment to Defendant. On appeal, the Third Circuit affirmed. The Third Circuit noted that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled, and the employment discrimination statutes do not undermine this rule. *Id.* at *12. The EEOC argued that this rule was inapplicable here, and that the conversion option was inadequate consideration because Defendant did not give the terminated agents anything in exchange for releasing their claims. The Third Circuit, however, observed that the agents were not entitled to continued employment because they were originally at-will employees and they were also not entitled to severance pay because Defendant terminated them pursuant to a group reorganization program. *Id.* at *15. Further, even though Defendant allowed agents to convert to independent contractor status during the decade preceding the restructuring, the Third Circuit opined that the conversion option was significantly more advantageous because it: (i) offered guaranteed conversion, whereas Defendant had previously retained discretion to deny conversion; (ii) came with a bonus; (iii) excused repayment of any outstanding office-expense advances; and (iv) gave the converting agent a transferable interest in his or her business after two years, rather than five. *Id.* at *15. Thus, the Third Circuit found that the conversion option offered terminated agents something of value to which they were not otherwise entitled, and remarked that the EEOC failed to articulate any good reason why an employer cannot require a release of discrimination claims by a terminated employee in exchange for a new business relationship with the employer. The EEOC also argued that Defendant violated the anti-retaliation statutes by creating a policy that agents who refused to sign the release would not be permitted to continue their careers, and then by enforcing this policy and actually withholding the conversion option from those agents. *Id.* at *18. The Third Circuit disagreed with the EEOC that refusing to sign a release constituted opposition to unlawful discrimination because such inaction did not communicate opposition sufficiently specific to qualify as protected employee activity. *Id.* at *19. Although the release barred its signatories from bringing any claims against Defendant concerning their employment or termination, the Third Circuit reasoned that agents who refused to sign it might have done so for any number of reasons unrelated to discrimination. Thus, the Third Circuit affirmed the grant of summary judgment in favor of Defendant, holding that Defendant did not violate the federal anti-retaliation laws by requiring that agents to sign the release in order to avail themselves of the conversion option.

***EEOC v. Court Of Common Pleas Of Allegheny County, Fifth Judicial District Of Pennsylvania,* 2015 U.S. Dist. LEXIS 117796 (W.D. Pa. Sept. 3, 2015).** The EEOC brought an action alleging that Defendant discriminated against its former employee, Carolyn J. Pittman, based on her age in violation of the Americans With Disabilities Act ("ADA"). The EEOC alleged that Defendant discharged Pittman because she was too old to adequately perform her job and made too many errors. *Id.* at *1. After a period of discovery, the parties advised the Court that all discovery was complete with the exception of the deposition of the EEOC investigator, Mark Delledonne. Among the documents produced in discovery was the EEOC's investigative file. Defendant, however, sought Delledonne's deposition. The EEOC filed a motion for protective order against Delledonne's deposition based on three grounds, including: (i) lack of relevance; (ii) lack of independent knowledge; and (iii) undue burden. The Court denied the motion. The EEOC first argued that Delledonne's deposition was not relevant to the claims and defenses of the case because the EEOC would try its case *de novo* at trial and the EEOC met its obligation of attempting conciliation prior to filing the lawsuit. The EEOC also argued that Defendant had not provided a reason for Delledonne's deposition besides a concern that Pittman's deposition was inconclusive. Defendant asserted that Delledonne's deposition was necessary to bolster the defense that Pittman was not sufficiently competent to do the job by showing that she was in a state of confusion when meeting with the EEOC and was unable to keep the facts of her termination and different EEOC forms straight. *Id*. at *6. The Court remarked that deposing Delledonne was relevant to Defendant's defense that Pittman was fired for poor job performance. *Id*. at *7. The Court reasoned that this evidence was crucial for Defendant to show that Pittman was discharged for a legitimate, non-discriminatory reason. Accordingly, the Court denied the EEOC's motion.

***EEOC v. FAPS, Inc.,* 2015 U.S. Dist. LEXIS 28274 (D.N.J. Mar. 9, 2015).** The EEOC brought an action under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act to correct unlawful employment practices on the basis of race and disability, and to provide relief to a class of potential and actual applicants who were adversely affected by such practices. In July 2013, the EEOC sent a letter request to the Court claiming that Defendant's counsel hired a private investigator to conduct *ex parte* interviews of the 28 claimants and potential claimants listed in the EEOC's second amended Rule 26 disclosures. The EEOC's letter had requested that the Court intervene to prevent Defendant's investigator from conducting any further interviews. Defendant had claimed that no attorney-client privilege existed between claimants and the EEOC, and that it had instructed the private investigator to terminate the interviews and cease contact with the claimants if they informed the investigator that their counsel represented them. *Id*. at *3. In September 2013, the Court ordered both the parties to cease all fact discovery and prohibited the parties from engaging in further discovery. *Id*. at *5. The Court found that both the parties continued to engage in discovery after the expiration of the fact discovery deadline, and thus violated the existing case management order ("CMO"). *Id*. Both parties subsequently moved for reconsideration of the Court's Order in September 2013. The Court denied both the motions. Defendant claimed that because no attorney-client relationship existed between the claimants and the EEOC, no inquiry into the claimants' representation was required prior to conducting the interviews. *Id*. at *8. The Court acknowledged the differing case law precedents regarding the parameters of the attorney-client relationship between the EEOC and claimants and noted that while several jurisdictions allow *ex parte* communications with the EEOC claimants prior to the establishment of the attorney-client relationship, *ex parte* communications should be undertaken with caution. *Id*. The Court remarked that although the presumption against the existence of an attorney-client relationship was stronger than the presumption in favor of an attorney-client relationship, in this instance, defense counsel did not take sufficient precautions to determine whether an attorney-client relationship existed prior to engaging in *ex parte* communications. *Id*. at *8-9. Because Defendant had failed to show an intervening change in the controlling law, the availability of new evidence, or the need to correct a clear error of law or fact to prevent manifest injustice, the Court denied Defendant's motion for reconsideration. *Id*. At the same time, the EEOC claimed that the questionnaire the EEOC expert had sent to claimants constituted expert discovery and therefore did not violate the fact discovery deadline set forth in the CMO. *Id*. at *6. The Court, however, found that the EEOC had failed to demonstrate any intervening changes of law or new evidence which would cause the Court to reconsider its decision. *Id*. at *10. Accordingly, the Court also denied the EEOC's motion for reconsideration.

***EEOC v. Grane Healthcare Co.,* 2015 U.S. Dist. LEXIS 123133 (W.D. Pa. Sept. 15, 2015).** The EEOC brought an action alleging that Defendants violated the Americans With Disabilities Act ("ADA") by conducting pre-offer drug tests on job applicants to determine the use of illegal drugs. According to the complaint, Defendants conducted pre-employment medical examinations along with drug tests. Although the purpose of the drug tests was to determine illegal drug use, which was permissible under the ADA, four applicants who tested positive asserted that their positive drug test results were due to the use of lawful prescription medications. The EEOC argued that the pre-offer drug tests violated the ADA because the test of the applicants' urine specimens constituted a "medical examination" that elicited medical information about the applicants, even if the tests were only intended to detect evidence of illegal drug use. *Id.* at *105. The Court earlier held, for purposes of deciding summary judgment motions, that the pre-offer drug test conducted by Defendants qualified as "medical examinations" because each urine sample was tested for both medical and drug-use purposes before being discarded. *Id.* After the bench trial, the Court concluded that the evidence showed that the drug tests "were proper drug screens" and thus it did not constitute medical examinations under the ADA. *Id.* at *106. Under the ADA, in order for a drug test to be considered a medical examination, a claimant must show that the drug test in question was not administered to determine the illegal use of drugs, and that the drug test did not, in fact, return a positive result for the illegal use of drugs. *Id.* at *108. The Court noted that Defendants presented credible testimony at trial that their only intent in performing pre-offer drug testing was to determine whether the applicants were using illicit drugs. *Id.* A defense witness testified at trial that when an applicant tested positive for a controlled substance, she would cross-check the positive result for controlled substance with the list of medications used by the applicants, and only at this point would Defendants discover whether an applicant was taking a lawfully prescribed medication. *Id.* Defendants thus submitted that the drug screen itself did not reveal whether or not an applicant was taking a lawfully prescribed medication. The Court found the testimony credible and observed that the review of an applicant's medication list was intended only to make employment decisions based on illegal drug use, rather than merely a positive test result. *Id.* at *109. Because such procedure was acceptable under the ADA, the Court concluded that Defendant's pre-offer drug test was not medical examination that violated the ADA. *Id.* As to four applicants who tested positive and were not hired, the Court noted that the EEOC failed to establish that the drug tests were incorrect, or that the applicants had valid prescriptions for lawful medications. *Id.* at *110-112. The EEOC also failed to establish a claim for disability discrimination with regard to individual claimants, and failed to causally link any claimant's alleged damages to the pre-offer medical examination. *Id.* at *178. The Court therefore concluded that Defendants had legitimate, non-discriminatory reasons for declining to hire the applicants and accordingly, entered judgment in Defendants' favor.

(iv) Fourth Circuit

***EEOC v. BMW Manufacturing Co., LLC,* Case No. 13-CV-1583 (D.S.C. May 26, 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 action alleging that Defendant's use of its criminal conviction background check policy constituted an unlawful employment practice. The EEOC sought an order compelling Defendants to provide a full and complete response to the EEOC's fourth set of interrogatories. Interrogatory no. 24 stated that if Defendant claimed that the information in any cell in the spreadsheet it provided was inaccurate, it needed to: (i) identify each cell that contained inaccurate information; (ii) state what it contended would be accurate information for the cell; and (iii) identify the source of the information supporting its claim. *Id*. at 3. Defendants asserted that the interrogatory exceeded the 25 interrogatory limitation set by Rule 33(a) and the agreed discovery plan. The EEOC contended that the interrogatory satisfied the "common theme" test applied within the Fourth Circuit and, therefore, it should be counted as a single interrogatory. *Id*. at 3. The Court noted that an interrogatory containing sub-parts directed at eliciting details concerning a common theme should be considered a single question; however, an interrogatory with sub-parts inquiring into discrete areas is likely to be counted as more than one for purposes of the limitation. *Id*. at 2. The Court found that the interrogatory contained a single question with numerous sub-parts that should be considered separate from the primary question of the numbered interrogatory. The Court reasoned that the interrogatory was a separate question with respect to each individual for whom the EEOC sought to have Defendant confirm the accuracy of the spreadsheet data. The spreadsheet contained approximately 724 separate individual names with corresponding information regarding race and disposition. The Court noted that although questioning with

respect to each individual may constitute a single theme for that individual, the same questioning with respect to each additional individual introduced a line of inquiry that was separate and distinct as to each person listed. The Court thus concluded that interrogatory no. 24 comprised at least 724 separate inquiries, thereby exceeding the limitations outlined in Rule 33(a). *Id*. at 4. Accordingly, the Court denied the EEOC's motion to compel.

***EEOC v. BMW Manufacturing Co., LLC,* 2015 U.S. Dist. LEXIS 125367 (D.S.C. July 30, 2015).** The EEOC brought an action alleging that Defendant's criminal background check policy constituted an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964. The EEOC contended that Defendant's policy had a disparate impact on black employees and applicants and was not job-related or consistent with a business necessity. *Id*. at *3. The parties cross-moved for summary judgment and to exclude the testimony of each other's expert. The Court denied both motions. At the outset, the Court noted that to establish a *prima facie* case of disparate impact discrimination, the EEOC must demonstrate that the facially neutral employment practice had a statistically significant discriminatory impact. *Id*. at *5. In addition, the Court observed that the employment practice must impose a substantially disproportionate burden upon a protected group as compared to a favored group within the total set of individuals to whom it is applied. *Id*. Defendant moved for summary judgment, arguing that the EEOC failed to submit evidence showing disparate impact because the set of 724 employees that the EEOC analyzed was inadequate to demonstrate that the criminal background check had a disparate impact. The EEOC asserted that when analyzing the set of 724 individuals, it showed a statistically significant disparate impact, thereby entitling it to summary judgment. *Id*. at *7. After reviewing the parties' arguments and the evidence, the Court concluded that there were genuine issues of material fact concerning which individuals were similarly-situated for purposes of determining disparate impact. *Id*. The Court expressed concern regarding whether the set of 724 individuals was adequate to determine disparate impact, but at this stage of the case, it held that summary judgment was not appropriate for either party.

***EEOC v. CCR*, 2015 U.S. Dist. LEXIS 62431 (W.D.N.C. May 7, 2015).** The EEOC brought an action alleging that Defendant terminated an employee, Megan McCloskey, during her pregnancy in violation of the federal law. The EEOC asked the Court to: (i) order McCloskey's deposition within one week after Defendant had responded to the EEOC's first set of interrogatories; (ii) issue a protective order governing discovery materials; and (iii) compel responses to the EEOC's interrogatories and requests for production. The Court granted the motions in part. The EEOC argued that it could not prepare for McCloskey's deposition without adequate responses to its interrogatories and requests for production. *Id.* at *2. The Court agreed and granted the protective order, directing that McCloskey's deposition would take place one week after Defendant responded to the first set of interrogatories. *Id*. Defendant opposed the EEOC's request to respond to Interrogatory No. 4 and Requests for Production Nos. 12 and 31 because those items concerned financial status, which it asserted was irrelevant to the dispute. The Court agreed and denied the EEOC's motion to compel production of financial information. The Court, however, granted the EEOC's motion to compel the response and production of information and documentation that supported the affirmative defenses raised in Defendant's answer, finding that the information was relevant to the dispute. *Id*. at *3.§

***EEOC v. Consol Energy, Inc.,* 2015 U.S. Dist. LEXIS 1326 (N.D. W. Va. Jan. 7, 2015).** The EEOC brought an action seeking a permanent injunction and monetary relief for Beverly Butcher, Defendants' employee, alleging that Defendants instituted practices that denied Butcher a religious accommodation. Defendants allegedly refused to accommodate Butcher's religious belief that submitting to a newly installed biometric hand-scanner for tracking of employees' time and attendance conflicted with his beliefs as an evangelical Christian. Butcher worked in Defendants' mine, and Defendants installed a hand-scanning technology in June 2010 for tracking employee time and attendance. Butcher informed Defendants that he could not submit to the hand-scanning device because he believed that such scanning would make him take on the "Mark of the Beast." *Id.* at *2. Defendants offered only an alternative of using left hand palm up instead of right hand palm down, reasoning that based on the Book of Revelation, the "Mark of the Beast" could only occur if the right hand was scanned. Eventually, Butcher involuntarily retired and complained to the EEOC. Moving for summary judgment, the EEOC argued that Defendants knew that

Butcher's beliefs were genuinely held, he only retired because Defendants did not accommodate his requests, and that there were suitable alternatives to the hand scanner. *Id.* at *3. Defendants also cross-moved for summary judgment, arguing that Butcher chose to retire before it could explore different accommodations, and that the alternatives suggested by Butcher would result in more than *de minimis* hardship to Defendants because they had already spent time and money on the new system, no system was in place for a time clock, and the old manual system had cost them millions of dollars in overtime. *Id.* at *9. Defendants further filed a motion *in limine* asserting that bifurcation of the EEOC's claim for punitive damages would be required as they would otherwise be prejudiced unfairly if the jury were to consider Defendants' finances and corporate wealth at the same time that it considered liability and/or compensatory damages. *Id.* at *12. The Court denied both motions for summary judgment. The Court found that there were material issues of facts as to whether or not Butcher was disciplined for failure to comply with Defendants' hand scanning policy, whether or not Defendants provided a reasonable accommodation or were unable to provide certain accommodations because of undue hardship, and whether or not Butcher's retirement was forced by the implementation of the hand scanning disciplinary policy and the actions taken by Defendants. *Id.* at *16-22. The Court granted Defendants' motion *in limine* regarding the EEOC's claim for punitive damages, finding that it could not at that time reach the question as to whether or not a reasonable accommodation was given, as there were still genuine issues of material fact remaining as to the constructive discharge and whether a *prima facie* religious accommodation claim had been made by the EEOC, and thus whether or not a reasonable juror could find that Butcher was entitled to punitive damages. *Id.* at *26. The Court therefore concluded that issues of liability could be determined during the first phase of trial, and if the jury determine that punitive damages could be awarded, evidence of the appropriate amount, including that of Defendants' wealth or financial condition where relevant, could be permitted in the second phase. *Id.* at *28-29. Accordingly, the Court denied the parties' motions for summary judgment, and granted Defendants' motion *in limine* for bifurcation of the claim for punitive damages.

***EEOC v. Consol Energy, Inc.,* 2015 U.S. Dist. LEXIS 60520 (N.D. W. Va. May 8, 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 ("Title VII") action alleging that Defendants instituted practices that denied one of its employees, Beverly R. Butcher, a religious accommodation. When the Court set the action to hear oral argument and receive evidence concerning damages, Defendants sought to exclude any evidence of accommodations to other employees, and the EEOC brought motions to exclude argument and evidence concerning any irrelevant and hypothetical rationale for Defendants' actions, and to exclude argument and evidence concerning hypothetical union grievances or hypothetical labor arbitrations outcome. The Court granted the EEOC's motions and denied Defendants' motion. Regarding its first motion, the EEOC argued that evidence as to state of mind of Mike Smith, Defendant's executive, should not be admitted as any belief by Butcher as to Smith's state of mind was pure speculation. *Id*. at *3. The EEOC contended that Smith was not involved in the decision-making regarding Butcher's request and thus this evidence was irrelevant. The Court found that the suggested testimony and evidence was speculative as to what Butcher thought Smith believed, and hence would not provide actual proof of Smith's state of mind. *Id*. at *4. Further, the Court opined that the value of such evidence would be substantially outweighed by the danger that the jury might be misled or confused. The EEOC also sought to exclude Defendants from arguing that Butcher should have accepted disciplinary action and a discharge, and then filed a union grievance, instead of retiring because he likely would have prevailed in an arbitration. *Id*. at *4-5. The EEOC contended that it was irrelevant because Title VII does not require an employee to seek arbitration nor does it require an employer to refuse a reasonable accommodation unless ordered to do so by an arbitrator. *Id*. at *5. The Court found that evidence regarding the union grievance was irrelevant as federal labor law could not trump Butcher's rights under Title VII. *Id*. at *6. Further, the Court determined that the offered evidence was not relevant as to Defendants' constructive discharge claim and other defense theories. The Court thus concluded that introduction of such evidence would constitute unfair prejudice, and accordingly, granted the EEOC's motions. *Id*. Finally, Defendants argued that evidence of accommodations requested by two other employees should be excluded as it was irrelevant because they did not make a religious accommodation requests, but rather had physical abnormalities which impeded their ability to use the scanner. *Id*. at *7. The EEOC, however, argued that the approach used by other miners was proof that Defendants did not offer Butcher a reasonable

accommodation and thus this evidence was relevant. The Court found that the evidence regarding other miners was relevant and should not be excluded. *Id*. The Court determined that accommodations provided to other miners would be a fact that would be of consequence in determining whether Defendants provided Butcher with a reasonable accommodation. *Id*. at *7-8. Accordingly, the Court denied Defendants' motion *in limine*.

***EEOC v. Consol Energy, Inc.,* 2015 U.S. Dist. LEXIS 110728 (N.D. W. Va. Aug. 21, 2015).** The EEOC brought an action alleging that Defendant violated Title VII of the Civil Rights Act of 1964 by denying its employee a religious accommodation involving an exemption from using a biometric hand scanner. The employee, Beverly R. Butcher, repeatedly informed Defendant and its officials that he could not comply with Defendant's hand scanning policy because it violated his sincerely held religious beliefs as an Evangelical Christian. Defendant refused to consider alternate means of tracking Butcher's time and attendance, and eventually Butcher resigned involuntarily. At trial, the jury ruled in favor of the EEOC and awarded Butcher $150,000 in compensatory damages. *Id.* at *42. Prior to trial, the parties filed motions *in limine* concerning certain issues relating to damages, which were held in abeyance pending trial. *Id.* at *2. Following the trial verdict, the EEOC sought additional back pay, front pay, and other damages on behalf of Butcher; and it filed a motion for a permanent injunction. *Id.* The Court granted the EEOC's motion, determining that Defendant must pay Butcher an additional $436,860.74 in back pay and front pay for the Title VII violations found by the jury, and ordered a permanent injunction for a three-year period barring Defendant from denying reasonable accommodations for religion in connection with its use of biometric hand screening. *Id.* at *42-43. Regarding the monetary damages, the parties disputed on the amount of back and front pay Butcher should receive. While the EEOC argued that the pension benefits Butcher received should not be used as an off-set to any back or front pay as they were collateral – not paid directly from and entirely by Defendant – Defendant argued that the pension benefit should off-set any economic damages as the pension plan was 100% employer-funded and thus a non-collateral source. *Id.* at *3-4. The Court agreed with the EEOC and held that the pension benefits were a collateral source as there had been no evidence that the fund was meant to be used as an indemnifying fund for potential litigation that was not in an employer's favor, and there had been no evidence that the applicable collective bargaining agreement contained a provision contemplating a set-off of benefits received in a case such as this. *Id.* at *8. Similarly, the Court found that supplemental pension benefits were also collateral as they were based on Butcher's length of employment and there was no indication that the collective bargaining agreement required a set-off. *Id.* at *11. Defendant argued that Butcher's back and front pay award should be limited as he failed to adequately mitigate his damages by failing to seek similar employment in the coal mining industry and by failing by apply for available openings in the coal industry that he was likely aware. *Id.* at *14. The Court, however, found that Butcher reasonably mitigated his damages, given the limited available positions in the coal mining industry, his personal economic circumstances, and his limitations due to his age and education for higher-paying jobs in his area. *Id.* at 20-24. Further, Butcher had testified that he did not completely forego a search for coal mining jobs, and that he would have accepted a mining job if the pay and benefits provided the same security he had with the pension benefits. *Id.* at *25. The Court therefore declined to make any deductions from Butcher's damages award for either back pay or front pay, and awarded him $436,860.74 in damages. Regarding the injunction request, the Court found that a permanent injunction was necessary as Defendant did not meet its heavy burden of proving that future discrimination would not occur. *Id.* at *38. Although Defendant attempted to take curative actions after the underlying incident and reported that no other incidents of discrimination occurred, the Court was skeptical because all four employees involved in the incidents continued to be Defendant's employees. *Id.* Further, the Court found that the scope of injunction was reasonable as the injunction specifically targeted religious discrimination based on precedential case law and the biometric hand scanning device, and was limited to a three-year span which would allow Defendant to put in place the required policies and procedures. *Id.* at *39. Accordingly, the Court granted the EEOC's motion for additional monetary damages and a permanent injunction.

***EEOC v. DHD Ventures Management Company, Inc.,* 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).** The EEOC brought an action alleging that Defendants subjected a group of employees to a racially hostile work environment, and that they were discharged in retaliation for complaining of alleged hostile

work environment in violation of Title VII of the Civil Rights Act of 1964. Defendants moved to dismiss the complaint, and the Court denied the motion. In their motion to dismiss, Defendants had argued that the Court lacked personal jurisdiction over them, and that the suit was barred by failure to exhaust administrative remedies. *Id*. at *9. The Magistrate Judge had recommended that the Court grant the motion to dismiss. The EEOC filed Rule 72 objections to the Magistrate Judge's recommendations and sought leave to conduct discovery on the issue of personal jurisdiction and the statute of limitations. *Id*. at *11. The Court found that the EEOC should be given time to conduct discovery regarding whether the Court could exercise personal jurisdiction over Defendants. *Id*. at *12. The EEOC also sought leave for discovery to determine the respective role of Defendants as to jurisdictional and statute of limitations issues. *Id*. The Court found that discovery on those issues would be helpful for a determination as to whether the allegations were barred by the statute of limitations. *Id*. Accordingly, the Court permitted discovery on the personal jurisdiction and the statute of limitations issues, and denied Defendants' motion to dismiss.

***EEOC v. FedEx Ground Package System, Inc.*, 2015 U.S. Dist. LEXIS 21801 (D. Md. Feb. 24, 2015).** The EEOC brought an Americans With Disabilities Act action alleging that Defendant discriminated against and failed to accommodate deaf or hard-of-hearing individuals employed as either package handlers or who had applied for a package handler position. Defendant moved to transfer the lawsuit to the U.S. District Court for the Western District of Pennsylvania, which the Court granted. *Id.* at *2. The Court found that although the government's choice of venue is entitled to some deference, the convenience of the parties' factor favored transfer. The Court noted that it was more convenient for Defendant to have this case proceed in Pittsburgh, Pennsylvania, where its headquarters was located. Many of its officers and directors were located in and around Pittsburgh, and Defendant asserted that relevant documentation including personnel records and documents related to the development of certain technology and equipment used by package handlers was located in Pittsburgh. *Id.* at *4. On the other hand, the EEOC contended that the investigation of this matter was centered in its Baltimore office and that its lead investigator worked under the supervision of managers in the Baltimore office. Further, the EEOC argued that its field office in Pittsburgh was small, had little support staff, and that no one in that office had worked on this investigation. The Court remarked that the EEOC's arguments centered more on the convenience of its attorneys, which is not a proper consideration for transfer of venue. *Id.* at *5. Even considering the convenience of the package handlers themselves, only one charging party was employed in a facility located in Maryland, and the rest worked or applied to work in facilities throughout the country. Thus, the Court concluded that this factor slightly favored transfer. The Court also found that the convenience of the witnesses factor strongly favored transfer. Defendant argued that its employees responsible for developing and implementing the training and orientation provided to package handlers, and those responsible for selecting and developing the equipment and technology used by package handlers, worked at its headquarters in Pittsburgh and lived in the Pittsburgh area. The EEOC, however, argued that the key witnesses were the aggrieved individuals themselves and the front-line managers and human resources officials from each distribution facility. The Court noted that only one distribution facility was located in Maryland, and the rest were disbursed across the country. Thus, with the exception of those potential witnesses connected with the Maryland facility, the Court opined that Baltimore was more convenient than Pittsburgh. Further, the Court observed that to determine the liability of the corporation under the anti-discrimination statutes, the finder of fact needs to understand how the official policy is developed, communicated, and monitored. *Id.* at *9. While the understanding of what was happening at the different distribution centers could come from witnesses dispersed around the country, the Court determined that the understanding of the official policy would come from witnesses who predominately worked and lived in Pittsburgh. Accordingly, the Court concluded that the convenience of witnesses factor favored transfer. Finally, the Court found that because Western District of Pennsylvania was less congested than the District of Maryland, transfer was appropriate in the interest of justice. Accordingly, the Court transferred the action to the Western District of Pennsylvania.

***EEOC v. Freeman, Inc.,* 778 F.3d 463 (4th Cir. 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 action alleging that Defendant, a corporate events service provider, conducted credit and criminal background checks on applicants and employees that resulted in a disparate impact on black and

male job applicants. Defendant required criminal background checks for all applicants, and credit checks for positions involving money handling or access to sensitive financial information. Defendant's policy disqualified applicants if their credit or criminal histories revealed "certain prohibited criteria." *Id.* at 465. Defendant modified these criteria from time to time, ultimately phasing out the use of credit checks. The EEOC commenced an investigation into Defendant's policy based on a charge of discrimination filed by an applicant in 2008, and later brought a pattern or practice lawsuit. The EEOC relied on a statistical report prepared by its expert, Dr. Kevin Murphy, an industrial and organizational psychologist, to support its disparate impact claim. Defendant moved for summary judgment on the basis that the EEOC's expert report was insufficient to demonstrate a *prima facie* case of disparate impact discrimination. Granting summary judgment to Defendant, the District Court excluded Murphy's expert report as it was "rife with analytical errors" and "completely unreliable." *Id. a*t 466. Upon the EEOC's appeal, the Fourth Circuit affirmed the District Court's judgment. In rejecting Murphy's expert report, the Fourth Circuit catalogued the "mind-boggling number of errors and unexplained discrepancies" identified by the District Court, including missing data, basic mathematical errors, and incorrect coding of race and background check results. *Id.* at 467. The Fourth Circuit particularly emphasized Murphy's highly selective sample, which analyzed only a limited number of background checks and excluded the data pertaining to "hundreds, if not thousands, of applicants" that were available for the relevant time period. *Id.* at 466. Although the EEOC attempted to correct the expert report through supplementation, the Fourth Circuit agreed with the District Court's finding that Murphy's attempt to fix errors was not only inadequate, but also in fact created fresh errors. *Id.* at 467. The Fourth Circuit found that "the sheer number of mistakes and omissions in Murphy's analysis renders it outside the range where experts might reasonably differ." *Id.* The Fourth Circuit therefore concluded that the District Court properly excluded Murphy's report, and accordingly, affirmed the summary judgment for Defendant.

Editor's Note: The ruling in *EEOC v. Freeman* constitutes the most notable decision against the Commission in 2015. Adding to the scathing majority opinion, the Concurring Judge further reprimanded the EEOC for its "disappointing litigation conduct" including its continued reliance on Murphy whose testimony was fatally flawed in multiple respects. *Id.* at 468. The Concurring Judge explicitly referenced a recent Sixth Circuit case where the EEOC relied on Murphy and lost, noting that the expert was no stranger to having courts reject his work for improper sampling. Pointing out that the EEOC's conduct suggested a lack of exercise of vigilance, the Concurring Judge cautioned it "to reconsider how it might better discharge the responsibilities delegated to it or face the consequences of failing to do so." *Id.* at 472-73.

***EEOC v. Freeman, Inc.*, 2015 U.S. Dist. LEXIS. 118307 (D. Md. Sept. 3, 2015).** The EEOC brought an action alleging that Defendant conducted criminal and credit background checks that had a disparate impact on African-American and male employment applicants. The Court granted Defendant's motion for summary judgment, which was affirmed on appeal. Defendant then moved for an award of attorneys' fees. *Id*. at *6. The Court granted the motion. The EEOC argued that Defendant was not entitled to attorneys' fees because its case was not factually groundless. The Court observed that EEOC needed to present reliable statistical evidence that Defendant's policies had a disparate impact to make out a *prima facie* case of discrimination. *Id*. at *10. The Court remarked that the EEOC argued that it could have been possible for the EEOC to show evidence of disparate impact, but that it failed to do so. *Id*. at *10-11. The Court opined that the possibility that some evidence existed somewhere to back-up a claim did not constitute reasonable grounds for continuing to litigate that claim. The Court reasoned that cases should be litigated based on evidence actually produced, and not on hunches. *Id*. at *11. Without reliable statistical evidence produced by an expert, which was absent in this case, the Court concluded that the EEOC could not make its *prima facie* case. *Id*. The Court also noted that it was unreasonable for the EEOC to continue to litigate on the basis of obviously flawed report from its expert, Dr. Kevin Murphy. Defendant's motion to exclude Dr. Murphy's expert report detailed the flaws in the report, and given those flaws, the Court determined that the EEOC could not possibly continue to rely in good faith on its expert's reports. *Id*. at *20. Accordingly, the Court concluded that because the EEOC relied on a severely and obviously flawed expert report, Defendant was entitled to its reasonable attorneys' fees. *Id*. at *29. The EEOC also objected to Defendant's fee request for the amici work on appeal, but the Court rejected the EEOC's objections, finding that the amici presented various relevant arguments in support of Defendant's position on appeal. *Id*. at

*37. The EEOC also objected to allegedly excessive hours spent by defense counsel on summary judgment briefing, fees related to ancillary, unsuccessful, or unfiled motions, and for fees related to the appeal. Defendant sought a total of $1.5 million in fees. After determining the reasonableness of the fees demanded by various attorneys, and the different stages of the litigation, the Court reduced the fee to $938,771.50. Accordingly, the Court granted Defendant's motion for attorneys' fees in part.

***EEOC v. Metro Special Police & Security Services, Inc.,* 2015 U.S. Dist. LEXIS 88698 (W.D.N.C. Jan. 21, 2015).** The EEOC brought an action alleging that Defendant committed unlawful employment practices on the basis of sex and retaliation. With the assistance of a mediator, the parties settled, and subsequently filed a joint motion to enter a consent decree. *Id*. at *2. The Court issued a settlement order adopting the consent decree. The EEOC then moved to show cause why Defendant should not be held in contempt for violating and failing to comply with the terms of the consent decree, including paying the settlement money. The Magistrate Judge recommended that the motion be denied. At the outset, the EEOC asserted that Defendant voluntarily agreed to settle the case and agreed to the payment of $155,000 as part of the settlement, but refused to pay, and therefore, it should be held in contempt. *Id*. at *3. Defendant responded that from the time the settlement was final, the EEOC was aware that that it was incapable of making any payments under the settlement without third-party financing. *Id.* The Magistrate Judge observed that the consent decree specifically described the recourse available to the EEOC in the event Defendant failed to timely make payments. The consent decree stated that upon Defendant's failure to make timely payments, the parties expressly agree to the entry of an executed consent judgment in the amount of $155,000. *Id*. at *9. The Magistrate Judge, however, found that neither party specifically addressed the applicable consent decree language in their briefs, which both parties voluntarily agreed to in settling this case. *Id*. Moreover, the parties' agreement did not anticipate or allow for contempt proceedings; rather, it specifically provided for the entry of a consent judgment. *Id.* Thus, the Magistrate Judge was not persuaded that Defendant by its conduct violated the terms of the consent decree, and had knowledge of such violations; rather, it found that the EEOC was in violation of the consent decree by pursuing its contempt motion instead of the agreed-upon remedy of entry of the consent judgment. *Id.* at *10. Accordingly, the Magistrate Judge recommended that the EEOC's motion be denied.

***EEOC v. Metro Special Police & Security Services, Inc.,* 2015 U.S. Dist. LEXIS 90913 (W.D.N.C. July 8, 2015).** The EEOC brought an action alleging that Defendant committed unlawful employment practices on the basis of sex and retaliation. Subsequently, Defendant settled the case pursuant to a consent decree. Later, the EEOC moved to show cause why Defendant should not be held in contempt for failing to comply with the terms of a consent decree, as Defendant failed to make payment of agreed upon monetary settlements. *Id.* at *1. The Magistrate Judge noted that paragraph 5 of the consent decree specifically described the recourse available to the EEOC in the event Defendant failed to timely make payments to the claimants. If Defendant did not make timely payments, the parties expressly agreed to the entry of an executed consent judgment in the amount of $155,000, and that the EEOC immediately could file a motion for entry of the consent judgment and proceed with collection. Because the parties' agreement did not anticipate or allow for contempt proceedings, the Magistrate Judge recommended denying the EEOC's motion. *Id.* at *1-2. The EEOC sought review of that recommendation per Rule 72. The parties thereafter filed a status report stating that they had reached an agreement that Defendant would make monetary payments to the individual claimants by June 1, 2015. *Id*. at *2. On June 23, 2015, the EEOC filed a notice of withdrawal of its motion, informing the Court that the Defendant made monetary payments in compliance with the agreement. As a result, the Court denied the EEOC's motion to show cause as moot.

***EEOC v. TNT Propane, Inc.*, 2015 U.S. Dist. LEXIS 10755 (D.S.C. Jan. 30, 2015).** The EEOC brought an action alleging that Defendants subjected a female employee to a sexually hostile work environment that resulted in the employee resigning from her position. Defendants' counsel moved to be relieved as counsel, which the Court granted. Counsel for Defendants had sent a copy of the motion to his clients via electronic mail and UPS overnight mail, and notified them that they must retain new counsel because corporate entities cannot represent themselves, that new counsel must be admitted to practice in the Court, and Defendants may be held in default if new counsel was not retained within a reasonable time. *Id.* at *1-

2. Counsel also notified Defendants that they could object to his request to be relieved by filing, through other counsel, a response to the motion within 17 days of the filing date. Additionally, counsel for Defendants provided Defendants with the notice of hearing and informed them of the requirement that someone must appear on their behalf. However, no representative for Defendants, legal or otherwise, appeared at the hearing. *Id.* at *2. Accordingly, the Court granted defense counsel's motion to be relieved, and granted Defendants 30 days' time to retain a new counsel.

***EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2015 U.S. Dist. LEXIS 10874 (4th Cir. June 26, 2015).** The EEOC brought an action alleging that Defendant violated the ADA by terminating Charlesetta Jennings, Defendant's employee, after she was diagnosed with lymphedema, a condition caused by breast cancer treatment, which affects the circulatory and immune systems. Jennings began working for Defendant in 2000 as a support services assistant ("SSA"), and in 2008 was diagnosed with breast cancer, and took intermittent leave while undergoing chemotherapy. *Id*. at *3. In November 2009, Jennings was diagnosed with lymphedema, and she devised alternate methods for accomplishing her work-related tasks to avoid further injury for about seven months. *Id*. at *4. In 2010, Jennings suffered an injury at work, and submitted a doctor's note that she could not lift more than 10 pounds. *Id*. at *5. Defendant accommodated her and in 2011, Jennings provided an updated doctor's note stating that she could lift up to 20 pounds. The office manager reassessed Jennings' condition to transfer her to another job position, and concluded that she might be qualified to work as a receptionist or message center operator, but those positions were already filled. Accordingly, in February 2011, Defendant placed Jennings on a medical leave of absence, and terminated her employment after the medical leave ran out. *Id*. at *8. The District Court granted Defendant summary judgment, and on the EEOC's appeal, the Fourth Circuit affirmed. The EEOC argued that Jennings could perform the essential functions of SSA job even without reasonable accommodation. Alternatively, the EEOC argued that requiring SSAs to help with tasks that involved lifting over 20 pounds was a reasonable accommodation that would have enabled Jennings to perform essential functions of the job. The Fourth Circuit disagreed, finding that the SSA position was multifaceted – requiring the ability to perform a wide variety of tasks during one shift – and many of those tasks could at any time require lifting over 20 pounds, the ability to lift that amount was an essential function of the job. *Id*. at *14. The Fourth Circuit noted that even though Jennings worked primarily in the copy room, she could have, at any time, been called upon to move heavy furniture or carry heavy packages. *Id*. In addition, it was undisputed that SSA tasks required lifting over 20 pounds. Because so many facets of the SSA job may at any time require lifting over 20 pounds, the ability to do so bore more than a marginal relationship to the job, and was thus an essential function of the position. *Id*. at *16. Because Jennings was unable to lift that amount, the Fourth Circuit concluded that she was unable to perform an essential function of the job. *Id*. The EEOC, however, argued that despite Jennings' inability to lift over 20 pounds, she could nevertheless perform the essential functions of the SSA job, as evidenced by her strong performance reviews. The Fourth Circuit, however, determined that Jennings' testimony reflected that she did lift more than 20 pounds prior to her injury, and her alternate work methods did not prevent her from having to lift more than 20 pounds and injuring herself. Accordingly, the Fourth Circuit found the EEOC's arguments unpersuasive and affirmed the grant of summary judgment to Defendant.

***EEOC v. Young And Associates, Inc.,* 2015 U.S. Dist. LEXIS 1236 (W.D. Va. Jan. 7, 2015).** The EEOC brought an ADA action on behalf of Brooke McCarter, a restaurant server, alleging that Defendant wrongfully discharged her because of her disability. McCarter had a specific medical impairment that substantially limited the proper function of her digestive system. When McCarter confirmed her disability in response to her manager's inquiry, the manager required her to provide a doctor's note affirming that she could work safely at the restaurant. *Id.* at *2. McCarter produced the note the very next day, but the manager refused to accept or even review the note, and immediately discharged her due to her disability. *Id.* Defendant moved to dismiss, arguing that the EEOC failed to allege sufficient facts to support the claim. The Court denied the motion. The Court disagreed with Defendant that to survive a motion to dismiss, the EEOC must plead sufficient facts to support a *prima facie* case of wrongful discharge. Instead, the Court observed that Rule 8(a)(2) requires only that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief, and that a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* at *3-4.

Further, regarding the standard for employment discrimination claims, the Court found that in order to survive a motion to dismiss, the EEOC is not required to plead facts that constitute a *prima facie* case, but that a complaint's factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at *4. Here, the complaint provided Defendant fair notice of the grounds for the EEOC's claims and stated a claim for which relief could be granted under the ADA. The complaint alleged that McCarter was within the ADA's protected class and suffered an adverse employment action because of her disability. *Id*. at *6. The complaint also alleged that McCarter was able to successfully perform her duties as a server, and that Defendant discharged her because she had a disability that impaired her digestive system. *Id*. Further, the complaint pointed out the precise circumstances surrounding McCarter's discharge, and that Defendant discharged her without reviewing or accepting her doctor's note. *Id*. Because these alleged facts gave rise to a reasonable inference that Defendant was liable for the misconduct alleged, and because they sufficiently nudged the EEOC's claims from conceivable to plausible, the Court denied Defendant's motion to dismiss. *Id.*

(v) Fifth Circuit

***EEOC v. A'Gaci, LLC*, 2015 U.S. Dist. LEXIS 14319 (W.D. Tex. Feb. 5, 2015).** The EEOC filed a subpoena enforcement action against Defendant seeking data and information relating to Chris Daiss' charge that Defendant terminated him in retaliation for complaining about potentially discriminatory hiring practices. Defendant moved to seal the EEOC's application to enforce its administrative subpoena, and to file exhibits in response under seal, which the Court granted. Further, Defendant moved to seal EEOC's reply and for a protective order, which the Court granted in part. Regarding the motion to seal the EEOC's application, Defendant pointed to 42 U.S.C. § 2000e-8(e), which makes it unlawful for the EEOC to make public in any manner whatever any information obtained by the EEOC pursuant to its authority under this section prior to the institution of any "proceeding" under this sub-chapter involving such information. *Id.* at *5. Defendant also pointed to § 2000e-5(b), which provides, in relevant part that charges shall not be made public by the Commission. *Id.* at *6. In *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1990), the U.S. Supreme Court suggested that filing an application to enforce an administrative subpoena did not qualify as a "proceeding" under § 2000e-8(e). *Id.* at *6. Thus, the Court opined that pursuant to § 2000e-8(e), the EEOC erred in making public information it obtained while investigating the charge. Further, the Court observed that the legislative purpose behind § 2000e-5(b)'s ban on making charges public was to prevent making available to the general public unproven charges, and that it was improper for the EEOC to quote directly from the charge in its application. *Id.* at *7. Nevertheless, the Court determined that the right to public access required parts of the application to remain in the public record because applications to enforce EEOC subpoenas are an important part of the EEOC's mission of vindicating the public interest in preventing employment discrimination. *Id.* at *8. Thus, the Court balanced the competing interests by granting Defendant's motion to seal the application currently in the record, and by ordering the EEOC to produce a redacted version of the application for the public record. Further, regarding Defendant's motion to file exhibits in its response under seal, the Court observed that the exhibits included Daiss' charge, the EEOC's notification of the charge, Defendant's position statement, and correspondence between the EEOC and Defendant. The Court granted the motion, holding that these documents should not be made public pursuant to Title VII's prohibitions on making public the charge and information obtained in the course of the investigation before a formal proceeding commences. *Id*. at *11. Similarly, the Court granted Defendant's motion to seal the EEOC's reply, and ordered the EEOC to produce a redacted copy of the reply for the public record. The Court observed that the EEOC repeatedly ignored the clear statutory prohibition on making charges of discrimination public, and even after Defendant's counsel alerted the EEOC to its obligations under the statute, the EEOC failed to redact the confidential excerpts from its filings. Thus, the Court granted Defendant's motion for a protective order prohibiting the EEOC from quoting from the charge and information obtained in the course of investigating the charge in future filings, until such time as a lawsuit may be filed regarding the charge. *Id*. at *13.

***EEOC v. A'Gaci,* LLC, 2015 U.S. Dist. LEXIS 144732 (W.D. Tex. Oct. 26, 2015).** The EEOC investigated Defendant after one of its employees, Chris Daiss, filed a charge alleging that he was terminated in retaliation for complaining about potential discriminatory hiring practices. The EEOC issued a subpoena to Defendant requesting various data and information in connection with Daiss' allegations. *Id*. at *2.

Defendant filed a petition to modify or revoke the subpoena, which the EEOC subsequently denied. The EEOC filed an application to enforce the administrative subpoena, and Defendant filed a motion to seal the EEOC's application, filed a motion to submit any exhibits in response under seal, and then filed a motion to seal the EEOC's reply. The Court granted Defendant's first two motions to seal, and granted the third motion in part. The EEOC moved to reconsider those orders, which the Court denied. The EEOC first asked the Court to reconsider its finding that it violated 42 U.S.C. § 2000e-5 by reproducing large parts if Daiss' charge in the record. In its previous order, the Court held that the EEOC had an obligation not to publicly disclose the charge of discrimination. The Court noted that § 2000e-5(b) restricts the EEOC from making public the contents of the charge without written consent of the concerned parties. *Id*. at *4. The Court found that the EEOC had demonstrated no manifest error of law as to the non-disclosure, and concluded that it was not entitled to reconsideration on this issue. *Id*. at *6. The EEOC also sought reconsideration of the Court's holding that an application to enforce an administrative subpoena did not qualify as a "proceeding," and therefore it could not make public any information that the EEOC obtained. *Id.* The Court observed that at this stage of the EEOC's investigation, no charges were proved against Defendant, and in fact, the EEOC had not even determined whether or not Daiss' charge had merit. *Id*. at *7. The Court ruled that it would be unfair if the EEOC could publish information obtained in the course of the investigating a charge before any determination is made as to whether the charge states a valid complaint. *Id*. Finally, the EEOC pointed to its authority to investigate and issue subpoenas under § 2000e-9, which incorporated by reference § 11 of the NLRA. The EEOC pointed to *NLRB v. Friedman*, 352 F.2d 545 (3d Cir. 1965), where the Third Circuit referred to an action brought to compel compliance with the NLRB-issued subpoenas as a proceeding. *Id*. at *9. The Court found that in *Friedman*, the Third Circuit used the term "proceeding" in the general sense and made no specific finding that the action to compel was a proceeding within the meaning of the statutory provision applicable to the EEOC. *Id*. Accordingly, the Court denied the EEOC's motion for reconsideration.

***EEOC v. Dolgencorp, LLC,* 2015 U.S. Dist. LEXIS 12571 (S.D. Miss. Feb. 3, 2015).** The EEOC brought an action on behalf of Demetrice Hersey, Defendant's lead sales associate, alleging racial discrimination and retaliation in violation of Title VII. The EEOC contended that Defendant did not promote Hersey to an assistant store manager position because she was black, and then retaliated against her by issuing written discipline when she filed a charge of discrimination with the EEOC. Defendant moved for summary judgment, which the Court granted in part. Regarding its racial discrimination claim, the EEOC presented evidence that store employees heard the store manager frequently using the word "nigger" when referring to black persons, and once called Hersey a "lazy black nigger." *Id*. at *2-4. The EEOC also presented evidence that the store manager had made a comment in April 2011 that she did not "want a nigger working for her" and that she was trying to get Hersey to leave when there was an assistant store manager position open in 2011. *Id*. at *4. The Court found that the EEOC had not challenged Defendant's failure to promote Hersey in 2011, but challenged only its failure to promote her in 2009 and 2010. Therefore, the Court observed that the store manager's 2011 comments – 15 months after the last challenged promotion – were too remote in time to constitute direct evidence of race discrimination. *Id*. at *6-7. The Court, however, observed that there was ample evidence in the record from which it could find that racial animus was also a factor. *Id*. at *9. The Court opined that the testimony regarding the store manager's comments about blacks in general, and Hersey in particular, could also constitute circumstantial evidence. The Court observed that if the jury believed this testimony, the jury could conclude that racial animus was a motivating factor in the store manager's decision not to promote Hersey. *Id*. at *9-10. Therefore, the Court concluded that summary judgment was inappropriate as to the EEOC's racial discrimination claim. *Id.* at *10. Regarding the retaliation claim, the Court noted that generally a written reprimand, without evidence of consequences, does not constitute an adverse employment action. *Id*. at *11. The Court relied on the facts that in a three-month period immediately after Hersey filed her EEOC charge, the store manager documented five instances where Hersey was responsible for the cash registers being short at the end of the day. *Id*. at *11-12. In addition, the store manager subsequently documented seven instances of dissatisfaction with Hersey's productivity and adherence to office procedures. *Id*. at *12. This contrasted with three written reprimands during all of 2008 and 2009, and it appeared to the Court that Defendant moved Hersey along a disciplinary track toward termination. *Id*. The Court, however, found that despite this, there was no practical effect on Hersey's conditions of employment including a possible termination.

Hersey left Defendant only after finding other employment, and not under threat of termination. Further, Defendant never removed Hersey from her position and never placed her on any type of performance improvement plan to address alleged performance deficiencies. *Id*. The Court found that those inconsequential disciplinary notices were the store manager's minor complaints about Hersey's work put into writing. *Id*. at *12-13. Thus, the Court concluded that the disciplinary notices that posed the potential threat to Hersey's conditions of employment were too speculative to make them materially adverse employment actions. *Id*. at *13. Accordingly, the Court granted Defendant's motion for summary judgment as to the EEOC's retaliation claim, and denied as to the racial discrimination claim. *Id.* at *13-14.

***EEOC v. EMCARE, Inc.,* 2015 U.S. Dist. LEXIS 102868 (N.D. Tex. Aug. 5, 2015).** The EEOC brought a Title VII action against Defendant for sexual harassment and retaliation of an employee, Gloria Stokes. Previously, the jury found that Stokes was sexually harassed by her supervisor and awarded $250,000 in punitive damages. Subsequently, Stokes moved for entry of judgment to include attorneys' fees for her counsel, Fielding, Parker & Hallmon, LLP. *Id.* at *2. Defendant objected to Stokes' application, contending that she failed to provide the Court an adequate basis on which to award the requested fees. *Id.* Stokes asserted that she was entitled to recovery of $249,542.50 for work performed by her lawyers on the case. *Id*. at *6. Stokes further requested $25,000 for work on post-verdict, and judgment motions and hearings. *Id.* The Court noted that the affidavit of Stokes' counsel set out the hourly billing rates for work performed by counsel, ranging between $295 to $300 per hour, and paralegal charges of $165 to $170 per hour. Stokes' counsel attested that the fees requested were reasonable and commensurate with the size and complexity of the case and issued involved in this matter. *Id*. at *7. Defendant contended that because the affidavit lacked testimony regarding the prevailing local rate for similar work performed by an attorney of similar skill, experience, and reputation, Stokes failed to meet her burden establishing entitlement to the fee. *Id*. at *8. The Court applied the three factor test set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), to determine the lodestar. The Court found that Stokes received a notable benefit from co-prosecution by the EEOC's lawyers. *Id.* at *13. Therefore, to reach a fair and reasonable attorneys' fee, the Court reduced the lodestar. *Id*. Defendant further argued that the $274,542.50 that Stokes asked the Court to award was clearly disproportionate to the $250,000 result obtained, and was *per se* unreasonable because it would award counsel more money than that recovered by Stokes. *Id*. Defendant asserted that Stokes' pleadings did not seek punitive damages and thus did not properly put those damages before the Court. The Court, however, held that as it was reducing the lodestar on grounds already addressed, it would not make an additional reduction on this argument. Thus, the Court found that, Stokes, as a prevailing party, was entitled to recover reasonable attorneys' fees for successful prosecution of her sexual harassment and punitive damages claims. *Id.* at *14. The Court concluded that a 33% reduction in the requested attorneys' fees was appropriate and awarded Stokes $183,028.34 in attorneys' fees. *Id.* at *15.

***EEOC v. Koch Foods Of Mississippi, LLC,* 2015 U.S. Dist. LEXIS 84924 (S.D. Miss. June 30, 2015).** The EEOC brought an action alleging that Defendant was engaged in a pattern or practice of sexual harassment, discrimination, and retaliation against female Hispanic workers. The EEOC alleged that supervisors sexually assaulted Hispanic women at work, charged them money for such things as using the bathroom, threatened the workers based on their immigration status, and retaliated against them when they complained about this conduct. Previously, the Magistrate Judge had permitted Defendant to conduct discovery regarding the employees' attempts to obtain U-Visas. *Id*. at *5-6. The Court had only partly affirmed the Magistrate Judge's order, concluding that discovery tailored to attempts to obtain U-Visas was not precluded by estoppel, the U-Visa statute and regulations, or concerns over the *in terrorem* effect of such discovery, but that the discovery could be obtained only from the aggrieved individuals, and not from the EEOC. *Id*. at *6. The Court, however, had permitted the use of a protective order to redact irrelevant information from the aggrieved individuals' immigration histories. *Id*. The EEOC moved for certification for interlocutory appeal and to stay the action pending resolution of the appeal, which the Court granted. The EEOC sought certification, pursuant to 28 U.S.C. § 1292(b), of the following questions for interlocutory appeal: (i) whether efforts to obtain U-Visas and other immigration protections were discoverable to test credibility ("question 1"); and (ii) whether federal law protected aggrieved individuals from disclosing U-Visa application information ("question 2"). *Id*. at *7. At the outset, the Court found that question 1 failed to

present a question of law, as it required a fact-intensive consideration, whereas question 2 presented a controlling question of law because if the Court of Appeals disagreed with its reasoning, the litigation would be fundamentally affected. *Id*. at *9-10. The Court found that resolving question 2 would have an extraordinarily significant impact on this litigation, and concluded that there was substantial ground for difference of opinion as to question 2. Finally, the Court noted that the requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involves a controlling question of law. *Id*. at *12. Because the Court found that question 2 was indeed a controlling question of law, it concluded that its resolution would materially advance the litigation. *Id*. at *13. Accordingly, the Court granted the EEOC's motion to certify for interlocutory appeal and motion to stay pending the appeal. *Id.* at *15.

***EEOC v. Lawler Foods, Inc.,* 2015 U.S. Dist. LEXIS 120946 (S.D. Tex. Sept. 10, 2015).** The EEOC brought an action alleging that Defendant discriminated against applicants with discriminatory hiring and recruiting practices in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). The EEOC filed a motion to bifurcate discovery and trial, which the Magistrate Judge granted in part. The EEOC contended that the U.S. Supreme Court had approved the bifurcation of trials into class-wide liability and individual damage phases in pattern or practice discrimination cases brought by the federal government under § 707 of Title VII. *Id*. at *2. However, the Magistrate Judge noted that the parties had not consented to trial before a Magistrate Judge, and the case was referred for pre-trial management only. *Id*. at *3. Accordingly, the Magistrate Judge left the issue of bifurcation of trial to the District Court. Regarding bifurcation of discovery, the Magistrate Judge noted that the EEOC claimed to have identified over 200 aggrieved individuals, and expected that number to rise as the case continued. *Id*. at *4. Unlimited discovery into the circumstances of each rejected applicant's claims for damages was certain to be very costly and time consuming. *Id*. The EEOC argued that its burden in a pattern or practice case was to prove that discrimination was the company's standard operating procedure, and that statistical proof together with evidence from the employer's files was necessary to meet that burden. *Id*. at *4-5. The Magistrate Judge observed that the EEOC's proof of pattern or practice hiring discrimination was expected to consist of documents from employer files, as well as testimony from company officials and employees, expert witnesses, and a select number of allegedly injured persons who applied for jobs but were not hired. *Id*. at *5. The Magistrate Judge agreed with the EEOC that at this stage of the litigation, the focus was properly on the employer's conduct, and in particular, whether there was sufficient pattern or practice evidence to warrant a trial on the merits. *Id*. The Magistrate Judge remarked that until that issue was resolved, economy and efficiency considerations weighed heavily in favor of postponing discovery regarding "second stage" issues, such as eligibility of individual victims of alleged discrimination for monetary relief and their alleged damages. *Id*. Accordingly, the Magistrate Judge granted bifurcation of discovery.

***EEOC v. Lawler Foods, Inc.,* 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015).** The EEOC brought an action alleging that Defendants discriminated against African-American and Hispanic job applicants in violation of Title VII of the Civil Rights Act of 1964. The EEOC filed a motion for partial summary judgment, which the Court granted. Defendants did not dispute that the EEOC conducted an investigation, or made multiple offers to settle its claims, and instead argued that the EEOC failed to provide a meaningful opportunity to remedy any unlawful employment practices by withholding certain information during the conciliation process. Specifically, Defendants alleged that the EEOC failed to disclose that two African-American and one Hispanic applicant were told that Defendants was not interested in hiring them. *Id*. at *7. The Court noted that in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), the U.S. Supreme Court held that the EEOC's conciliation efforts are subject to cursory review. Applying *Mach Mining*, the Court found that the EEOC satisfied its statutory duty to attempt conciliation with Defendants. The EEOC gave notice of the allegations in its pre-suit letters and made multiple offers of settlement. *Id*. at *6. The Court observed that the undisputed evidence indicated that the EEOC notified Defendants that it had found a pattern or practice of intentionally failing to hire African-American and Hispanic applicants and the use of applicant screening techniques that disparately impacted African-Americans and Hispanics. *Id.* at *8. In other words, the EEOC informed Defendants what unlawful practices it had engaged in, and which class of employees had suffered, as required by *Mach Mining*. *Id*.

at *9. Accordingly, the Court granted the EEOC's motion for partial summary judgment on the issue of its duty of conciliation.

***EEOC v. Rite Way Services, Inc.,* 2015 U.S. Dist. LEXIS 42113 (S.D. Miss. Mar. 31, 2015).** The EEOC brought an action against Defendant, a janitorial cleaning services provider, alleging that it violated Title VII of the Civil Rights Act of 1964 ("Title VII") by terminating an employee in retaliation for participating in an internal investigation concerning a sexual harassment complaint submitted by a co-worker. *Id.* at 14. According to the complaint, Defendant employed Mekeva Tennort between 2009 and 2011 as a janitor at Biloxi Junior High School. In August 2011, Tennort gave a statement to supervisors investigating a complaint by another employee who had alleged sexually offensive conduct. Following Tennort's participation in the police investigation, Defendant required a written statement from Tennort. Later, in September 2011, Defendant terminated Tennort based on poor performance. Tennort filed a charge of discrimination with the EEOC claiming that Defendant retaliated against her after she provided the written statement. *Id.* at *13. Defendant moved for summary judgment, contending that the EEOC could not establish a *prima facie* case of retaliation because Tennort never engaged in protected activity. *Id.* at *14. The Court agreed and granted Defendant's motion for summary judgment. *Id.* at *32. It was undisputed that, at the time of Tennort's discharge, neither she nor the co-worker had filed a charge with the EEOC or otherwise instituted proceedings related to the alleged retaliation. *Id.* at *20. The Court therefore found that the EEOC could not rely upon the "participation clause" to demonstrate that Tennort engaged in protected activity. *Id.* The Court determined that the EEOC could not establish that Tennort opposed an employment practice that she believed to be barred by Title VII. According to the Court, a single, isolated incident of alleged sexual harassment that occurred once over the span of approximately three weeks did not rise to the level of being as severe or pervasive as to alter the condition of employment or create an abusive working environment. *Id.* at *24-27. The Court therefore concluded that the EEOC failed to establish a *prima facie* case of retaliation, and accordingly, granted Defendant's motion for summary judgment. *Id.* at *32.

***EEOC v. Stone Pony Pizza, Inc.*, 2015 U.S. Dist. LEXIS 40312 (N.D. Miss. Mar. 30, 2015).** The EEOC brought an action alleging that Defendant failed to hire qualified African-American applicants on the basis of their race and maintained a racially segregated workforce in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Before the Court could rule on motions for summary judgment, Defendant filed for bankruptcy. *Id*. at *2. In line with other Title VII cases where an employer files a bankruptcy while an action is pending, the Court dismissed the case by reason of the pending bankruptcy, but retained jurisdiction over the action in case further litigation was necessary. *Id.* The EEOC filed a motion to vacate the dismissal on the basis that the automatic stay prescribed by the Bankruptcy Code does not apply to government entities seeking to enforce their police powers. *Id.* The Court then vacated the order of dismissal and re-opened the motion for partial summary judgment. The Court noted that upon filing of a voluntary petition in bankruptcy, 11 U.S.C. § 362 (a) provides an automatic stay of the continuation of judicial proceedings against the debtor except for an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. *Id*. at *2-3. The Court observed that in *EEOC v. McLean Trucking Co.*, 834 F.2d. 398 (4th Cir. 1987), the Fourth Circuit determined that: (i) because the EEOC was a governmental unit attempting to enjoin and fix damages for violations of Title VII; and (ii) the EEOC, by bringing the action, was enforcing its regulatory power; therefore, (3) the underlying action was not subject to the automatic-stay provision of the Bankruptcy Code until the prayer for relief, including monetary relief, was reduced to judgment. *Id*. at *3. Based on the language in the Bankruptcy Code and other Title VII cases prosecuted by the EEOC, the Court concluded that the automatic stay provision was not applicable in this case. *Id*. at *3-4. Accordingly, the Court vacated the order of dismissal, and re-opened the motions for partial summary judgment and summary judgment. *Id.* at *4.

***EEOC v. Vicksburg Healthcare, LLC*, 2015 U.S. Dist. LEXIS 52812 (S.D. Miss. April 22, 2015).** The EEOC brought an Americans With Disabilities Act action alleging that Defendant terminated its employee, Beatrice Chambers, because of her alleged disability. The EEOC served a request to inspect the general operations of the Surgical Services Department (the "Department") of Defendant's medical center facility (the "Facility"), the type of equipment and/or instruments commonly in use, the layout of the Department,

and the feasibility of certain accommodations for the limited purpose of fact discovery. *Id.* at *5-6. The EEOC also wanted to collect measurements as to the amount of force required in order to push/pull certain equipment, and observe the day-to-day job functions and duties of the Licensed Practical Nurse ("LPN") position, the LPN II position, and other positions. *Id.* at *6. The inspectors/observers would include Chambers, the EEOC's attorney, and a vocational rehabilitation expert. *Id.* Defendant objected on the grounds that the Facility had already provided information related to the essential functions or particular tasks of the relevant functions of the job, it was undisputed that the lifting and pushing of heavy objects were essential, and that the inspection would necessarily reveal confidential information subject to the physician-patient privilege and the HIPPA. *Id.* at *7. The Court declined to allow the inspection. *Id.* at *15. First, the Court noted that the right to inspect under Rule 34 has ultimate and necessary boundaries, and the degree to which the proposed inspection would aid in the search for truth must be balanced against the burdens and dangers created by the inspection. *Id.* at *8-9. The EEOC argued that observing the equipment commonly used by LPNs within the Department – and measuring the force required to push, pull, or lift equipment, as well as the distances that LPNs must traverse and the ease with which the LPNs could call on each other for assistance – would allow it to gain an understanding of the normal operations of the department and the duties of an LPN II; further, it would allow the EEOC's expert to render an opinion regarding the essential LPN functions and whether Chambers could perform them with or without reasonable accommodations. *Id.* at *9-10. In addition, the EEOC sought to interview employees during the inspection. *Id.* at *10. The Court found, however, it was unlikely that the three-hour inspection the EEOC wished to conduct would reliably establish which tasks LPNs commonly performed or which equipment they commonly used. *Id.* at *10. The Court observed that according to the Vice President of Human Resources at the Facility, the essential functions, including the lifting and pushing of heavy objects, were not necessarily performed on any given day. *Id*. at *10-11. Similarly, the amount of force required to push, pull, and/or lift equipment such as gurneys, beds, and wheelchairs would depend on the weight of the patient and the equipment. The Court concluded that the EEOC failed to establish that the three-hour inspection would allow it to observe a representative sample of patients or duties. *Id.* at *11. In addition, the Court found that the possible disruption of patient care and the risk of compromising patients' rights to confidentiality were significant concerns. *Id.* at *12. The EEOC also had sought to test equipment being utilized to treat patients, and subject personnel at the Facility to roving depositions while they attempted to perform their duties. *Id.* at *12-13. Moreover, although the EEOC asserted that its inspectors and observers would not seek to communicate with any patient, attempt to make any requests of patients, seek medical records or personally identifiable information, or observe patients undergoing any procedures, the Court opined that observing the normal operations of the Department would likely include the communication or observation of patients' confidential information. *Id.* at *13. Accordingly, in light of these concerns, and because the information gathered during the EEOC's requested inspection would likely be of limited use, the Court denied the EEOC's motion to compel. *Id.* at *15.

***EEOC v. Vicksburg Healthcare, LLC,* 2015 U.S. Dist. LEXIS 113869 (S.D. Miss. Aug. 27, 2015).** The EEOC brought an action alleging that Defendants terminated Beatrice Chambers, a nurse, because of her disability and also failed to provide her with a reasonable accommodation in violation of the Americans With Disabilities Act ("ADA"). Chambers was a nurse for Vicksburg Healthcare, LLC d/b/a River Region Medical Center ("River Region"). After taking medical leave for shoulder surgery, Chambers' physician sent a note to River Region stating that she could return to duty as long as she was limited to "light work." *Id.* at *3. Because River Region concluded that Chambers could not perform the essential functions of her job when limited to "light work," River Region terminated Chambers. *Id.* The day after Chambers was terminated, Chambers' physician filled out a disability insurance claim form, which stated that Chambers had a "temporary total disability." *Id.* at *4. Chambers reviewed the form and sent it to her insurer. The EEOC filed suit on Chambers' behalf, claiming she could perform the essential functions of her job while being limited to light duty and that her termination violated the ADA. The Court began by noting that "[t]o establish a *prima facie* discrimination claim under the ADA, a Plaintiff must prove: (i) that he has a disability; (ii) that he was qualified for the job; and (iii) that he was subject to an adverse employment decision on account of his disability." *Id.* at *7. The Court then considered whether the EEOC could prove that Chambers was qualified to perform the essential functions of her job in light of the statement in her insurance claim that she was totally disabled. *Id.* at *7-8. The Court noted that *Cleveland v. Policy*

Management Systems Corp., 526 U.S. 795, 806 (1999) held that "'when faced with a Plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim.'" *Id.* The Court concluded that the EEOC would, in light of *Cleveland*, have to present an explanation that would allow the Court to conclude that Chambers could perform the essential functions of her job despite her insurance claim. *Id.* at *8. According to the EEOC, the fact that Chambers applied for disability benefits after her termination explained the discrepancy between her insurance claim and her litigation position. *Id.* at *8-9. The Court disagreed, finding the explanation insufficient to explain the discrepancy. *Id.* at *9-10. The Court thus granted summary judgment to River Region, finding that the EEOC had not met its burden of producing sufficient evidence supported by specific facts that Chambers was qualified to perform the essential functions of her job. *Id.* at *12.

(vi) Sixth Circuit

***EEOC v. Cintas Corp.,* Case No. 04-CV-40132 (E.D. Mich. Mar. 16, 2015).** The EEOC brought an action alleging that Defendant had engaged in a pattern or practice of sex discrimination when it refused to recruit and hire a class of females on the basis of their sex. The class comprised all females who applied at one of Defendant's facilities in Michigan from 1999 to at least April 1, 2005 and were not hired to be a Route Sales Driver/Service Sales Representative. *Id*. at 2. The EEOC brought the action pursuant to § 706 of Title VII of the Civil Rights Act of 1964 ("Title VII"), which does not contain explicit authorization for suits under a pattern or practice theory. *Id*. at 1. Accordingly, the District Court ruled that because the EEOC filed suit under § 706, and not under § 707, it could not proceed under a pattern or practice theory. *Id*. at 2. The Sixth Circuit relied on its earlier opinion in *Serrano v. Cintas Corp.,* 699 F.3d 884 (6th Cir. 2012), and ruled that the EEOC could proceed in the action under a pattern or practice theory even though it filed the action under § 706 alone. *Id*. Upon remand, the EEOC sought to prove the alleged discrimination claim via the pattern or practice framework. Although the parties agreed that the trial should be bifurcated into two stages, the parties disagreed as to whether the EEOC should be required to identify the individual females on whose behalf the EEOC would seek money damages. *Id*. The EEOC contended that the District Court should not order it to disclose the individuals on whose behalf it might seek damages because it had already indicated that it could seek such damages for every female applicant during the applicable period, and those individual damages determinations were not at issue until phase II of the litigation. *Id*. at 3. The EEOC asserted that because Defendant knew the affected class period, Defendant had the information as to the potential pool of individuals who could obtain monetary relief at a phase II trial. In addition, the EEOC stated that it expected to seek damages in the phase II trial on behalf of approximately 50 different alleged victims. *Id*. Defendant, however, argued that there were at least 1,300 applicants, and that by pointing to every single female applicant, the EEOC was in essence refusing to identify both the females it alleged Defendant should have hired and the claimants on whose behalf it would ultimately seek monetary relief. *Id*. The District Court concluded that the EEOC should identify the names of the approximately 50 applicants on whose behalf it intended to seek monetary damages, so that it could issue a scheduling order that would address all of the outstanding issues.

***EEOC v. Cintas Corp.*, 2015 U.S. Dist. LEXIS 55889 (E.D. Mich. April 29, 2015).** The EEOC brought an action alleging that Defendant engaged in a pattern or practice of unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Previously, the Court had ruled that because the EEOC filed suit under § 706 and not under § 707, it could not proceed under a pattern or practice theory. *Id*. at *3. On appeal, the Sixth Circuit reversed that order, holding that the EEOC could proceed under a pattern or practice theory per § 706 alone. *Id*. Following remand, the parties agreed that the trial should be bifurcated into two stages, but disagreed as to several issues concerning how the case should proceed. Both parties filed cross motions on their positions. The Court ruled that the trial should be bifurcated into two stages, and then ruled on the parties' disagreements. Since both parties wished to file amended witness lists, the Court concluded that an additional 12 months of fact discovery was appropriate prior to the phase I trial. *Id*. at *8. Among other things, the remand order vacated the previous ruling that provided that the EEOC could not depose Defendant's CEO Scott Farmer; therefore, the Court instructed the parties to meet and confer and to coordinate a mutually agreeable date for the deposition. *Id*. at *9. Finally, the parties disagreed as to when a jury should consider the punitive damages claim. The EEOC contended

that the jury should determine the punitive damages during the phase I trial, while Defendant contended that should be done in phase II. *Id.* at *11. The Court, however, adopted a third position where the availability of punitive damages would be decided at phase I, but the amount of punitive damages would be decided in phase II. *Id*. at *11-12. The Court relied on *Ellis v. Costco Wholesale Corporation*, 285 F.R.D. 492 (N.D. Cal. 2012), which had adopted this third position, and concluded that while the availability of punitive damages should be adjudicated in stage I of the trial, determination of the aggregate amount and individual distribution of punitive damages should be reserved for stage II. *Id*. at *13. Accordingly, the Court ordered the parties to meet and confer, while also re-opening fact discovery for a period of 12 months. *Id.* at *13-14.

***EEOC v. Cintas Corp.,* Case No. 04-CV-40132 (E.D. Mich. Aug. 20, 2015).** The EEOC brought an action under § 706 of Title VII of the Civil Rights Act of 1964 alleging that Defendant engaged in gender discrimination by refusing to recruit and hire females for the position of route sales drivers/service sales representatives at its facilities. During discovery, Defendant requested the EEOC to identify each individual on whose behalf the EEOC intended to seek damages, and the EEOC failed to respond. In an order dated March 2, 2010, the Magistrate Judge ordered the EEOC to produce the identities of the women on whose behalf the EEOC would be pursuing damages from Defendant. *Id*. at 2. The EEOC neither objected to that order nor provided the requested information. Meanwhile, in a separate order, the District Court held that the EEOC could not proceed the action under a pattern or practice theory because the EEOC brought the action under § 706, and not under § 707. *Id.* On the EEOC's appeal, the Sixth Circuit reversed, holding that the EEOC could proceed the action under a pattern or practice theory. On remand, Defendant sent the EEOC an interrogatory request asking it to identify each individual on whose behalf it would seek equitable relief, back pay, and/or compensatory damages. *Id.* at 2-3. The EEOC responded by stating that the class on whose behalf it would seek monetary relief composed of females who applied at one of Defendant's facilities in Michigan from 1999 to at least April 1, 2005, and were not hired to be Route Sales Drivers or Service Sales Representative. *Id.* at 3. The EEOC also stated that Defendant could derive the names of the individuals from the application materials that Defendant provided during discovery. *Id.* In an order dated March 16, 2015, the District Court required the EEOC to file a list of the names of female applicants on whose behalf the EEOC intended to seek monetary damages. *Id.* at 4. The EEOC subsequently submitted a list containing the names of approximately 800 individuals, and stated that it would be seeking back pay relief for a number of positions equal to the shortfall. *Id.* at 5. Defendant then filed a motion for sanctions, arguing that the EEOC failed to comply with Magistrate Judge's March 2, 2010 order. The District Court denied the motion on the basis that the EEOC's latest list provided Defendant a responsive answer to its interrogatory by identifying each individual on whose behalf the EEOC would seek equitable relief, back pay, and/or compensatory damages. *Id.* at 7-8. The District Court pointed out that it ordered the EEOC only to file a list of names of the female applicants on whose behalf it intended to seek monetary damages, and the EEOC complied by filing the list. *Id.* at 8-9. The District Court therefore found no basis to impose sanctions. Defendant next asserted that the EEOC was judicially estopped from pursuing monetary damages on behalf of more than 125 individuals at any damages trial. Defendant based its assertion upon statements the EEOC made while responding to Defendant's petition for a writ of *certiorari* after the Sixth Circuit's reversal on pattern or practice theory. *Id.* at 11. In its briefing, the EEOC had mentioned a figure of approximately 125 women for measuring damages. *Id.* at 12. The District Court found that Defendant's judicial-estoppel argument failed because it could not establish that the EEOC had successfully or unequivocally asserted that it would seek damages only on behalf of 125 individuals at any damages trial. *Id.* at 12-13. According to the District Court, the EEOC basically responded to Defendant's argument, that the action might turn into a massive action if it proceeded as a pattern or practice case, by asserting that Defendant overstated the numbers as being more than 1,300 and offered two potential ways of measuring damages that would involve far fewer than 94 and 125 members. *Id.* at 13. The District Court therefore declined to view the EEOC's statements as taking an unequivocal position that the number of individuals who could receive monetary damages in the action would be limited to 125. *Id.* Accordingly, the District Court denied Defendant's motion for sanctions.

***EEOC v. Dunecraft, Inc.*, 2015 U.S. Dist. LEXIS 58263 (N.D. Ohio May 4, 2015).** The EEOC brought an action alleging that Defendant discriminated and retaliated against its former employee, Kevin Marken, in

violation of the ADEA. The EEOC alleged that Defendant's owner and CEO, Grant Cleveland, frequently and publicly ridiculed Marken with age-based criticism, and subjected him to a hostile work environment, and subsequently, fired him because of his age. *Id*. at *2. Defendant moved for summary judgment. The EEOC first claimed that circumstantial evidence proved that Marken was fired because of his age. To counter the first element of Marken's *prima facie* case, Defendant argued that Marken did not remain qualified for his position, as demonstrated by his multiple written warnings and low ratings on performance reviews. The Court noted that some affidavits labeled Marken as incompetent, but others described him as a hard worker and effective team member. *Id*. at *10. The Court, therefore, ruled that the EEOC satisfied the lenient standard of demonstrating that Marken was at least qualified for his job. *Id*. The Court noted that Marken was fired and was over 40 at the time, and a younger person replaced Marken. *Id*. at *11. Accordingly, the Court ruled that the EEOC established a *prima face* case of age based discrimination. The Court also observed that Defendant met its burden of showing that it had a legitimate, non-discriminatory reason for terminating him. Defendant provided a litany of reasons for firing Marken that were unrelated to age, and maintained that Marken worked poorly with others, did not improve his work after warnings, and cost the company tens of thousands of dollars in fines for late shipping. *Id*. At the same time, the Court observed that the alleged frequency and specificity of Cleveland's age-related comments provided evidence that Marken's age, and not his work performance, may have actually motivated the firing. *Id*. at *12. Defendant, nevertheless, maintained that it was its former Operations Manager, Andrew Johnson, and not Cleveland, who actually fired Marken. Defendant asserted that Johnson was the relevant decision maker for Marken's termination, making Cleveland's alleged comments irrelevant. *Id*. The Court, however, noted that Cleveland was directly involved in Marken's termination, as he was present during the termination and was the person that actually informed Marken that he was fired. *Id*. Thus, the Court concluded that a reasonable jury could find that Cleveland made that decision to fire Marken. The Court similarly found that the EEOC made a *prima facie* case for retaliatory termination, based on Cleveland's constant and continuous comments and Marken's complaints to Cleveland. Accordingly, the Court denied Defendant's motion for summary judgment.

***EEOC v. Ford Motor Co.,* 782 F.3d 753 (6th Cir. 2015).** The EEOC brought an action under the ADA alleging that Defendant failed to reasonably accommodate Jane Harris, a steel resale buyer. *Id.* at 757-58. Resale buyers acted as intermediaries between Defendant's steel suppliers and its parts manufacturers, and according to Defendant, the position was highly interactive. *Id.* at 758. Harris suffered from irritable bowel syndrome, and as an accommodation for her condition, she requested that Defendant allow her to work from home as needed and up to four days per week. After several meetings, Defendant advised Harris that it could not accommodate her telecommuting request because it would prevent her from performing the essential functions of her job. Particularly, Defendant found that out of Harris' ten job responsibilities, four could not be performed from home effectively and two were not significant enough to support telecommuting. *Id.* at 759. Defendant offered her other accommodations, including moving her closer to the restroom and jobs more suited for telecommuting. *Id.* at 760. Harris turned down these accommodations, sent an e-mail to Defendant claiming that the denial of her accommodation request violated the ADA, and filed a charge with the EEOC. The EEOC subsequently sued Defendant on Harris' behalf. The District Court granted Defendant's motion for summary judgment, concluding that working from home up to four days per week was not a reasonable accommodation under the ADA. *Id.* The EEOC appealed, and the Sixth Circuit affirmed. *Id.* at 761. The Sixth Circuit found that regular and predictable on-site attendance was essential for Harris' position and her repeated absences made her unable to perform the essential functions of a resale buyer. *Id.* at 752-53. The Sixth Circuit pointed out several facts that suggested that telecommuting would not permit Harris to perform her essential job functions. Although Defendant had in fact allowed Harris to telecommute on an *ad hoc* basis on several occasions, those telecommuting experiments had failed, and Harris had agreed that four of her ten primary duties could not be performed at home. *Id.* at 763. Moreover, Harris proposed to work from home "as needed" and without a set schedule. *Id*. The Sixth Circuit noted that, although a few of Defendant's other resale buyers telecommuted, they did so only on one set day per week and they agreed to come to work if needed. *Id*. The Sixth Circuit therefore determined that Harris' up-to-four-days telecommuting proposal, which removed the essential functions of her job, was not a reasonable accommodation for Harris. *Id.* The Sixth Circuit also found that Harris' testimony that she could perform her job functions from home did not create a

genuine dispute of fact because an employee's opinion about what functions were essential was not relevant. *Id.* at 763-64. The Sixth Circuit further rejected the EEOC's argument that technology had advanced to the point that telecommuting was now a more viable accommodation option. *Id.* at 765-66. The Sixth Circuit reasoned that the fact of advancing technology in the abstract was not a proof that technological advances made Harris' highly interactive job one that could be effectively performed at home. *Id.* The Sixth Circuit therefore concluded that the District Court properly granted summary judgment. *Id.* at 766. The Sixth Circuit further held that Defendant did not retaliate against Harris for making a charge of discrimination. *Id.* at 767. While agreeing that the timing of Harris' discharge seemed suspicious, the Sixth Circuit found that temporal proximity could not be sole basis for finding pre-text. *Id.* at 767-68. According to the Sixth Circuit, Harris' meetings with a non-decisionmaker could not prove pre-text because actions by non-decisionmakers could not alone prove pre-text, and Harris' poor performance review after the charge could not establish pre-text because it was as poor as her last pre-charge performance review. *Id.* at 768-69. Accordingly, the Sixth Circuit affirmed the District Court's grant of summary judgment. *Id.* at 770.

***EEOC v. Gregg Appliances, Inc.,* 2015 U.S. Dist. LEXIS 108963 (M.D. Tenn. Aug. 17, 2015).** The EEOC brought an action alleging that Defendant retaliated against a former employee, Courtney Keen, in violation of Title VII of the Civil Rights Act of 1964. Keen worked at Defendant's store as an office manager until she completed a management-in-training program and was promoted to assistant manager in 2008. In December of 2008, Keen reported to her district manager that her general manager had been sending her sexually harassing text messages. After an investigation, Defendant terminated the general manager and replaced him with Ken Sundwall. Sundwall issued Keen fourteen correction action reports ("CARs") in less than four months and eventually terminated her employment in April 2009. The case went to trial on March 31, 2015. At trial, the EEOC presented evidence that Keen's career with Defendant was successful and progressing until Defendant replaced Keen's general manager with Sundwall, and that Defendant had a retaliatory motive in disciplining and terminating Keen. Sundwall explained that he disciplined Keen solely based on her performance and her failure to improve. *Id.* at *12. The jury entered a verdict in Defendant's favor, rejecting EEOC's various theories and finding sufficient evidence for Defendant's decision to terminate Keen based on her performance. *Id.* at *19. The EEOC filed a motion for a new trial on the basis that certain jury instructions and evidentiary issues were prejudicial and that the jury's verdict in Defendant's favor was contrary to the weight of the evidence presented at trial. The Court denied the motion. Considering and comparing all of the evidence at trial, the Court concluded that a reasonable juror could only find in favor Defendant. *Id.* at *18. Although the jury could have been easily persuaded by the EEOC's circumstantial evidence, particularly as to the highly suspicious timing of events and allegedly preferential treatment of a male employee, the Court found that the jury could have been swayed just as well by Defendant's evidence, based largely on direct testimony that Sundwall was an unbiased taskmaster. *Id.* at *18. While Keen testified generally that the CARs were "very inaccurate," she provided little evidence to back-up that assertion. *Id.* The Court, therefore, accepted the jury's verdict under the circumstances. *Id.* at *19. The EEOC also contended that the Court erred by issuing an instruction addressing the jury's assessment of those employees similarly-situated to Keen and by refusing to issue a spoliation instruction. *Id*. The Court, however, declined to find that it erred in giving jury instructions. Since the EEOC argued at trial that Defendant treated similarly-situated employees, who had not engaged in protective activity, better than Keen, the Court delivered Defendant's proposed instruction addressing EEOC's reliance on the evidence of similarly-situated employees. *Id.* at *21. The EEOC argued that the instruction suggested that Keen's comparators must have committed literally the same conduct as Keen in order to be considered similarly-situated. *Id.* at *24-25. The Court found that the EEOC's argument focused narrowly on the same conduct language and ignored the remaining sentences that informed the jury to consider surrounding circumstances when evaluating the conduct. *Id.* at *25. The Court, therefore, held that its instruction regarding similarly-situated did not rise to the level of plain error. The Court also ruled that a spoliation instruction was not appropriate or its omission was not prejudicial because the EEOC offered no evidence that Defendant destroyed Keen's reviews at a time when it was obligated to preserve them and the Court was not persuaded that Keen's 2006, 2007, and 2008 evaluations would have meaningfully supported the EEOC's position. *Id.* at *31. The Court thus found no error or prejudice in its jury instructions. Accordingly, the Court denied the EEOC's motion for a new trial.

***EEOC v. Helping Hand Home Health Care Corp.*, 2015 U.S. Dist. LEXIS 65698 (E.D. Mich. May 20, 2015).** In this subpoena enforcement action brought by the EEOC, the Court denied Defendant's motion for reconsideration. The Court had previously entered an order to show cause as to why the EEOC's subpoena should not be enforced. In Defendant's papers moving for reconsideration, the Court observed that Defendant raised the same arguments previously presented to the Court as to jurisdiction, exhaustion, and the EEOC's status relating to the subpoena it issued to Defendant. *Id*. at *2-3. The Court determined that it had addressed those issues in its previous order, and that Defendant, in effect, simply repeated the same arguments made in its previous submissions. *Id*. Accordingly, the Court denied Defendant's motion for reconsideration.

***EEOC v. Kyklos Bearings International, LLC*, 2015 U.S. Dist. LEXIS 30037 (N.D. Ohio. Mar. 11, 2015).** The EEOC brought an action alleging that Defendant violated the Americans With Disabilities Act by terminating an employee based on her status as a cancer survivor. The EEOC alleged that Defendant put the employee on a medical restriction when she found it difficult to move a train of overloaded carts after she returned to her job as a tugger following recovery from breast cancer. Although the employee provided Defendant with documents from her doctor establishing that she had been cleared to work without any medical restriction, Defendant relied on its own doctor's opinion, who diagnosed her with lymphedema and imposed a permanent seven pound limit on lifting. Defendant eventually terminated her employment. *Id.* at *7. The employee subsequently filed a disability discrimination charge with the EEOC. *Id.* The EEOC claimed that Defendant unjustifiably and unlawfully regarded the employee as disabled. *Id.* at *8. Defendant moved for summary judgment, arguing that the employee had a medical restriction that limited her ability to lift and it could not accommodate her due to lack of any light-duty work. *Id.* at *10. The Court denied Defendant's motion for summary judgment. *Id.* at *12. The Court found that a rational jury could find that Defendant failed to conduct an individualized inquiry into the employee's actual medical history and condition. *Id.* at *10. The Court noted that the seven-pound lifting restriction imposed by Defendant's doctor was unsupported by any concrete medical findings and was at odds with the objective evidence in the record. *Id.* at *12. The Court therefore denied Defendant's motion for summary judgment. *Id.* at *13.

***EEOC v. Mel-K Management Co.*, 2015 U.S. Dist. LEXIS 8733 (N.D. Ohio Jan. 26, 2015).** The EEOC brought an action alleging racial harassment against Defendant on behalf of a group of African-American employees, and race-based and sex-based harassment and retaliation against the charging party. *Id.* at *1. Defendant moved to dismiss the complaint or alternatively to stay the proceedings based on the EEOC's failure to conciliate in good faith prior to filing its lawsuit. *Id.* The EEOC moved to strike Defendant's motion and supporting exhibits, arguing that they impermissibly disclosed confidential conciliation communications without the written consent of the EEOC. *Id.* at *2. The EEOC's motion also clarified that it had no objection to the use of non-confidential information in Defendant's motion. *Id.* The Court granted the EEOC's motion. *Id.* at *3. The Court ruled that the EEOC must first attempt a resolution using informal methods of conference, conciliation, and persuasion before filing suit under Title VII against an employer. *Id.* at *2. Further, the Court observed that nothing said or done during and as a part of conciliation may be made public by the EEOC, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned, and that there was no exception to this prohibition. *Id.* at *2-3. Defendant's motion to dismiss included exhibits, several exchanges of correspondence about conciliation between counsel for both parties, and referred to this correspondence in its motion, including lengthy direct quotations. *Id.* at *3. The Court determined that using these documents as evidence in Defendant's pleading without the written consent of the EEOC violated the prohibition against disclosure contained in Title VII. *Id.* On this basis, the Court granted the EEOC's motion to strike the confidential conciliation communications and documents cited in Defendant's motion. *Id.*

***EEOC v. Memphis, Light, Gas & Water Division,* 2015 U.S. Dist. LEXIS 100810 (W.D. Tenn. July 31, 2015).** The EEOC brought an action alleging that Defendant violated the Age Discrimination in Employment Act ("ADEA") by not selecting a current employee, Carlos Phifer, for the position of computer operator specialist 1 ("COS 1") because of his age (57). Phifer, who was employed as a service advisor, submitted a timely application for the COS 1 position posted by Defendant both internally and externally.

Defendant's policies and procedures required a qualified full-time employee to be awarded a position over a part-time, temporary, or external applicant. *Id*. at *6. After reviewing applications, Defendant selected three individuals, including Phifer, for interviews; after the interviews, the panel determined that Phifer was the most qualified and the best fit to fill the vacancy. *Id.* at *10. According to the EEOC, when the panel reported its selection of Phifer to manager Elvis Morgan, he challenged the selection. Morgan allegedly "kept talking about" Phifer's age, retirement, and health condition. *Id.* at *11. Defendant eventually selected an external candidate. After discovery, Defendant moved for summary judgment, arguing that it had a legitimate, non-discriminatory reason for not selecting Phifer to fill the position, and therefore, was entitled to judgment as a matter of law. The Court denied Defendant's motion on the basis that the evidence was sufficient to permit a reasonable jury to conclude that Phifer's age was the "but for" cause of Defendant's employment decision. *Id.* at *29-30. The Court found that Morgan's comments about Phifer's age, retirement, and health conditions did not rise to the level of direct evidence of age discrimination because they required a trier of fact to make inferences in order to conclude that Morgan's decision was based on his discriminatory animus. *Id.* at *24. The Court also found that Morgan's statement, "[w]e're looking for young blood with new ideas" did not rise to the level of direct evidence of age discrimination because it could also be reasonably construed to mean that Morgan wanted to hire another candidate because he thought she was better qualified for the modified COS 1 position and viewed her as someone who had fresh ideas. *Id.* The Court, however, found that Morgan's comments provided support to show that Defendant's employment decision was impermissibly based on Phifer's age, as the EEOC presented evidence that Phifer received the highest score of the three candidates and the interview panel had unanimously determined that Phifer was the most qualified and the best fit to fill the vacancy. *Id.* at *28-29. The evidence further showed that the panel had placed the successful external candidate in the lower "clearly acceptable" category, and Defendant had failed to follow its own policies and procedures by selecting an external candidate over a qualified full-time internal candidate. *Id.* at *29. The Court found this evidence sufficient to permit a reasonable jury to conclude that Phifer's age was the "but for" cause of Defendant's employment decision. *Id.* at *29-30. Accordingly, the Court denied Defendant's motion for summary judgment. *Id.* at *33.

***EEOC v. New Breed Logistics,* 783 F.3d 1057 (6th Cir. 2015).** The EEOC brought an action alleging that Defendant, a supply-chain logistics company, unlawfully discriminated against three female workers who objected to a supervisor's sexual advances. *Id.* at 1061. The three female employees, supplied by a temporary staffing agency, asserted that their worksite supervisor made sexually-suggestive comments to each of them on a daily basis and sometimes engaged in physical contact with one of them. Each of the three female employees opposed the misconduct, telling the supervisor to "stop touching [her]" and to "leave [her] alone." *Id.* at 1062. A male co-worker who overheard the sexual comments told the supervisor to "calm down on making comments." *Id.* at 1063. Shortly after objecting to the harassment, Defendant warned one of the female employees about her attendance and a week later terminated her. While the supervisor learned that the other two female employees intended to make an anonymous complaint against him through a hotline, he recommended terminating their employment based on their performance. Defendant subsequently terminated them. Defendant also terminated the male co-worker, shortly after it interviewed him regarding the supervisor's alleged harassment, reasoning that he clocked-in early and stayed late without authorization. *Id.* at 1064-65. The EEOC brought an action alleging harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). A jury found in favor of the EEOC and awarded all four employees compensatory and punitive damages totaling over $1.5 million. *Id.* at 1065. Defendant moved for a new trial challenging the sufficiency of the evidence as to liability and damages. *Id.* The District Court denied the motion, concluding that the evidence supported the jury's verdict. Defendant appealed. Defendant did not dispute the harassment finding, but argued that there was no evidence that the employees had engaged in any protected conduct or that it terminated the employees in retaliation for such conduct. *Id*. at 1066. The Sixth Circuit rejected Defendant's arguments and upheld the District Court's judgment. *Id.* at 1077. The Sixth Circuit held that an employee's demand to a harassing supervisor that the supervisor cease his harassing conduct constituted protected activity under Title VII. *Id.* at 1067. The Sixth Circuit reasoned that, because sexual harassment is an unlawful employment practice, "[i]f an employee demands that his/her supervisor stop engaging in this unlawful practice – *i.e.,* resists or confronts that supervisor's unlawful harassment – the opposition clause's broad

language confers protection of this conduct." *Id.* at 1067-68. Although the language of the retaliation provision of Title VII does not specify as to whom protected activity must be directed, the Sixth Circuit found that it would be unfair to read into Title VII that opposition to harassment be directed to a "particular official designated by the employer." *Id.* at 1068. Defendant also argued that there was no evidence that the decision-makers who terminated the employees knew that the employees had confronted their supervisor when the decision-makers decided to terminate them. The Sixth Circuit, however, held that the EEOC had presented sufficient evidence for the jury to find that the supervisor was the driving force behind the decision-makers' actions. *Id.* at 1069-70. Finally, the Sixth Circuit ruled that the temporal proximity between the protected conduct and the terminations was sufficient to support the jury's decision that Defendant terminated them because of their protected conduct. *Id.* at 1070-71. Accordingly, the Sixth Circuit affirmed the District Court's ruling denying Defendant a new trial. *Id.* at 1077.

***EEOC v. OhioHealth Corp.,* 2015 U.S. Dist. LEXIS 84016 (S.D. Ohio June 29, 2015).** In August 2013, the EEOC filed a complaint alleging that Defendant failed to reasonably accommodate a former employee in violation of the Americans With Disabilities Act. *Id.* at *1. Defendant filed a motion for summary judgment in which it argued, in part, that the EEOC failed to satisfy all required conditions precedent to filing its lawsuit, including good faith conciliation. *Id.* The Court held that this threshold issue of conciliation must be decided before reaching the merits since if it did otherwise, it would be "put[ting] the cart before the horse" *Id.* The Court described that the EEOC's duty under *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645 (2015), is two-fold – first, the EEOC must inform the employer about the specific allegation, and second, the EEOC must try to engage the employer in some form of discussion so as to give the employer an opportunity to remedy the allegedly discriminatory practice. *Id.* at *3. Here, the issue presented to the Court was whether the EEOC met its second required duty. *Id.* In trying to demonstrate that it satisfied its conciliation obligation, the EEOC presented a sworn affidavit attesting to the agency's conciliation efforts. *Id.* at *4. In relevant part, the EEOC's affidavit indicated that it issued a determination on September 15, 2011, engaged in communications with Defendant until October 14, 2011, and only brought suit after Defendant rejected the EEOC's conciliation proposal. *Id.* Defendant submitted its own declaration, the crux of which was that the EEOC presented its demand as a take-it-or-leave-it proposition, failed to provide Defendant with requested information and declared conciliation efforts failed even though Defendant made it clear that it was "ready and willing to negotiate." *Id.* at *4-5. Preliminarily, the Court rejected the EEOC's argument that OhioHealth waived its failure to conciliate defense by not raising it sooner because failure to conciliate is not an affirmative defense; rather, it is a condition precedent for the EEOC brining suit which did not have to be raised prior to summary judgment. *Id.* at *5. With respect to the merits, the Court held that the conciliation obligation was not satisfied because there were numerous conflicting facts which gave the appearance that the EEOC was "engaged in the production of bookend letters that failed to reflect a good faith conciliation effort" and thus, "if the proceedings were for appearances only, then there never was a real attempt to engage in conciliation as the law requires." *Id.* at *6. The Court also found that conciliation failed because the EEOC indicated in its original determination letter that an EEOC representative would "prepare a dollar amount that includes lost wages and benefits, applicable interest, and any appropriate attorneys' fees and costs." *Id.* at *6-7. Nothing the EEOC presented to the Court demonstrated that it ever provided Defendant with such a proposal. *Id.* at *7. As viewed by the Court, "absent disclosure of this calculation to OhioHealth, the conciliation process could have been nothing but a sham." *Id.* Absent this information, "the EEOC can hardly be said to have given the employer an opportunity to remedy the allegedly discriminatory practice." *Id.* As such, the Court held that "an unsupported demand letter such as the one involved here alone cannot logically constitute an attempt to inform and engage in the conciliation process." *Id.* As a result of the EEOC's failure to conciliate, the Court stayed the case pending the EEOC's mandated efforts to obtain voluntary compliance. *Id.* at *8.

Editor's Note: The ruling in *EEOC v. OhioHealth Corp.* was one of the first to apply the new standards established by *Mach Mining LLC v. EEOC*.

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 2015 U.S. Dist. LEXIS 52016 (E.D. Mich. April 21, 2015).** The EEOC brought an action alleging that Defendant, a Detroit-based funeral home, discriminated against a funeral director/embalmer on the basis of her sex in violation of Title VII of the Civil Rights Act of

1964 ("Title VII"). Defendant employed Amiee Stephens as a funeral director/embalmer beginning in October 2007. In or around July 2013, Stephens informed Defendant and her co-workers that she was undergoing a gender transition from male to female, and that she would soon begin to present as a woman. Two weeks later, Defendant fired Stephens, telling her that what she was "proposing to do" was "unacceptable." *Id.* at *4. The EEOC brought its action alleging that Plaintiff's termination violated Title VII. *Id.* at *9. Recognizing that transgendered, or transsexual status is currently not a protected class under Title VII, the EEOC alleged that Defendant's decision to fire Stephens was motivated by sex-based consideration, in that Defendant fired Stephens because she was transgendered, because of Stephen's transition from male to female, and/or because Stephens did not conform to Defendant's sex- or gender-based preferences, expectations, or stereotypes. *Id.* Defendant moved to dismiss on the ground that Title VII does not protect transgendered individuals. *Id.* at *10-11. The Court denied Defendant's motion to dismiss. *Id.* at *25. Although the Court agreed that transgender persons are not a protected group under Title VII, it noted that the EEOC did not allege that Defendant fired Stephens solely because of transgendered status. *Id.* The Court explained that had the EEOC alleged that Defendant fired Stephens based solely on Stephens' status as a transgendered person, it would be inclined to grant Defendant's motion to dismiss. *Id.* The EEOC, however, did not make such sole assertion. The Court pointed out the significance of the EEOC's allegation that Defendant fired Stephens because she did not conform to Defendant's sex- or gender-based preferences, expectations, or stereotypes. *Id.* at *11. According to the Court, even though transgendered/transsexual status is currently not a protected class under Title VII, the statute nevertheless "protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender." *Id.* at *11-12. Because the EEOC based its theory of liability, in part, on Defendant's alleged sex-based consideration, the Court concluded that the EEOC had sufficiently pleaded a sex-stereotyping gender-discrimination claim under Title VII. *Id.* at *22-23. Accordingly, the Court denied Defendant's motion to dismiss. *Id.* at *25.

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., **Case No. 14-CV-13710 (E.D. Mich. Sept. 24, 2015).** The EEOC brought an action alleging that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII") of by terminating a transgender employee, Aimee Stephens, on the basis of her sex. Defendant employed Stephens as a funeral director in 2007, and terminated her in 2013. Defendant did so after informing Stephens, who was a male when hired, that her intention of dressing as a woman was unacceptable. *Id.* at 2. Defendant moved to dismiss the claim on the grounds that gender identity disorder was not a protected class under Title VII. *Id.* The Court denied the motion on April 23, 2015, finding that the EEOC's complaint did not allege that Defendant terminated Stephens based solely upon Stephens' status as a transgender person, but also because Stephens did not conform to Defendant's sex or gender-based preferences, expectations, or stereotypes. *Id.* Defendant then served discovery seeking information relating to the prior and current status of Stephens' sexual anatomy, the progress of Stephens' gender transition, and Stephens' familial background and relationships. *Id.* at 3. The EEOC moved for a protective order to preclude discovery into these areas on various grounds. The Court granted in part and denied in part the EEOC's motion for protective order. The Court grant the EEOC's motion to the extent Defendant's discovery requests concerned Stephens' sexual anatomy, her familial background and relationships, and any medical or psychological records related to the progress of her gender transition. The Court opined that these discovery topics were all irrelevant in light of the Court's previous ruling that the EEOC's salient claim was limited to "gender stereotyping." *Id.* at 5-6. According to the Court, the relevant inquiry underlying the EEOC's theory of liability was a subjective one – whether Defendant's supervisors perceived Stephens as a man who was acting like a woman – rather than an objective one, *i.e.*, whether Stephens was ever actually a woman. Hence, it would be harassing and oppressive to require the disclosure of information of the most intimate and private nature information, given that Defendant failed to show its relevance to the disposition of the EEOC's gender-stereotyping claim. *Id.* at 7. The Court, however, required the EEOC to respond to Defendant's two other interrogatories, finding that they were distinguishable from the prohibited discovery requests because they sought information that Stephens presented publicly or to third-parties, *i.e.,* Stephens' physical appearance at work and her communications with other employees, as opposed to private facts of an intimate nature. *Id.* at 8. Accordingly, the Court granted in part and denied in part the EEOC's motion for protective order.

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 2015 U.S. Dist. LEXIS 161314 (E.D. Mich. Nov. 25, 2015).** The EEOC brought an action alleging that Defendant violated Title VII of the Civil Rights Act of 1964 ("Title VII") by terminating a transgendered employee, Aimee Stephens, on the basis of her sex. Defendant hired Stephens as a funeral director in 2007, and terminated her in 2013. The Magistrate Judge granted in part the EEOC's motion for protective order, relative to Defendant's discovery regarding Stephen's personal sexual information. On Defendant's subsequent Rule 72 objections, the Court rejected Defendant's position. *Id.* at *1. The Court observed that Defendant's objections to the Magistrate Judge's order were based on its assumption that all the EEOC's case theories remained in limbo, and therefore, the discovery requests should not be deemed irrelevant. *Id*. at *2. The Court rejected Defendant's objections, finding that it had conclusively determined the sustainable theories on which the EEOC could bring its Title VII claim. *Id*. The Court explained that the EEOC asserted two different Title VII claims against Defendant. The EEOC's first claim was that Defendant discriminated against Stephens by terminating her because she is transgender; because of Stephens' transition from male to female; and because she did not conform to Defendant's sex or gender-based preferences, expectations, or stereotypes. *Id*. at *3-4. Second, the EEOC alleged that Defendant violated Title VII by providing a clothing allowance to male employees and not to female employees. *Id*. at *4. The Court opined that when it denied Defendant's motion to dismiss on the EEOC's first Title VII claim, it ruled that the EEOC could pursue a Title VII claim based upon the theory that Stephens' failure to conform to sex stereotypes was the driving force behind the termination. *Id*. at *5. The Court therefore concluded that the EEOC's complaint stated a Title VII claim as to Stephens' termination, and the Magistrate Judge correctly determined that Defendant's discovery was not relevant to that claim.

***EEOC v. Skanska USA Building, Inc.*, 80 F. Supp. 3d 766 (W.D. Tenn. 2015).** The EEOC brought an action alleging racial discrimination and retaliation on behalf of Maurice Knox, Samuel Burt, and Robert Vassar, three African-American employees who were hired by C-1, Inc. at the construction site for which Skanska USA Building, Inc. was a general contractor. The parties filed cross motions for summary judgment. *Id.* at 770. The Court denied Defendant's motion, and granted the EEOC's motion in part. *Id.* First, the Court noted that to determine whether harassing conduct is sufficiently severe or pervasive to establish a hostile work environment; whether the totality of the circumstances should be considered, including the frequency of the discriminatory conduct; its severity, and whether it is physically threatening or humiliating. *Id.* at 772. Because there was evidence that there was a racially discriminatory hostile work environment, the Court denied Defendant's motion on this claim. *Id.* at 773. Further, Defendant claimed that it first knew of Knox's harassment when he complained after a co-worker threw a mixture of chemicals and urine on him. Defendant asserted that it investigated the complaint and took action, including posting signs that stated that harassment would not be tolerated. The Court, however, noted that there was an extensive record of racial harassment on the site prior to Knox's arrival that Defendant knew or should have known about and failed to adequately respond to, and further remarked that the eventual response to Knox's complaints did not excuse Defendant for its failure to respond to his earlier complaints. *Id.* at 774. Thus, the Court denied Defendant's motion with regard to Knox's hostile work environment claims. *Id.* The Court reasoned that Knox had complained multiple times about the harassment, and that there was an adverse employment action against his employer when Defendant suspended C-1's contract after his complaints. *Id.* at 775. Although Defendant reinstated the contract, two weeks later it permanently removed Knox from the site for allegedly using his cell phone while working. The Court stated that this evidence of disparate treatment created a genuine issue of material fact as to whether Knox's termination was in retaliation for his racial harassment complaints. *Id.* Defendant also removed Burt from the jobsite approximately two months after he first complained about racial harassment without being given a reason for his dismissal. The Court found that there was a causal connection between the complaints and the adverse employment action, and that the allegations made out a *prima facie* case of retaliation. *Id.* at 775-76. The Court further noted that the EEOC is not precluded from bringing suit on claims that were not included in the charge of discrimination if facts related to the charged claim would prompt the EEOC to investigate a different, uncharged claim. *Id.* at 778. Here, Knox filed a charge of discrimination alleging racial harassment and retaliation. Because the facts of Knox's charged claim gave rise to the investigation of the similar claims on behalf of Burt and Vassar, the Court opined that these claims were within the scope of the EEOC's investigation, and accordingly, granted summary judgment to the EEOC on Skanska's

affirmative defense that the Court lacked jurisdiction over the subject matter of that claim. *Id*. at 778-79. The Court also found that the EEOC had attempted to conciliate in good faith the claims of Knox and a class of other C-1 employees before instituting the suit. *Id*. at 778. Accordingly, the Court denied Defendant's motion for summary judgment and granted in part the EEOC's motion for partial summary judgment. *Id.* at 781.

***EEOC v. Tepro,* 2015 U.S. Dist. LEXIS 134901 (E.D. Tenn. Sept. 28, 2015).** The EEOC brought an Age Discrimination in Employment Act ("ADEA") action on behalf of 25 former employees alleging that Defendant engaged in a discriminatory reduction-in-force ("RIF"). *Id.* at *4. According to the complaint, Defendant, a manufacturer of rubber products for the automotive industry, re-classified its employees over the age of 40 from "Tech II" to "Tech III" positions, which resulted in the re-classified employees losing their seniority dates and ultimately being laid-off. *Id.* at *2. The EEOC alleged that, by the end of June 2009, Defendant improperly re-classified more than 25 employees in the protected age group before their lay-off. *Id.* Defendant moved for summary judgment, arguing that the EEOC presented no direct evidence of discrimination, the EEOC could not meet its burden of establishing a *prima facie* case of discrimination, and even if it could, the EEOC could not establish that Defendant's legitimate non-discriminatory reason for the lay-offs were a pre-text for age discrimination. *Id.* at *56-57. Defendant further argued that several individual employees should be dismissed because their testimony demonstrated that age was not the "but for" reason for their termination. *Id.* at *57. The Court denied Defendant's motion, finding that, although the EEOC failed to present any direct evidence of discrimination, it submitted enough circumstantial evidence to conclude that issues of fact remain as to whether Defendant discriminated against its employees based on their age. *Id.* at *61-65. The statistical evidence suggested that older employees were overrepresented at a statistically significant level in both the re-classification efforts and the RIF, and it showed significant disparities in the employer's pattern of conduct toward a protected class. *Id.* at *65-66. Further, a multitude of facts – that Defendant focused on employees' ages in the numerous lists that it made for the re-classification and RIF, Defendant did not advise the employees that their seniority would be affected by their decision to re-classification to Tech III status, the temporal proximity between the re-classification efforts and the RIF, the testimony from certain employees that they felt pressured to accept re-classification, and the fact that no employees younger than 40 were re-classified to Tech III status or subjected to RIF – all constituted circumstantial evidence that Defendant might have targeted the employees based on their age. *Id.* at *66-67. Defendant argued that a workforce reduction was necessary due to its financial position and that Tech II employees with the shortest length of service in that position were chosen for lay-off pursuant to the terms of Defendant's employee handbook, and because terminating them would have the least impact on the company's overall operations. *Id.* at *68. Although the undisputed facts confirmed that Defendant was in financial distress, that it took numerous cost saving measures that were ultimately unsuccessful, and that a RIF was necessary for it financial survival, the Court found that genuine issues of material fact remain as to whether Defendant appropriately followed the lay-off policy set forth in its employee handbook. *Id.* at *75. The EEOC requested the Court to view the re-classification and RIF as a single continuous action designed by Defendant with the goal of moving older employees into positions that easily could be eliminated. The Court found that the statistical and circumstantial evidence, along with the timing of the lay-offs of Tech III employees immediately upon the heels of a large scale effort to re-classify employees into that position, was suspicious. *Id.* at *73. Thus, finding that genuine issues of material fact remain as to Defendant's stated reasons for subjecting the 25 employees to the RIF, the Court denied Defendant's motion for summary judgment. The Court also rejected Defendant's affirmative defenses, finding that it did not prove that it was entitled to summary judgment on the doctrine of laches and that there was no dispute that the EEOC attempted good faith conciliation before filing its lawsuit. *Id.* at *77-82.

***EEOC v. The Pines Of Clarkston,* 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. April 29, 2015).** The EEOC brought an action alleging that Defendant, an assisted living facility, terminated Jamie Holden as a nursing administrator on the basis of her epilepsy in violation of the Americans With Disabilities Act ("ADA") and Michigan's Persons with Disabilities Civil Rights Act. Holden underwent a pre-employment drug screen the day after Defendant hired her, and she tested positive for marijuana. *Id.* at *2-3. She disclosed to Defendant that she used marijuana for epilepsy. Defendant questioned Holden about her epilepsy and

later terminated her. *Id.* at *3. Defendant moved for summary judgment, arguing that it was not an "employer" within the meaning of the ADA and that it had a legitimate reason for its employment decision since Holden failed the drug test. *Id.* at *2. The Court denied Defendant's motion. *Id.* First, the Court found that Defendant had admitted that it employed at least 15 employees in its answer to the EEOC's complaint, and thus it was a covered "employer" under the ADA. *Id.* at *8. Defendant argued that it should not be bound by its admissions in its answers because it had alleged in its responses to the EEOC's requests for admissions and interrogatories that it employed less than 15 employees. *Id.* at *9. The Court, however, noted that the discovery closed months before Defendant raised this issue. *Id.* at *11. Further, the EEOC had conducted no discovery on the issue and relied on Defendant's judicial admissions. *Id.* The Court thus found that it would be unfair to force the EEOC to address this new defense without re-opening discovery, and re-opening discovery at this stage would not be appropriate as the case was near trial. *Id.* at *11-12. The Court therefore concluded that Defendant was bound by its admission that it employed the requisite 15 employees at the time of the adverse employment action. *Id.* at *12. Next, the Court found that a genuine issue of material fact existed as to whether Defendant discharged Holden because of her epilepsy. *Id.* at *16. Defendant's argument that it dismissed Holden for failing her drug test conflicted with its managers' stated rationales to the EEOC that it terminated her for failing to disclose her medication or that Holden could not perform the duties of the position given her medical condition. *Id.* at *16. While the Court agreed that discharge for illegal drug use was a permissible non-discriminatory reason, it also noted that an employer's changing rationale for making an adverse employment decision could be evidence of pre-text. *Id.* Moreover, Holden's evidence indicated that Defendant knew of her epilepsy, the managers questioned her about her condition, and they told her that she could not perform the job because of her medical condition. *Id.* at *18. Under these circumstances, the Court found that a genuine issue of material fact existed as to whether Defendant gave a legitimate non-discriminatory reason for the firing or whether it was a pre-text for disability discrimination. *Id.* at *18-20. Further, the Court found that Defendant was not entitled to summary judgment under the "honest belief" doctrine because Defendant never told Holden that it terminated her for illegal drug use. *Id*. at *19-20. Accordingly, the Court denied Defendant's motion for summary judgment. *Id.* at *20.

(vii) Seventh Circuit

***EEOC v. Amsted Rail Co., Inc.,* 2015 U.S. Dist. LEXIS 94807 (S.D. Ill. July 21, 2015).** The EEOC brought an action alleging that Defendant's medical screening process for potential employees discriminated against qualified applicants based on their record of disability or because Defendant regarded them as disabled in violation of the Americans With Disabilities Act ("ADA"). The EEOC sought injunctive relief as well as compensatory and punitive damages. Defendant asserted 10 affirmative defenses, including: (i) Defense 1 – failure to state a claim; (ii) Defense 4 – actions against employees were taken for legitimate, non-discriminatory reasons; (iii) Defense 5 – Defendant made good faith effort to comply with the law; (iv) Defense 6 – the lack of subject-matter jurisdiction because of the EEOC's failure to conciliate; (v) Defense 7 – damages sought by the EEOC were not recoverable under the ADA; (vi) Defense 8 – laches; (vii) Defense 9 – the EEOC's after-acquired evidence; and (viii) Defense 10 – Defendant's reservation of its right to add defenses. *Id*. at *2. The EEOC moved to strike those defenses or, in the alternative, for judgment on the pleadings on some of those defenses. The Court granted the motion in part. The EEOC asked the Court to strike for judgment on the pleadings on defenses 1-6 as they were not supported by sufficient facts as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 533 (2007), and that it would prejudiced by having to litigate them. The Court noted that under Rule 12(f), it may strike pleadings to prevent unnecessary expenditures of time and money litigating spurious issues. *Id*. at *3. Defendant subsequently sought permission to withdraw defenses 1, 4, and 9; therefore, the Court granted the EEOC's motion as to those three defenses. *Id*. at *2. The Court found that the EEOC had not carried its burden with respect to defenses 5, 6, 7, and 8. The Court explained that Defense 5 had a logical connection to the EEOC's ADA claims in that it asserted a good faith defense to punitive damages in a discrimination claim. *Id*. at *4. Similarly, the Court found that defenses 6, 7, and 8 were good faith defenses, which the EEOC must answer. *Id*. at *4. More importantly, the Court found that the EEOC did not show that it would be prejudiced from allowing those defenses to remain in Defendant's answer. *Id*. Finally, the Court found that defense 10 was not a defense at all but essentially a declaration of exemption

from Rule 13's rules on amending pleadings. *Id*. at *5. The Court remarked that this declaration had no relation or logical connection to the claims in this case, and accordingly struck it down. *Id*.

***EEOC v. Aurora Health Care, Inc.*, 2015 U.S. Dist. LEXIS 63321 (E.D. Wis. May 14, 2015).** The EEOC brought an action alleging that Defendant violated various provisions of the Americans With Disabilities Act ("ADA") in discriminating against Kelly Beckwith, a job applicant, by rescinding an offer of employment after learning that she was diagnosed with multiple sclerosis ("MS"). Defendant operated the Aurora Visiting Nurse Association ("AVNA"), which provided home care and hospice services to patients, and hired nurses to work unsupervised in the homes of patients. *Id*. at *3. Defendant's hiring process required that after a prospective employee filled out the form, a licensed practical nurse ("LPN") or medical assistant ("MA") measured the applicant's vital signs, blood pressure, and weight; administered a vision and grip test; and, occasionally, drew blood from the applicant. *Id*. at *6-7. After the LPN or MA had completed the initial examination and review, a physician would review the form with the applicant and perform the actual physical examination before the applicant underwent a drug screen. *Id*. at *7. The EEOC contended that after reviewing Beckwith's application and interviewing her, Defendant offered her employment with AVNA, which was contingent upon her passing a pre-employment physical. *Id*. at *16. During her physical, Beckwith filled out a form and did not disclose she was prescribed Rebif as her medication for MS, because she was not compliant with the medication at that time. *Id*. at *20. Defendant contended that its LPN noticed that Beckwith's records showed a prescription to Rebif that she had not disclosed. Having found out that Beckwith was diagnosed with MS, Defendant rescinded the job offer on the basis of her dishonesty regarding her medical records. *Id*. at *27. The EEOC asserted that this course of events was different from Defendant's typical practice, where it performed an investigation before rescinding a job offer for dishonesty. The parties cross-moved for summary judgment. *Id.* at *39-40. As a preliminary issue, the Court found that Defendant's action would not violate the ADA unless Beckwith had a disability as defined by 42 U.S.C. § 12102. *Id.* at *42. Defendant contended that Beckwith was never substantially limited in her life activities given her mild case of MS. The Court observed that while the EEOC had not presented evidence to carry its burden to show that Defendant regarded Beckwith as disabled, at the same time the EEOC had offered enough evidence to preclude Defendant's motion for summary judgment on this point. *Id*. at *44-45. Accordingly, the Court denied the parties' motions on the issue of disability. *Id.* at *45. Defendant also argued that Beckwith's discrimination claim should be dismissed because the EEOC could not prove that Defendant rescinded her offer because of her MS. *Id.* at *47. The EEOC asserted that Defendant's honesty policy was *per se* discriminatory because Defendant applied its honesty policy only to people with disabilities. Defendant argued that it had a reason for focusing on dishonesty that was related to a significant medical condition, and that the form was designed to help Defendant determine whether prospective employees would need any accommodations to perform their job. *Id*. at *49-50. The Court found that the EEOC had not produced any direct evidence of discriminatory animus; however, it identified only one piece of evidence, *i.e.*, the allegedly suspicious timing of Defendant's decision to rescind Beckwith's offer. The EEOC posited that had Defendant rescinded Beckwith's offer for falsifying or omitting responses from the form, then her disease would not have been relevant or warranted comment. *Id*. at *51. The Court found that this piece of evidence was enough for the EEOC to overcome summary judgment. *Id.* The Court, however, granted summary judgment for Defendant as to the EEOC's confidentiality claim insofar it relied upon a physician assistant ("PA") (who disclosed the information to an employee health specialist ("EHS") who was responsible for making sure that AVNA nurses could meet the physical demands of their jobs). *Id.* at *54-57. The Court ruled that Defendant could not be held liable for the PA's disclosure to the EHS. *Id.* Finally, the Court granted the EEOC's motion for summary judgment on Defendant's equitable defense of failure to state claim, finding that moving to dismiss after answering to the complaint was untimely. Accordingly, the Court granted both parties' motions for summary judgment in part and denied in part. *Id.* at *68.

***EEOC v. Autozone Inc*., 2015 U.S. Dist. LEXIS 101347 (N.D. Ill. Aug. 4, 2015).** The EEOC brought an action on behalf of an African-American employee alleging disparate treatment under Title VII of the Civil Rights Act of 1964 ("Title VII") and claiming that he was transferred from one store to another on the basis of his race. The employee initially worked in one location and after eight months was transferred to Defendant's "Kedzie" store, in the same position and at the same rate of pay. *Id.* at *2. Thereafter,

Defendant promoted the employee to a part-time sales manager position and in a few weeks' time transferred him to two other stores, both in Chicago. In 2011, Defendant transferred the employee back to the Kedzie store, and in 2012 transferred him to another store. *Id.* at *3. The employee believed that his transfer from the Kedzie store in July 2012 was based on race because Defendant's district manager wanted to make the Kedzie store predominantly Hispanic. *Id.* at *3-4. Defendant moved for summary judgment, which the Court granted. *Id.* at *15. The EEOC asserted that this action was not being brought under 42 U.S.C. § 2000e-2(a)(1), but instead under § 2000e-2(a)(2), contending that Defendant's conduct was unlawful because it transferred the employee as part of a plan to limit, segregate, or classify employees on the basis of race. *Id.* at *6. The Court observed that although § 2000e-2(a)(2*)* creates a broad substantive right that extends far beyond the simple refusal or failure to hire, the EEOC failed to point to any legal authority that it was not required to present evidence of an adverse employment action under its theory of liability. *Id.* at *7. The Court observed that in Seventh Circuit cases involving § 2000e-2(a)(2)'s prohibition of limiting, segregating, or classifying employees, the case law requires that the EEOC establish that the alleged victim suffered an adverse employment action. *Id.* The Court remarked that while adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action. *Id.* at *12. Here, when Defendant transferred the employee from the Kedzie store in 2012, he did not receive a reduction in pay, a change in benefits, or any change in job duties. The Court remarked that a transfer that does not involve a demotion cannot rise to the level of a materially adverse employment action. *Id.* Further, there was no evidence in the record that the 2012 transfer from the Kedzie store resulted in an objectively humiliating or degrading change in work conditions; instead there was evidence that the employee objected to the transfer to store 2290 because of the distance from his home and the resultant inconvenience of a longer commute. *Id.* at *13-14. The Court opined that this disruption, without more, did not amount to an adverse employment action under Title VII. *Id.* at *14. Thus, because employee did not suffer any material adversity in relation to his July 2012 transfer, the Court granted Defendant's motion for summary judgment. *Id.* at *14-15.

***EEOC v. AutoZone, Inc.*, 2014 U.S. Dist. LEXIS 149849 (N.D. Ill. Nov. 4, 2015).** The EEOC brought an action on behalf of three employees alleging that Defendants discriminated against them on the basis of their disabilities by failing to accommodate them and discharging them in violation of the ADA. Defendants filed its answer and affirmative defenses, and moved to limit the scope of the litigation to three of its stores at issue, which the Court denied. The crux of Defendants' argument was that the EEOC did not conduct an adequate nationwide investigation to support its decision to file suit against Defendants for employment discrimination in any of the stores other than the three Illinois stores where the three employees worked. *Id*. at *7. The Court observed that the Seventh Circuit had held that EEOC lawsuits are not confined to claims typified by those of a charging party, and the lawsuit should not be limited to claims that are supported by the evidence obtained in the EEOC's investigation. *Id*. at *8. The Court explained that the rationale for prohibiting parties from challenging the sufficiency of the EEOC's investigation is because this would improperly place the focus of employment discrimination litigation on the EEOC's administrative efforts, rather than the validity of the actual claims of discrimination. *Id*. The Court further observed that in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), the Supreme Court determined that a sworn affidavit from the EEOC stating that it has performed its obligations would show that the EEOC had met its conciliation requirement. *Id*. at *11. Here, the Court noted that the EEOC's amended determinations clearly put Defendants on notice that the EEOC had conducted an investigation of Defendants' attendance policy, and that it would pursue charges against Defendants for discrimination that has occurred in Defendants' stores throughout the United States. *Id*. at *14. The Court remarked that this was sufficient for the Court to make its determination. In addition to challenging the sufficiency of the EEOC's investigation, Defendants also asked the Court to limit the scope of the litigation because the EEOC had not provided an explanation as to what prompted it to rescind its original determination on the charges of the three employees. The Court, however, held that the EEOC was not required to explain why it issued the original determination, and then issued amended determinations. *Id*. at *19. Accordingly, the Court denied Defendants' motion.

***EEOC v. Celadon Trucking Services, Inc.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).** The EEOC brought an action on behalf job applicants for driver positions, alleging that Defendant engaged in a

pattern or practice of discrimination by refusing them jobs in violation of the Americans With Disabilities Act ("ADA"). Defendant, an interstate motor carrier company, is subject to various Department of Transportation ("DOT") regulations, including those prescribing health and safety standards for its drivers. *Id*. at *1-2. Among those requirements were that all drivers pass DOT-sanctioned medical examinations and otherwise possess certain minimum medical qualifications. *Id*. at *2. The EEOC brought suit on behalf of two groups of applicants, including: (i) 23 unsuccessful applicants, 22 of whom never received certifications that they had passed the required DOT physical and thus never received employment offers; and (ii) 6 individuals who were refused employment after health personnel did not certify them as having passed their DOT physical exams. *Id*. at *8. The EEOC claims that these six individuals were not only subject to Defendant's policy of pre-hire medical inquiries and examinations, but also were victims of intentional employment discrimination on the basis of real or perceived disabilities. *Id.* at *9. The parties filed cross-motions for summary judgment, which the Court granted in part. *Id.* at *97. The EEOC first alleged that as part of its standard hiring process for drivers, Defendant made medical inquiries of its applicants and required them to submit to physical examinations before they were extended offers of employment. *Id*. at *17-18. Defendant's written application form contained three health-related questions. The first question broadly asked applicants to disclose if they had ever been injured, hospitalized, had surgery, or been treated by a doctor on an outpatient basis. The Court remarked that leaving aside the questions of business-relatedness, the questions in the applications appeared to be the type of open-ended inquiries that Congress sought to restrict by enacting 42 U.S.C. § 1211(d)(2), which restricts prospective employers from using disclosed information to screen out applicants whose hiring would entail providing an accommodation. *Id*. at *18. Defendant contended that § 12112(d)(2)'s prohibitions shielded only qualified individuals, those who, with or without reasonable accommodation, could perform the essential functions of the job in question. *Id*. at *22. The Court noted that all circuits, including the Seventh Circuit, had implicitly rejected Defendant's interpretation and have held that § 1211(d)(2)-(4) does not require that an individual be disabled to state a claim. *Id*. at *28. Accordingly, the Court concluded that the EEOC need not establish that the job applicants who were subjected to pre-employment inquiries and examinations were otherwise qualified. *Id*. at *30. Defendant next argued that even if § 12112(d)(2) applied to all job applicants, the EEOC did not state a claim because it could not establish that any of the class members suffered an injury-in-fact. *Id.* at *31. The Court observed that although an individual must demonstrate a tangible injury resulting from the company's conduct to recover damages, the EEOC was situated differently than an individual Plaintiff. *Id*. at *31-32. The Court reasoned that *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) held that EEOC's standing to bring a suit challenging a violation of the ADA is not derivative of a class members' personal claims; it stems directly from the statute, and the EEOC's own statutory enforcement authority. *Id*. at *32. Accordingly, the Court concluded that the EEOC suffers an injury sufficient to give rise to an Article III standing when a violation of § 102 ADA occurs. *Id.* at *33. Defendant also argued that its hiring questions fit within the safe harbor for job-related inquiries provided in § 12112(d)(2) because they were all directly related to the applicant's ability to secure DOT medical certifications as well as their ability to safely drive trucks. *Id.* at *36. The Court observed that the DOT's certifications were mandatory, but Defendant failed to show a nexus between the inquiries it actually made and the undeniably important regulations under which it was obliged to operate for the public good. *Id*. at *44. The Court found that Defendant established no genuine dispute of material fact regarding the job-relatedness of the questions. *Id.* Therefore, the Court granted EEOC's motion for summary judgment. Likewise, the Court granted in part the EEOC's motion for summary judgment on Defendant's failure to hire the six individuals. The Court found that the EEOC had established a *prima facie* case as to four applicants, but failed to do so for the remaining two. *Id.* at *97. Accordingly, the District Court granted in part the EEOC's motions for summary judgment. *Id.*

***EEOC v. CVS Pharmacy, Inc.,* 2015 U.S. App. LEXIS 21963 (7th Cir. Dec. 17, 2015).** The EEOC alleged that certain provisions of Defendant's standard severance agreement violated Title VII of the Civil Rights Act of 1964 because they interfere with an employee's right to file charges, communicate voluntarily with the EEOC and other state agencies, and participate in agency investigations. *Id.* at *5. The case arose out of a former CVS pharmacy manager who was discharged in July 2011. *Id.* at *3. The charging party filed a charge with the EEOC alleging that Defendant terminated her due to her sex and race. *Id.* On June 13, 2013, the EEOC dismissed the charge, but it then sent Defendant a letter saying that it had

reasonable cause to believe that Defendant was engaged in a pattern or practice of resistance to the full employment of rights secured by Title VII by virtue of the severance agreements that charging party and others signed at their terminations. *Id.* at *5-6. Specifically, the EEOC claimed that the agreement deterred the filing of charges and interfered with the employee's ability to communicate voluntarily with the EEOC, and other federal and state agencies. *Id.* Subsequently, the EEOC filed suit, which Defendant moved to dismiss. The District Court dismissed the EEOC's case on purely procedural grounds, as it was undisputed that the EEOC did not engage in any effort to conciliate prior to bringing suit. *Id.* at *8. The EEOC argued that it was not required to engage in conciliation procedures because it was not bringing a garden-variety pattern or practice claim under § 707(e), but rather was alleging a pattern or practice of resistance to the full enjoyment of rights created by Title VII. *Id.* That "resistance" claim was brought under § 707(a), which does not mandate the same pre-suit procedures as are required under § 707(e). *Id.* On its appeal to the Seventh Circuit, the EEOC asserted that the District Court erred because: (i) § 707(a) authorizes the agency to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without following any of the pre-suit procedures contained in § 706, including conciliation; (ii) Defendant's use of a severance agreement that could chill terminated employees from filing charges or participating in EEOC proceedings constitutes a "pattern or practice of resistance" for purposes of § 707(a); and (iii) a reasonable jury could conclude that the agreement deterred signatories from filing charges with the EEOC because of its length, small font, and the fact that it is drafted in "legalese," thus making summary judgment for CVS improper. *Id.* at *9. The Seventh Circuit summarily rejected the EEOC's first argument, and therefore, did not address the additional grounds set forth by the EEOC in support of its appeal. With respect to the EEOC's contention that it was not required to engage in any pre-suit procedures, the Seventh Circuit rejected "the EEOC's … novel interpretation of its powers under § 707(a) that extends beyond the pursuit of unlawful unemployment practices involving discrimination and retaliation, and that frees the EEOC from engaging in informal methods of dispute resolution as a prerequisite to litigation," as it "cites to no case law….nor has any case been found that supports the distinction between the two sections as argued by the EEOC." *Id.* at *14. Moreover, because the Seventh Circuit found no difference between a suit challenging a "pattern or practice of resistance" under § 707(a) and a "pattern or practice of discrimination" under § 707(e), it reasoned that the EEOC must comply with all of the pre-suit procedures contained in § 706, including conciliation. *Id.* at *18. As the Seventh Circuit noted, "[i]f we were to adopt the EEOC's interpretation of § 707(a), the EEOC would never be required to engage in conciliation before filing a suit because it could always contend that it was acting pursuant to its broader power under § 707(a). In other words, the EEOC's position reads the conciliation requirement out of the statute." *Id.* at *19. The Seventh Circuit therefore affirmed the District Court's ruling dismissing the EEOC's claims.

***EEOC v. Costco Wholesale Corp.,* 2015 U.S. Dist. LEXIS 168187 (N.D. Ill. Dec. 15, 2015).** The EEOC brought an action alleging that Defendant violated the rights of Dawn Suppo, an employee, under Title VII of the Civil Rights Act of 1964, by subjecting her to a hostile work environment consisting of sexual comments, unwelcome touching, and advances and stalking by a customer at the store. Suppo repeatedly complained to her manager about the customer's stalking and unwanted contacts, and eventually obtained an order of protection against the customer, and when the situated persisted, Suppo complained to the police and subsequently requested an extended medical leave pursuant to her employment agreement. *Id.* at *16-17. Suppo took a medical leave of absence and when the leave expired, she requested an additional one to two years of leave. Defendant refused and later terminated Suppo. *Id.* at *21-22. The EEOC alleged that Defendant subjected Suppo to a hostile work environment and that it constructively discharged Plaintiff because she left her job due to Defendant's failure to remedy the harassment. *Id.* at *22. Defendant moved for summary judgment on both claims. The Court granted in part and denied in part Defendant's motion. The Court entered judgment in Defendant's favor on the constructive discharge claim, finding no genuine issue of material fact regarding whether Suppo resigned. *Id.* at *28. The Court noted that, to prevail on a claim for constructive discharge, the EEOC must show that Suppo "was forced to resign because [her] working conditions, from the standpoint of the reasonable employee, had become unbearable." *Id.* at *35. The undisputed evidence here showed that Suppo never resigned; instead, she stopped reporting to work, took an extended medical leave, and Defendant ultimately terminated her after her medical leave ran out. *Id.* at *36. Because a constructive discharge claim arise only when an

employee actually resigns, and fact that Suppo requested and obtained medical leave from Defendant showed a continuing employment relationship, and not resignation, the Court concluded that Defendant could not be liable for her constructive discharge. *Id.* at *38-39. The Court, however, denied Defendant's request for summary judgment on Suppo's hostile work environment claim, finding factual disputes surrounding what steps Defendant took to make the charging employee feel safe so that she could return to work. *Id.* at *33. Although Defendant tried to defuse the situated by banning the stalking customer from the store, the Court noted that it did not take this step until after the employee had been subjected to harassment by the customer for more than a year. *Id.* at *34. The Court thus could not conclude as a matter of law that Defendant took reasonable steps to end the alleged harassment. Accordingly, the Court granted in part and denied in part Defendant's motion for summary judgment.

***EEOC v. Dolgencorp, LLC*, Case No. 13-CV-4307 (N.D. Ill. April 20, 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 action alleging that Defendant engaged in a pattern or practice of conducting criminal background checks on potential employees that had a disparate impact on African-American job applicants. The parties disagreed about discovery; Defendant brought a motion for a protective order relative to aspects of the EEOC's discovery and the EEOC moved to compel. First, the Court denied Defendant's motion for a protective order in relation to the two store manager depositions. The Court, however, required the EEOC to provide a listing of topics that it intended to cover in the dispositions of the two store managers. *Id*. at 1. Next, the Court granted in part the EEOC's motion to compel answers to interrogatories and requests for production of documents. The Court directed Defendant to produce the most recent Desired Behavioral Assessment ("DBA") used to screen applicants and the scoring for the DBA. *Id*. at 2. The Court also ordered Defendant to produce documents reflecting any studies, testing, or analysis of whether Defendant's use of the DBA had resulted in reductions in employee theft and shrinkage since 2004. The Court further ordered Defendant to produce the most recent policy relating to drug testing, as well as policies relating to credit checks and reference checks. *Id*. In addition, the Court directed Defendant to identify all security measures used in its stores and to produce documents reflecting any studies, testing, or analysis of whether its use of security measures in retail stores had been effective in reducing workplace violence and employee theft since 2004. *Id*. at 3. Finally, to the extent that Defendant refused to respond to any interrogatory on the ground that the EEOC served too many interrogatories, the Court overruled the defense objection. The Court, however, determined that the EEOC could not serve additional interrogatories without leave of the Court.

***EEOC v. Dolgencorp, LLC,* 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015).** The EEOC brought an action alleging that Defendant's use of criminal background checks for applicants and employees violated Title VII of the Civil Rights Act of 1964 as it had a disparate impact on African-American job applicants. Both parties moved to compel discovery. The EEOC sought production of Defendant's electronically-stored information ("ESI") regarding conditional hires. Specifically, the EEOC wanted ESI data with names, social security numbers, addresses, and telephone numbers. *Id.* at *2. The EEOC also requested that Defendant reproduce certain ESI that Defendant redacted due to a purported lack of relevance. *Id.* at *3. In granting the motion, the Court found that the requested data fields were unquestionably calculated to lead to the discovery of admissible evidence by permitting the EEOC and its experts to analyze the statistical impact of Defendant's use of criminal background checks. *Id.* at *4. The Court rejected Defendant's assertion that producing the requested information would infringe upon the privacy of its conditional hires, noting that there was a confidentiality order in place that expressly prohibited the use or disclosure of personal information except as necessary for purposes of the litigation. *Id.* at *5. Regarding the redacted data, Defendant argued that it should be permitted to maintain the redactions because the information was proprietary and not relevant to the litigation. The Court disagreed, noting that even irrelevant information might be relevant to understanding the context of a document. *Id.* at *6-7. Since Defendant failed to establish that the information was sufficiently sensitive to warrant such redactions, the Court ordered Defendant to reproduce the data in full, noting that the confidentiality order in place provided protections regarding the proprietary data. *Id.* at *7-8. Defendant also sought discovery from the EEOC relative to its internal policies and procedures regarding its own use of criminal background checks in making employment decisions, and any statistical analyses the EEOC had regarding the purported disparate impact of Defendant's background check policy. *Id.* at *8. The EEOC refused to turn over its

internal policies and procedures, arguing that it was not relevant, and that the deliberative process privilege and work-product doctrine protected the statistical analyses from discovery. *Id.* at *10. While agreeing with Defendant that a government agency's employment policies could be discoverable in employment discrimination litigation, the Court denied Defendant's motion to compel production of the EEOC's background check policies and procedures, finding that such information would only be discoverable if Defendant could potentially use it to show that its use of criminal background checks was "job-related for the position in question." *Id*. at *13. The Court remarked that the policy was not relevant here because Defendant had not shown that "functions performed by its employees were in any way comparable to those undertaken by the EEOC's employees." *Id.* at *13-14. Regarding the statistical analyses, the EEOC argued that it prepared the analyses during the EEOC's investigation to determine whether to issue a reasonable cause determination of discrimination, and thus, the analyses were protected by the deliberative process privilege. *Id.* at *9-10. The EEOC also contended that the work-product doctrine protected its analyses because the EEOC's attorneys used the analyses in making the decision to sue Defendant and because one of the analyses was provided to an EEOC investigator by an EEOC attorney. *Id.* at *11. Because the Court could not determine the legitimacy of the EEOC's deliberative process and attorney work-product assertions without reviewing the documents in question, the Court ordered the EEOC to deliver copies of the withheld documents for *in camera* review. *Id.* at *11-12. Accordingly, the Court granted the EEOC's motion to compel in entirety, and granted Defendant's motion to compel in part. *Id.* at *22.

***EEOC v. Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 80140 (N.D. Ill. June 19, 2015).** The EEOC brought an action alleging that Defendant used criminal background checks while considering potential employees, which resulted in a disparate impact on African-American job applicants in violation Title VII of the Civil Rights Act of 1964. As part of the extensive and contentious discovery process, the Court had resolved cross-motions to compel discoveries. *Id.* at *1-2. Defendant then filed a motion for reconsideration of the order requiring it to produce electronically-stored information containing personal identifying information ("PII") of Defendant's conditional hires. Defendant also sought reconsideration of the portion of the ruling in which the Court declined to require the EEOC to produce information relating to the agency's own use of background checks and criminal history records when making employment decisions. *Id*. at *3. Finally, Defendant sought reconsideration of the denial of its motion to compel the EEOC to produce information and documents regarding other employers whose criminal background checks and policies previously had been found to be reasonable. *Id.* The Court granted the motion to stay but denied the motion to reconsider. The Court noted that in its order for the production of PII of conditional hires, it considered the EEOC's arguments that it required the information to link separate databases maintained by Defendant and two of its vendors, and to analyze whether any statistical effect observed was due to race as opposed to other demographic factors. *Id.* at *4. Defendant argued that the Court rejected the affidavit of its consultant and economist stating that the relevant databases could be easily linked without the PII, by merely using the last four digits of candidates' social security numbers, and the city and state of candidates' residence. *Id*. Although the Court agreed with Owens, it believed that the additional information comprised by the PII was itself relevant. *Id*. at *5. Defendant further argued that the EEOC was not entitled to undertake an analysis of non-racial demographic factors and thus, the Court's reliance on the EEOC's need to do so was a manifest error that required reversal. *Id.* at *5-6. The Court remarked that when it noted that the full PII would allow the EEOC to determine whether non-racial demographic factors may have caused a statistical impact, it was not giving the EEOC leave to make new or different discrimination claims, rather it was merely indicating that the additional PII data fields could be used as controls in conducting an analysis of the disparate impact on African-Americans of Defendant's criminal background check policy. *Id*. at *6. Accordingly, the Court denied Defendant's motion for reconsideration. The Court also denied Defendant's request to compel the production of data relating EEOC's background checks and criminal history. *Id*. at *10-11. The Court reasoned that because the business necessity defense applied only where the challenged practice was job-related for the position in question, any practices utilized by the EEOC were irrelevant to Defendant's business necessity defense. *Id*. at *9. The Court also denied Defendant's motion for reconsideration of its order denying its request of seeking other employers' use of background checks and criminal history records. *Id*. at *11-12. Accordingly, the Court granted Defendant's motion to stay and denied Defendant's motion for reconsideration. *Id.* at *12.

***EEOC v. Dolgencorp, LLC,* 2015 U.S. Dist. LEXIS 154842 (N.D. Ill. Nov. 17, 2015).** The EEOC brought an action alleging that Defendant engaged in a pattern or practice of conducting criminal background checks on potential employees that had a disparate impact on African-American job applicants in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *1. The Court referred the matter to the Magistrate Judge for supervision of discovery. *Id.* Defendant subsequently filed two Rule 72 objections to the Magistrate Judge's discovery rulings, and the Court overruled the objections. *Id.* First, Defendant objected to portions of the Magistrate Judge's April 20, 2015 order granting the EEOC's motion to compel. *Id.* at *2. At issue was Defendant's use of its desired behavior assessment ("DBA"), credit checks, reference checks, and drug testing. Defendant challenged the Magistrate Judge's ruling and argued that the materials were irrelevant. The Court held that all of the tests that the EEOC sought were relevant to the EEOC's rebuttal of Defendant's business necessity defense. *Id*. at *7. The Court determined that if the EEOC met its burden of showing that the challenged criminal background checks caused a disparate impact on the basis of race, Defendant would have the opportunity to prove that the criminal background checks were job-related and consistent with the business necessity. *Id*. Furthermore, the Court noted that if Defendant was able to establish its business necessity defense, the EEOC would have the opportunity to rebut that defense by demonstrating that an alternative employment practice exists and that Defendant refused to adopt it. *Id*. at *8. Accordingly, the Court overruled Defendant's objections. Defendant also objected to Magistrate Judge's order on the ground that the EEOC exceeded the 25-interrogatory limit imposed by the Federal Rules of Civil Procedure. The EEOC asserted that it needed more than 25 interrogatories because the case was nationwide in scope, raised complicated data issues, and involved many different legal and factual areas. *Id*. at *12. On this basis, the Court held that Magistrate Judge did not err in allowing over 25 interrogatories. Defendant also objected to Magistrate Judge's May 26, 2015 order, finding that certain materials that Defendant sought in discovery from the EEOC were protected by the deliberative process privilege. The Court noted that the deliberative process privilege protects communications that are part of a governmental agency's decision-making process. *Id*. at *13. Here, the EEOC asserted this privilege in response to certain interrogatories and requests for production of documents, to which the Court ordered the EEOC to deliver copies of the withheld documents for an *in camera* review with the Magistrate Judge. *Id*. The Magistrate Judge reviewed the documents and found that the EEOC had properly asserted the privilege. The Court reviewed those documents once again and found that the Magistrate Judge did not commit any error, and overruled Defendant's objection. *Id*. at *14.

***EEOC v. Flambeau, Inc.,* 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 31, 2015).** The EEOC filed an action against Defendant, a manufacturer of plastic products, alleging that it violated the ADA by requiring its employees to complete health risk assessment and biometric screening tests before they could enroll in Defendant's health insurance benefit plan. The parties filed cross-motions for summary judgment. The Court denied the EEOC's motion, granted Defendant's motion, and entered judgment in Defendant's favor. *Id.* at *2. The EEOC contended that Defendant violated 42 U.S.C. § 12112(d)(4)(A), which generally prohibits employers from requiring their employees to submit to medical examinations, by conditioning participation in its employee health insurance plan on completing a "health risk assessment" and a "biometric screening test." *Id.* at *1. Defendant argued that its practice of conditioning enrollment in its benefit plan on completion of the wellness program was protected by the ADA's "safe harbor" for insurance benefit plans set forth in 42 U.S.C. § 12201(c)(2). *Id.* at *7. The Court noted that when an employer sponsors a wellness program that is not part of the employer's benefit plan, it cannot avail itself of the § 12112(c)(2) safe harbor, but it may still rely on the employee health program exception in § 12112(d)(4)(B) if it satisfies that provision's requirements. *Id.* at *10. The EEOC contended that the Court was compelled by traditional principles of statutory interpretation to construe § 12201(c)(2) narrowly because it is an "exception" or "proviso," and that by contrast, the ADA is a remedial statute and must be construed with all the liberality necessary to achieve such purposes. *Id.* at *11. In rejecting this argument, the Court noted that the fact that wellness programs may fall within the scope of the exception set forth in § 12112(d)(4)(B) does not mean that they cannot also be protected by § 12201(c)(2)'s safe harbor. *Id.* at *12. Finally, the Court found that there was no evidence that Defendant used the information gathered from the tests and assessments to make disability-related distinctions with respect to employees' benefits. *Id.* at *19. Accordingly, the Court denied the EEOC's motion for summary judgment, granted Defendant's motion for summary judgment, and entered judgment in Defendant's favor. *Id.*

***EEOC v. GGNSC Holdings, LLC,* 2015 U.S. Dist. LEXIS 96806 (E.D. Wis. July 24 2015).** The EEOC brought an action on behalf of Juanette Barbee, a former employee, alleging that Defendants discriminated against her in violation of the Americans With Disabilities Act ("ADA"). The EEOC sought to file a second amended complaint adding GGNSC Administrative Services as a Defendant, and the Court granted the motion. *Id*. at *2. Defendant asserted that because Barbee did not name GNSC Administrative Services in her charge of discrimination, it could not be a Defendant in this action. *Id*. The Court observed that while a party not named in an EEOC charge ordinarily cannot be sued by the EEOC under the ADA, the rule has two exceptions. *Id*. First, the "actual notice exception" applies when the unnamed party has been provided with adequate notice of the proceedings aimed at voluntary compliance. *Id*. at *2-3. Second, the "identity-of-interest exception" applies if the named party sufficiently represented the unnamed party's interests when negotiating possible conciliation. *Id*. at *3. The Court remarked that it could not determine at that time which exception applied, as it needed more information to clarify the relationship between GGNSC Administrative Services and the two Defendants. *Id*. Absent that information, the Court remarked that that it could not conclude that the amendment sought by the EEOC would be futile. *Id*. Because the EEOC's amendment would not cause undue delay or undue prejudice to either Defendant, the Court granted the EEOC's motion for leave to file a second amended complaint. *Id*.

***EEOC v. Hufcor, Inc., d/b/a Total Quality Plastics,* 2015 U.S. Dist. LEXIS 7536 (E.D. Wis. Jan. 21, 2015).** The EEOC brought an action against Defendant alleging sex discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Katy Degenhardt, a former employee of Defendant, moved to intervene as a Plaintiff. The Court granted the motion. *Id.* at *2. The Court noted that under Rule 24(a)(1), an interested party is given an unconditional right to intervene by federal statute as long as their motion to intervene is timely filed. *Id*. at *1. The Court found that Degenhardt had filed her complaint in a timely manner. Thus, the Court concluded that Degenhardt had an unconditional right to intervene. *Id*. at *2. The Court further reasoned that even if Degenhardt did not have the right to intervene, it had the discretion to allow her to intervene under Rule 24(b)(2) if there was a common question of law or fact and independent jurisdiction. *Id*. The Court concluded that Degenhardt met those two elements because her claims arose under Title VII and were identical to the EEOC's claims. *Id*. For these reasons, the Court ruled that permissive intervention was appropriate, and accordingly granted Degenhardt's motion to intervene. *Id.*

***EEOC v. Northern Star Hospitality, Inc.,* 2015 U.S. App. LEXIS 1465 (7th Cir. Jan. 29, 2015).** Dion Miller, an African-American, was a cook for Northern Star Hospitality, Inc. d/b/a Sparx Restaurant ("Sparx" or "Hospitality"), and alleged that he was subjected to discrimination in violation of Title VII of the Civil Rights Act of 1964, when his co-workers put a display featuring a noose and a picture in the kitchen cooler. Miller had another co-worker take a photograph of the display in the cooler and lodged a complaint with the restaurant's general manager. The general manager learned that two of Miller's superiors – the kitchen manager and kitchen supervisor – admitted that they were responsible for the display. As a result of the complaint, the kitchen supervisor was given a warning, with the kitchen manager receiving no discipline at all. After Miller's complaint, the kitchen manager and supervisor began to criticize Miller's performance. Miller was then terminated less than one month after the display was put up. On March 27, 2012, the EEOC filed suit against Defendant on Miller's behalf, claiming that he was the victim of racial harassment and that he was wrongfully terminated for opposing that harassment. On September 7, 2012, the EEOC amended its complaint to add Northern Star Properties, LLC ("Properties") and North Broadway Holdings, Inc. ("Holdings") and claimed that they also were liable for this conduct. By this time, Sparx had closed and Hospitality had dissolved. Sparx was replaced by a Denny's Restaurant franchise owned by Holdings, while Properties owned the building where Sparx and the Denny's Restaurant were located. Hospitality, Properties, and Holdings were all owned by the same individual. After trial, the jury awarded the EEOC $15,000 in compensatory damages for Miller's wrongful termination while denying him punitive damages. The EEOC petitioned the District Court to award Miller front pay and back pay, as well as a tax award to off-set income tax liability on the back pay award. The District Court granted the EEOC's request for back pay and awarded Miller an additional $43,300.50, plus $6,495 to off-set his resulting tax liability. Because Hospitality no longer existed and thus could not pay these damages, the EEOC sought to have Properties and Holdings pay these damages either on a successor liability theory or by piercing of Hospitality's

corporate veil. The District Court granted the EEOC's request under both theories. Defendants appealed. The Seventh Circuit began its analysis by noting that "successor liability is 'the default rule . . . to enforce federal labor or employment laws.'" *Id.* This is because "[w]ithout [successor liability], 'the victim of the illegal employment practice is helpless to protect his rights against an employer's change in the business.'" *Id.* The Seventh Circuit laid out "a five-factor test for successor liability in the federal employment-law context, including: (i) whether the successor had notice of the pending lawsuit; (ii) whether the predecessor could have provided the relief sought before the sale or dissolution; (iii) whether the predecessor could have provided relief after the sale or dissolution; (iv) whether the successor can provide the relief sought; and (v) whether there is continuity between the operations and workforce of the predecessor and successor." *Id.* The Seventh Circuit found that the first factor was satisfied, reasoning that Holdings had notice of the lawsuit because both Holdings and Hospitality were owned by the same individual. *Id*. With respect to the second factor, the Seventh Circuit determined that, because Hospitality paid a number of its bills before its dissolution, as well as several bills that would benefit Holdings, it could have paid the judgment prior to its dissolution. *Id*. at *4. It held that, since Hospitality no longer existed, Hospitality could no longer pay the judgment, thus satisfying the third factor. *Id*. It determined that the fourth factor was satisfied since Holdings was a going concern and thus could pay the judgment entered in favor of Miller. *Id*. With respect to the fifth factor, the Seventh Circuit ruled that there was a continuity between the operations and workforce of Hospitality and Holdings because "[Holdings] moved into a building prepared for it by Hospitality to the specifications of the Denny's Corporation, hired more than half of the employees previously employed by Hospitality, hired Hospitality's management team, the members of which had been trained by Denny's at Hospitality's expense, and used the same work rules for the employees that Hospitality had used at Sparx. In other words, Holdings carried on the restaurant business at 1827 North Broadway, albeit with a different name and theme." *Id*. Having concluded that all the factors were satisfied, the Seventh Circuit held that Holdings was liable as a successor to Hospitality. *Id*. It held this even though Holdings did not exist at the time of the alleged wrongful conduct. *Id*. Having decided that Holdings was liable as a successor to Hospitality, the Seventh Circuit declined to review whether the District Court was correct when it decided to pierce the corporate veil of Hospitality to reach Properties and Holdings. *Id*. at *5. It further declined to consider whether Properties was also a successor entity of Hospitality. *Id*. at *4.

***EEOC v. Northern Star Hospitality,* 2015 U.S. Dist. LEXIS 74875 (W.D. Wis. June 9, 2015).** In this action brought by the EEOC on behalf of Defendant's employee, Dion Miller, the jury found that North Broadway Holdings, Inc. had violated Miller's rights under Title VII of the Civil Rights Act of 1964, and awarded damages. The EEOC then moved to compel North Broadway to produce all relevant documents, provide complete answers to the EEOC's interrogatories, and to pay reasonable attorney fees. The EEOC also contended that North Broadway failed to comply with the Court's order to file an annual statement of compliance until the EEOC moved for contempt, and had failed to pay judgment and costs to the EEOC and to Miller. *Id*. at *1. The EEOC pointed out that North Broadway did not respond to the EEOC's interrogatory, which sought a list and detailed description of all real or personal property owned by North Broadway in the past four years, including the purchase price, current value, amount of any loan balance against the property and the location of the property. *Id*. at *1-2. Moreover, North Broadway had not produced a list of inventory or copies of its insurance policies. The Court found that North Broadway's failure to turn over that information, coupled with its refusal to cooperate earlier on the alleged ground that all of its documents were in the possession of its tax preparer, appeared to warrant an award of attorneys' fees and costs to the EEOC. *Id*. at *2. The EEOC also sought a writ of continuing garnishment to Peoples State Bank that maintained a checking account for North Broadway. While North Broadway opposed issuance of the writ and asserted a right to be heard before it was issued, the Court remarked that the garnishment proceedings would provide North Broadway an opportunity to be heard after the garnishee North Broadway had filed its answer with the Court and served a copy on the EEOC. *Id*. at *2-3. Thus, the Court granted the EEOC's application for a writ of continuing garnishment, and denied North Broadway's motion for a pre-garnishment hearing. *Id*. at *3. In addition, the Court set a hearing to consider the EEOC's motion for an award of reasonable expenses, including attorneys' fees, for North Broadway's failure to comply promptly with the EEOC's motion to compel responses to post-judgment discovery from North Broadway, and any objections the EEOC or North Broadway had to the garnishment.

***EEOC v. Northern Star Hospitality,* Case No. 12-CV-214 (W.D. Wis. July 28, 2015).** The EEOC brought suit claiming that Defendant fired an employee in retaliation for complaining about a racist posting in his workplace in violation of Title VII of the Civil Rights Act of 1964. A jury rendered a verdict in favor of the EEOC. Defendant failed to pay the judgment, and the EEOC began efforts to collect the amount owed of over $82,000. The EEOC sought information about Defendant's financial status and assets and ultimately obtained a court order that required Defendant to provide the information. Defendant failed to comply as ordered, and the EEOC moved for an order of civil contempt. The Court held Defendant in contempt and imposed a fine of $1,000 for every day until Defendant complied with the Court's order by providing complete information to the EEOC. *Id*. at 2. The Court also ordered Defendant and its counsel to pay the EEOC's attorneys' fees for bringing the contempt motion.

***EEOC v. Northern Star Hospitality,* 2015 U.S. Dist. LEXIS 112896 (W.D. Wis. Aug. 26, 2015).** The EEOC brought an action alleging that Defendants discriminated against a former employee on the basis of his race. Previously, the EEOC sought for an order of civil contempt, contending that Defendant had failed to provide discovery in compliance with the Court's order, which was vacated on August 7, 2015. *Id.* at *1. Subsequently, another hearing was held on the EEOC's motion to compel and the Court's order of civil contempt. Defendants argued that they had complied with the Court's order to provide the information sought by the EEOC in its attempt to collect the judgment entered against Defendants. The amount of judgment entered was $64,795.50 and was affirmed on appeal. The Court found that Defendants failed to submit the necessary financial information on the basis that the information was in the hands of their tax preparers, without even making any apparent attempt to obtain copies of the information from the tax preparers. *Id.* at *2. In addition, the Court determined that they had changed bank accounts after the Court granted Plaintiff's motion to garnish Peoples State Bank, where Defendant's had an account. Furthermore, Defendants were asked for a detailed description about real or personal property they owned in the preceding four years whose value exceeded $500, together with the loan balance against the property, if any, and the location, including the county, and if the property was transferred, the name, address and telephone number of the person or entity; however, Defendants failed to comply with this request. *Id.* Thus, the Court directed the EEOC's counsel to confer with Defendants' counsel and develop an agreed upon resolution of Defendants' obligation. Accordingly, the Court ordered both parties to submit written statements to the Court on the status of their commitments.

***EEOC v. Northern Star Hospitality,* 2015 U.S. Dist. LEXIS 153655 (W.D. Wis. Nov. 13, 2015).** The EEOC brought suit claiming that Defendants fired an employee, Dion Miller, in retaliation for complaining about a racist posting in his workplace in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *1. The jury awarded Miller almost $65,000 in damages, which the Seventh Circuit affirmed. *Id*. at *3-4. Defendants failed to pay the judgment. *Id*. at *5. The EEOC filed a motion to garnish a bank account at Peoples State Bank, which had a balance of $3,431.72. *Id*. The EEOC then filed a second writ of garnishment, directed this time to Central Bank, and after receiving the writ, Central Bank indicated that Defendants' account had a balance of $26.03. *Id*. at *6. The EEOC next sought a writ of garnishment for a third bank, Dairy State Bank, reportedly having a balance of $14,908.18. *Id*. Defendants, however, filed an affidavit stating that the account represented funds belonging to Rice Lake Harley-Davidson, Inc., a corporation owned by Christopher Brekken, the sole shareholder of each of Defendant's corporations. *Id*. at *7. Defendants maintained that the account was beyond the EEOC's reach because the bank had entered into an agreement with Rice Lank under Wisconsin law. *Id*. Finding this argument unpersuasive, the Court granted the writ of garnishment directed at Dairy State Bank. *Id*. At the same time, the Court granted Defendants' request to respond to the EEOC's allegations, and to present evidence of their inability to pay the judgment in full and show that they never had the cash or assets from which they could have satisfied the judgment. *Id*. After hearing the parties, the Court granted the EEOC's motion for entry of an order granting final disposition of writs of garnishment directed at Central Bank and Dairy State Bank. The Court remarked that under the Federal Priority Statute 31 U.S.C. § 3713(a)(i), the EEOC, being an agency of the United States, stood first in line for the money in the Dairy State Bank account. *Id.* at *9. The Court explained that under this statute, the federal government is to be paid first when a person indebted to the government is insolvent, and without enough property to pay all debts makes a voluntary assignment of property. *Id*. Defendants consistently maintained that they were without property to satisfy

the judgment, despite making repeated voluntary assignments of property in violation of the statute. *Id*. Defendants advised the EEOC on September 23, 2015, under oath, that they had no bank accounts of any kind, yet on October 14, 2015, their account showed a balance of $14,908.18. *Id*. at *9-10. The Court found that even if it was not clear whether the source of the funds in the Dairy State Bank was an infusion of cash deposited by Rice Lake Harley-Davidson for Defendants' use, the EEOC was entitled to the funds because they were deposited in a bank account in Defendants' name at a time when Defendants were insolvent and owed money to EEOC. *Id.* at *10-11. Accordingly, the Court granted EEOC's motion for final disposition of writs of garnishment directed to garnishee Defendants' account at Central Bank and Dairy State Bank.

***EEOC v. Northern Star Hospitality,* 2015 U.S. Dist. LEXIS 169261 (W.D. Wis. Dec. 17, 2015).** In this action filed by the EEOC alleging discrimination and retaliation claims, the EEOC moved to hold Christopher Brekken, the sole stockholder of all of Defendant's corporations, liable for the unpaid portion of the judgment entered in the EEOC's favor. The Court granted the motion. The EEOC contended that although Brekken was not a named Defendant, he could be held responsible under the Federal Priority Statute for satisfying the judgment, if he paid part of the corporations' debts before paying the government's claim. *Id.* at *1-2. Brekken argued that he moved funds to various accounts rather than paying the judgment because he believed that it was reasonable for Defendants to devote their income and assets to keeping the business afloat financially and thus maximize the amount of money that would be available to pay the judgment. *Id.* at *3. The Court, however, found that he never explained this to the EEOC nor obtained its permission to delay the payments, nor took steps to work out a payment schedule. *Id.* Brekken argued that he did not violate the Federal Priority Statute when he paid off AnchorBank, the mortgagee of Defendant Northern Star Properties, because that mortgage had been perfected before the EEOC filed its abstract of judgment and thus the payments were not a voluntary assignment of property. *Id.* at *4. The Court found that this was an improper transfer because North Broadway Holdings – and not Northern Star Properties – was not the owner of the personal property of the business. Therefore, the Court found that because AnchorBank's mortgage did not extend to Holdings, the bank had no claim under that mortgage to property belonging to Holdings. *Id.* at *5. The Court ruled that even if Properties had been the mortgagor of the personal property, it could not have turned the sale proceeds from the sale of the personal property over to AnchorBank without violating the EEOC's prior right to the funds. *Id.* The Court noted that the Federal Priority Statute recognized the priority of obligations that were based on a choate lien. Further, liens on personal property are not choate liens, because the loan agreement does not refer specifically to the items of personal property that are covered by the loan. *Id.* Here, Defendants had not shown that AnchorBank's lien was one in which the identity of the personal property subject to the lien had been established. *Id.* at *6. Further, the Court found that under § 3713(b), the representative of a person or an estate paying any part of a debt of the person or the estate before paying a claim of the government is liable to the extent of the payment for unpaid claims of the government. *Id.* Brekken had made no showing that he did not know that Defendants owed a debt to the EEOC or that Defendants were insolvent when they paid other debts ahead of the debt to the EEOC, and therefore the Court found that he was in violation of § 3713. *Id.* at *7. The EEOC also contended that Brekken and Defendants should be held liable for the amount of the EEOC's judgment because they were in contempt of the Court. The Court found that Defendants evaded the Court's orders and the EEOC's efforts to collect on its judgment. Further, Defendants failed to send to the EEOC the annual statement of compliance until the EEOC obtained an order of contempt, and they eluded the EEOC's discovery requests and failed to answer interrogatories in a timely manner. *Id.* at *8-9. Additionally, the Court held that Defendants resisted a writ of garnishment directed to two banks by maintaining insufficient balances. *Id.* at *9. Thus, the Court concluded that these acts demonstrated contempt, and it awarded the EEOC the amount remaining uncollected on the judgment, along with the interest, costs, and penalties. *Id.* at *10. Accordingly, the Court granted the EEOC's motion to hold Brekken liable for the unpaid portion of the judgment entered against Defendants.

***EEOC v. Office Concepts, Inc.,* 2015 U.S. Dist. LEXIS 170587 (N.D. Ind. Dec. 22, 2015).** The EEOC brought a charge on behalf of Lynsey Burd alleging that Defendant discriminated against and wrongfully terminated Burd due to her gender and pregnancy. The EEOC's notice of the charge included instructions

to Defendant to preserve payroll and personnel records related to the charge. *Id.* at *5. Defendant deleted Burd's computer profile and e-mail weeks later, and eventually replaced all of the computers in her immediate area. *Id.* at *5-7. The EEOC moved the Court to sanction Defendant for spoliation of evidence, while Defendant filed a motion to strike attorney-client privileged documents and communications referenced by the EEOC in its motion for sanctions. *Id.* at *1. The Court denied the motion to strike and denied the motion for sanctions. *Id.* at *27. First, in addressing the motion to strike, the Court noted that it initially would determine whether it may consider the evidence Defendant sought to strike when ruling on the motion for sanctions. *Id.* at *7. After Burd's co-worker discovered inappropriate e-mails on her computer while Burd was on leave due to a pregnancy-related illness, Defendant's counsel sent Defendant's president an e-mail that contained a draft separation agreement. Defendant argued that this e-mail, in addition to any and all communications with counsel that were produced, were attorney-client privileged. *Id.* at *12. The Court rejected this argument, noting that Defendant could not assert privilege over any and all communications between Defendant and its counsel, but rather had to produce a privilege log identifying which of its documents were privileged. *Id.* The Court further held that the seven-week delay in issuing the privilege log (after having been informed by the EEOC that potentially privileged documents had been produced) was unreasonable. *Id.* at *17-18. Accordingly, the Court denied Defendant's motion to strike. *Id.* at *18-19. The Court then used a two-part inquiry to analyze the EEOC's motion for sanctions regarding spoliation, including: (i) whether Defendant had a duty to preserve the evidence; and (ii) whether the evidence was destroyed in bad faith. *Id.* at *20. Regarding the first prong, the Court found that Defendant was on notice of Burd's claim and therefore had a duty to preserve the evidence on the computer. *Id.* at *23. Noting that Defendant deleted Burd's account as part of standard procedure following her termination, and further replaced all of the computers in the area due to them being outdated, the Court held that Defendant's conduct did not rise to the level of bad faith. *Id.* at *25-26. Therefore, since the second prong regarding bad faith was not met, the Court denied the EEOC's motion for sanctions due to spoliation. *Id.* at *27. Accordingly, the Court denied Defendant's motion to strike and denied the EEOC's motion for sanctions. *Id.*

***EEOC v. Office Concepts, Inc.,* 2015 U.S. Dist. LEXIS 53174 (N.D. Ind. April 23, 2015).** The EEOC brought an action under the Title VII of the Civil Rights Act of 1964 alleging that Defendant discriminated against Lynsey Burd, its employee, by terminating her due to her pregnancy. The parties moved for approval of two different proposed Stipulated Protective Orders ("SPO"), which the Court denied without prejudice. *Id.* at *1. The first proposed SPO stemmed from the parties' dispute concerning the confidentiality provision of a settlement agreement between Defendant and Terry Forsyth, a non-party former employee of Defendant who was identified in both parties' initial disclosures as a person likely to had discoverable information about the claims and defenses in the action. *Id*. The parties stated that Forsyth believed the settlement agreement prohibited her from discussing certain information with the EEOC and could subject her to economic and non-economic penalties for violating the agreement. *Id*. at *1-2. Therefore, the parties submitted a proposed SPO stating that Defendant agreed that it would not exercise its rights under the settlement agreement because of Forsyth's communication with the EEOC, and that violation of the order could be remedied by the Court's contempt authority. *Id.* at *2. The Court, however, found that the entry of a SPO between the parties, which actually pertained to a non-party, was not justified at that stage. *Id.* Moreover, the Court found that Defendant could instead provide Forsyth with a limited waiver of the confidentiality provision without need for the Court's involvement. *Id*. The second proposed SPO sought to protect Defendant's trade secrets and corporate financial information. *Id.* at *3. The Court, however, was reluctant to approve the proposed order as it contained a provision that the order "shall continue to be binding for a period of 20 years after the conclusion of this proceeding". *Id*. The Court thus declined to enter a protective order that expressly suggested that the Court would retain jurisdiction of any kind after the resolution of the case. *Id*. Accordingly, the Court denied without prejudice the two motions for entry of a proposed SPO. *Id.* at *4.

***EEOC v. Orion Energy Systems, Inc.,* 2015 U.S. Dist. LEXIS 86428 (E.D. Wis. July 2, 2015).** The EEOC brought an action alleging that Defendant discriminated against its employee, Scott Conant, on the basis of a disability, retaliated against him, and terminated him for requesting an accommodation in violation of the Americans With Disabilities Act ("ADA"). *Id.* at *1. Conant had severe mobility issues after

he suffered an injury while exercising in the company's fitness room, and was informed by his doctor that he had a lesion in the spinal cord, and that the lesions causing the partial paralysis would remain and Conant should not expect any major improvement of mobility. *Id*. at *3. Shortly thereafter, Conant began using the wheelchair at work, and his manager relocated his work space from the IT bullpen where workers had to walk up the stairs to the Tech Center, which had two elevators. *Id*. at *3-4. Subsequently, Conant requested additional accommodations, including: (i) that he work part-time from home; and (ii) power assisted doors to be installed in the building and bathroom. *Id*. at *4. Conant provided no specific medical diagnosis or prognosis because he had not yet been given any himself. *Id.* Defendant offered Conant work from home and flexible working hours to enable him to attend to his doctor's appointments, but denied his request to install power assisted doors in the building. *Id*. at *4-5. The EEOC contended that Defendant later asked him to attend to his team meetings in the IT bullpen, to which Conant agreed provided the accessibility issues were resolved. *Id*. at *7. The EEOC asserted that Conant was fired the next day and was informed that his position was being outsourced. *Id*. Defendant filed a partial motion for summary judgment on the failure-to-accommodate claims, which the Court denied. *Id.* at *11. At the outset, the Court noted that a failure-to-accommodate claim under the ADA requires a *prima facie* showing that: (i) the individual is qualified and has a disability; (ii) the employer was aware of the disability; and (iii) the employer failed to reasonably accommodate the disability. *Id*. at *8. Defendant conceded that Conant was qualified and that he was in a wheelchair, but argued that it did not know whether his condition was permanent or only temporary due an injury he suffered while exercising. *Id.* The Court reasoned that under the 2008 ADA Amendments Act, a person with an impairment that substantially limits a major life activity, or a record of one, is disabled, even if the impairment is transitory and minor. *Id*. Therefore, the Court concluded that it was immaterial if Defendant did not know that Conant's limitation was permanent, or that it was unaware of the precise nature of his disability. *Id*. at *9. Accordingly, the Court held that the second element was satisfied. *Id.* at *9-10. As to the third element, Defendant argued that at the time it fired Conant, it was still not clear whether his condition was permanent, and that it was waiting for a definitive diagnosis so as to determine if it was economically reasonable to incur the expense of installing door assists to help Conant. *Id*. at *10. The Court remarked that because permanent impairment was not a criterion for providing a reasonable accommodation, it would leave the issue to be determined by the jury regarding Defendant's delay in accommodating Conant. *Id*. at *10-11. Accordingly, the Court denied Defendant's motion for partial summary judgment. *Id.* at *11.

***EEOC v. Orion Energy Systems, Inc.,* 2015 U.S. Dist. LEXIS 153216 (E.D. Wis. Nov. 12, 2015).** The EEOC brought an action alleging that Defendant administered involuntary medical examinations and disability-related inquiries as part of its wellness program in violation of the Americans With Disabilities Act. The EEOC instituted this action after Defendant's former employee, Wendy Schobert, filed a charge alleging that Defendant terminated her employment because she refused to participate in a wellness program. *Id*. at *2. Defendant asserted numerous affirmative defenses, but failed to assert a statute of limitations defense based on the fact that Schobert did not file her administrative complaint within 300 days from her termination date. Defendant moved to amend its answer and affirmative defenses to add a statute of limitations defense, which the Court denied. *Id.* at *2. At the outset, the Court noted that a party seeking to amend the pleadings after the deadline has passed must show good cause as required under Rule 16(b)(4). *Id*. at *3. Here, Defendant argued that it exercised diligence in seeking this amendment because it only learned the basis for its statute of limitations defense after Schobert's recent deposition. In response, the EEOC argued that Defendant had notice of this issue as early as February 2011, when the EEOC began investigating Schobert's initial complaint. *Id*. at *3. The Court observed that pursuant to 42 U.S.C. § 12117(a), the statute of limitations ends 300 days after the alleged unlawful employment practice. *Id*. at *5. The Court also noted that there was a two prong test to fix a date of termination: (i) the ultimate decision to terminate the employee; and (ii) the employer's notice of its final termination decision. *Id.* at *6. The Court reasoned that Defendant's decision to terminate Schobert had become final by the time she overheard a conversation about her termination. *Id*. at *7. The Court remarked that an employer must give the employee unequivocal notice of its final decision; therefore, in this case, where the facts showed that Schobert simply overheard a conversation that an unnamed employee would be fired, Defendant had not meet that standard. *Id*. at *8. Accordingly, the Court denied the motion to amend on the basis that Defendant did not diligently pursue its statute of limitations defense.

***EEOC v. Rosebud Restaurants, Inc.*, 85 F. Supp. 3d 1002 (N.D. Ill. 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 ("Title VII") action alleging that Defendants had a practice of refusing to hire African-Americans on the basis of their race. *Id.* at 1004. The EEOC alleged that the individual who owned or controlled Defendants' restaurant had expressed a preference not to hire black applicants, and as a result, few African-Americans were employed at Defendants' restaurants. *Id.* Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim, which the Court denied. *Id.* at 1006. Specifically, Defendants contended that EEOC's complaint failed to identify a specific individual aggrieved by the alleged discrimination as required under § 706 of the Title VII. *Id.* at 1004. Defendants argued that in contrast to § 707 of Title VII, which allows for the filing of a civil action against an employer engaged in a "pattern or practice of resistance," § 706 does not contain the "pattern or practice" phrase. *Id.* at 1005. Thus, Defendants argued that § 706 only authorized the EEOC to bring actions to assert the rights of aggrieved individuals and at least one injured individual must be named in the complaint. *Id.* The Court found that the language of Title VII did not support that argument because § 706's authorization of EEOC actions contained no provision limiting such actions to matters brought on behalf of individuals; instead, § 706 authorizes the EEOC to prevent any person from engaging in any unlawful employment practice prohibited by Title VII. *Id.* The Court noted that the failure to hire an individual because of his race was a practice made unlawful by § 703(a)(1), and when performed on a regular, purposeful, and widespread basis, remained a sub-set of the types of discrimination prohibited by Title VII. *Id.* Thus, the Court concluded that because widespread discriminatory actions were within the category of discrimination prohibited by Title VII, they were also within the authority granted to the EEOC by § 706. *Id.* The Court reiterated the Supreme Court as well as the Seventh Circuit precedents that the EEOC may bring an action under § 706 in its own name to vindicate the public interest in preventing employment discrimination. *Id.* Defendants relied on *EEOC v. Bass Pro Outdoor World, Inc.*, 884 F. Supp. 2d 499 (S.D. Tex. 2012), to contend that the EEOC must name an aggrieved individual to pursue a § 706 action. *Id.* The Court pointed out, however, that Bass Pro did not find the EEOC's complaint insufficient solely based on failure to name aggrieved individuals; instead, it found the small number of racial incidents alleged to be too few and too isolated to raise a plausible inference of a nationwide pattern or practice under § 707. *Id.* at 1005-06. Here, the Court found the allegations of the complaint readily distinguishable because, while the EEOC alleged that a single person who either owned or controlled each of the Defendants possessed the intent to discriminate and made that intention known, the holding in *Bass Pro* construed the EEOC's § 706 claims as retaliation claims and it was in that context that the Court faulted the EEOC for failure to name any aggrieved individual. *Id.* at 1006. Accordingly, the Court concluded that, because *Bass Pro* assessed retaliation claims, which triggered different pleading standards than those raised by the discrimination complaint in this action, its ruling offered no basis for a similar disposition of the EEOC's claims in this case. *Id.* On this basis, the Court denied Defendants' motion to dismiss. *Id.*

***EEOC v. Rosebud Restaurants, Inc.,* 2015 U.S. Dist. LEXIS 138342 (N.D. Ill. Oct. 7, 2015).** The EEOC brought an action alleging that Defendants refused to hire African-American applicants in violation of Title VII of the Civil Rights Act of 1964. The EEOC moved to strike Defendants' first affirmative defense that the EEOC failed to comply with its administrative obligation to engage in good faith efforts to conciliate before filing suit. *Id.* at *2. The EEOC contended that it attempted to eliminate the alleged unlawful employment practices through conciliation before the filling the lawsuit. In their answer, Defendants argued that the EEOC unilaterally determined that conciliation had failed without responding to Defendants' settlement overtures, and the EEOC had a duty to conciliate as a condition precedent to filing suit and that the duty had not been satisfied. *Id.* at *2-3. The EEOC asserted that those denials must be stricken because they did not comply with Rule 9(c). The Court, however, found that Defendants' denials were pled in compliance with Rule 9(c) and therefore denied the EEOC's motion to strike Paragraphs 21 and 22 of the answer. *Id.* at *3-4. Regarding the EEOC's motion to strike Defendants' first affirmative defense, the Court found that Defendants failed to show that the EEOC lacked good faith in its conciliation efforts and that they merely denied the complaint's allegations that all conditions precedent to the filing of this action had been fulfilled. *Id.* at *4. Thus, the Court granted the EEOC's motion to strike Defendants' first affirmative defense. Accordingly, the Court granted the EEOC'S motions in part and denied in part.

***EEOC v. Source One Staffing, Inc.*, 2015 U.S. Dist. LEXIS 152853 (N.D. Ill. Nov. 9, 2015).** The EEOC brought an action alleging that Defendant subjected employees to discrimination on the basis of their gender. The parties eventually settled, and the Court entered a consent decree resolving the Parties' dispute and memorializing the terms of the settlement. *Id*. at *1. Defendant moved to clarify the consent decree, and the EEOC filed a motion to show cause why Defendant should not be held in contempt for violating the terms of the consent decree. The Court granted Defendant's motion, and denied the EEOC's motion to show cause. The EEOC interpreted the consent decree to require Defendant to collect, maintain, and make available to the EEOC a list of its employees with information about their gender identification. Defendant interpreted the consent decree to require day and temporary labor service agencies, like Defendant, to track only gender-related data that employees volunteered to their employees. *Id*. at *3. Since the inception of the consent decree, Defendant's employees had not self-reported information about their gender and Defendant had not asked them for that information. Accordingly, Defendant did not maintain such data and it had not given the EEOC any data on the gender of its employees pursuant to the consent decree. *Id*. The Court remarked that the consent decree was the product of careful negotiation, and the purpose of the consent decree was to ensure that Defendant did not use gender as a basis for assigning its employees work. *Id*. at *6. The EEOC negotiated for the appointment of a monitor for mechanisms to ensure that the monitor could determine whether Defendant was in compliance with the consent decree. The Court observed that the consent decree required Defendant to maintain and provide the EEOC a list of its employees with gender identification information. *Id*. at *7. The Court reasoned that the consent decree did not give Defendant the option of obtaining or maintaining that information, it simply said that the Defendant should collect and maintain data of temporary laborers who self-identified their gender. *Id*. at *8. The Court remarked that this did not necessitate initiating contempt proceedings against Defendant, particularly when the consent decree provided for dispute resolution if the parties failed to comply with the decree. *Id*.

***EEOC v. Trinity Health Corp.*, 2015 U.S. Dist. LEXIS 60994 (N.D. Ind. May 11, 2015).** Pursuant to a charge filed by Simore Hasan alleging that Defendant, a non-profit Catholic healthcare system, violated the Americans With Disabilities Act ("ADA") by suspending and later terminating her based on a disability-related absence, the EEOC issued an administrative subpoena to Defendant demanding information about all its employees who had been adversely affected by its no-fault attendance policy. *Id.* at *1-2. Defendant objected, arguing that the information sought was irrelevant to Hasan's claims and that production would be unduly burdensome. *Id.* at *3. The EEOC subsequently brought an administrative enforcement action relative to its subpoena. The Magistrate Judge ordered Defendant to comply with the subpoena. *Id.* at *3-4. Defendant thereafter filed Rule 72 objections to that ruling. The Court adopted the Magistrate Judge's order enforcing the EEOC's administrative subpoena. *Id.* at *13. The Court agreed with the EEOC's assertion that Defendant's own assessment of the facts relating to Hasan's claim should not be considered in determining what was relevant to the EEOC's investigation. *Id.* at *8-9. Defendant argued that, because the information sought included the identity of the individuals who were not similarly-situated, the information was not relevant to Hasan's claims. While Defendant did not discharge Hasan, who was eligible for and had not exhausted her Family and Medical Leave Act ("FMLA") leave, for violating the attendance policy, it terminated other individuals, who were not eligible for FMLA leave or had exhausted their FMLA entitlement under its no-fault attendance policy. *Id.* at *5-6. Defendant thus argued that it should not be required to help the EEOC identify other employees who might have other claims against Defendant. *Id.* at *6. The Court, however, disagreed. The Court explained that because Hasan had alleged that Defendant subjected her to discrimination when it suspended her and then terminated her based on disability, the EEOC had the authority to investigate her charge of disability bias with access to "virtually any material that might cast light on the allegations against the employer." *Id.* Early in its investigation of Hasan's claim, the EEOC had obtained information from Defendant about its no-fault attendance policy. Believing that there was evidence that the policy might have adversely impacted her, the EEOC investigator determined that additional information about the policy was necessary and relevant to the investigation. *Id.* at *7-8. To that end, the Court found that Defendant's disagreement with the EEOC's evaluation of what evidence was necessary to its investigation did not demonstrate that the EEOC's determination of what was relevant was "obviously wrong." *Id.* at *8-9. While Defendant might ultimately have the opportunity to argue the merits of Hasan's allegations, the Court agreed with the EEOC

that a subpoena enforcement proceeding was not the proper forum for that determination, as the EEOC was tasked with the responsibility of assessing relevance. *Id.* at *8. The Court also found that Defendant's assertion that the sole purpose of the subpoena was to identify other employees who might have claims was insufficient to establish that the information being sought was intended for an illegitimate purpose. *Id.* at *10-11. Because Defendant was sufficiently equipped to absorb the costs of production based on its own estimate, and because the relevance of the requested information to the question of whether it discriminated against Hasan in violation of the ADA outweighed the identified costs, the Court rejected Defendant's contention that complying with the subpoena would pose an undue burden. *Id.* at *12-13. Accordingly, the Court overruled Defendant's objection to the Magistrate Judge's findings and ordered it to comply with the EEOC's subpoena. *Id.* at *13.

***EEOC v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2015 U.S. Dist. LEXIS 148486 (N.D. Ill. Oct. 29, 2015).** The EEOC investigated a charge filed by an employee alleging that Defendant denied her a reasonable accommodation for her disability and discharged her during her medical leave of absence. During its investigation, the EEOC learned that Defendant did not allow employees to extend leave taken under the Family and Medical Leave Act ("FMLA") under any circumstances and did not allow the employees to return from medical leave with medical restrictions. *Id*. at *2. The EEOC subsequently issued a subpoena seeking an electronic database of information about employees who sought reasonable accommodations, and regarding Defendant's Illinois-based employees who requested medical leaves. *Id*. The EEOC brought a subpoena enforcement action when Defendant objected to the EEOC's subpoena. Defendant contended that the EEOC's demand for its employees' personal information was overly broad and unreasonable. Defendant also argued that the EEOC's request had no relevance to the investigation of a solitary charge of disability discrimination. *Id*. at *4. The Court disagreed, and found that the EEOC was free to pursue any of Defendant's policies that were linked to the charge in its investigation. During the EEOC's investigation, Defendant's management reported that Defendant had a common policy that precluded employees from extending leave taken under the FMLA under any circumstances and did not allow employees to return employees with medical restrictions. *Id*. at *5. The Court remarked that, if true, these practices likely violated the Americans With Disabilities Act. The Court concluded that investigating whether Defendant had a procedure or practice that failed to reasonably accommodate employees who have taken a medical leave of absence was related to the EEOC's investigations into the charge. *Id*. at *5. Accordingly, the Court granted the EEOC's application to enforce its subpoena.

***EEOC v. Union Pacific Railroad Co.,* 2015 U.S. Dist. LEXIS 57305 (E.D. Wis. May 1, 2015).** Defendant's former employees, Frank Burks and Cornelius Jones, filed charges of race discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging that Defendant denied them the opportunity to take a test for an "assistant signal person" position. *Id.* at *1. The EEOC requested information about Defendant's data and software systems that stored personnel information, as well as information about Defendant's assessment program for assistant signal person applicants in 2011. *Id.* at *1-2. When Defendant refused, the EEOC brought a subpoena enforcement action. During the investigation, the EEOC issued right-to-sue notices to the charging parties, who sued Defendant in the U.S. District Court for the Northern District of Illinois for Title VII violations. *Id.* at *2. The Court in that case granted Defendant's motion for summary judgment and dismissed the case. As a result, Defendant filed a motion to dismiss the subpoena enforcement action, arguing that the EEOC no longer had authority to investigate the charges because it had issued right-to-sue notices and Burks and Jones had lost their civil suit based on the same charges; Defendant alternatively argued that the subpoena sought information not relevant to the charges. *Id*. at *2-3. The Court denied Defendant's motion to dismiss. *Id.* at *12. At the outset, the Court noted that the Fifth and Ninth Circuits had addressed a similar issue previously. The Fifth Circuit in *EEOC v. Hearst Corporation*, 103 F.3d 462, 469-71 (5th Cir. 1997), held that in a case where the charging party received a right-to-sue notice and was engaged in a civil action that was based upon the conduct alleged in the charge filed with the EEOC, that charge would no longer provide a basis for the EEOC investigation. *Id.* at *3-4. The Ninth Circuit, however, came to the opposite conclusion in *EEOC v. Federal Express Corporation*, 558 F.3d 842, 854 (9th Cir. 2009), holding that the EEOC retains the authority to issue an administrative subpoena against an employer even after the charging party received a right-to-sue letter and instituted a private action based upon that charge. *Id*. at *4. The Court found the

reasoning of the Ninth Circuit more persuasive and concluded that the issuance of right-to-sue notices, the charging parties' civil suit, and the judgment in favor of Defendant did not divest the EEOC of authority to continue its investigation. *Id*. at *5. First, the Court noted that no federal statute or regulation would support Defendant's argument that the EEOC's authority to investigate a charge ends at a certain point. Second, the Court opined that the EEOC does not simply represent the interests of private parties; it also represents the public interest independent of the charging parties' interests. *Id*. at *6. Third, the Court reasoned that it was irrelevant that the charges in this case alleged only individual discrimination rather than a pattern or practice of discrimination. *Id.* at *6-7. Because the EEOC's investigation could encompass more than the charging parties' individual claims, the summary judgment decision in favor of Defendant did not deprive the EEOC of continuing authority to investigate the charges. *Id*. at *8. As the EEOC received two separate discrimination charges, and during the course of investigation, it learned about Defendant's alleged discriminatory promotion practices, the Court concluded that the EEOC was justified in seeking evidence related to an alleged pattern or practice of discrimination despite the fact that the charges did not specifically allege a pattern or practice. *Id*. at *10. Finally, although Defendant argued that unreasonable delay in the investigation prejudiced it because it had to comply with the EEOC's subpoena when it had already litigated the underlying discrimination charges, the Court found that Defendant was responsible for some of the delay because it refused to cooperate with the EEOC's subpoenas, which required the EEOC to petition the Court to enforce them. *Id*. at *11. Accordingly, the Court denied Defendant's motion to dismiss. *Id.* at *12.

***EEOC v. United Airlines, Inc.*, 2015 U.S. Dist. LEXIS 79312 (N.D. Ill. June 8, 2015).** The EEOC brought an action alleging that Defendant unlawfully denied the charging parties and similarly-situated disabled employees the reasonable accommodation of reassignment to a vacant position for which they were qualified, and which they needed to accommodate their respective disabilities. *Id*. at *1-2. The parties subsequently entered into a consent decree, which the Court approved. *Id.* at *2. Although the consent decree comprised the full and final resolution of all claims arising out of the charges filed by the charging parties and all Americans With Disabilities Act ("ADA") claims pled by the EEOC, it did not resolve any future charges or charges that may be pending with the EEOC. *Id.* at *2-3. Pursuant to the consent decree, the Court enjoined Defendant from unlawfully failing to provide reasonable accommodation to a qualified individual with a disability; or retaliating against any person because he or she: (i) made a request for a reasonable accommodation; (ii) opposed discriminatory practices made unlawful by the ADA; or (iii) filed a charge of discrimination or assisted and participated in the filing of a charge of discrimination or in an investigation or proceeding brought under laws prohibiting discrimination or retaliation. *Id.* at *3-4. The Court directed Defendant to revise its policies or adopt new policies with regard to reassignment as a reasonable accommodation for disabled employees, and provide a non-competitive procedure by which disabled employees who were unable to work in their current position due to a disability were considered for reassignment to a vacant position as a reasonable accommodation if feasible. *Id.* at *4-5. Further, the Court directed Defendant to provide timely written notice to any applicable employee regarding the availability of reassignment as a possible reasonable accommodation, when such employee was unable to continuing working in his/her current position due to a medical condition and/or was placed on extended illness status. *Id.* at *5. The Court instructed noted that reassignment candidates whom Defendant deemed minimally qualified for an available lateral or lower level vacant position, for which they applied, would be reassigned to the position, and directed Defendant to provide the individual with an explanation of the reason for the non-placement into the position and inform the individual that they should continue to utilize Defendant's on-line job posting/application. *Id.* at *6. Additionally, the Court required Defendant to provide training regarding reassignment as a reasonable accommodation to all human resources employees with reasonable accommodation responsibilities. *Id.* at *6-7. The Court also agreed that Defendant should pay relief to claimants in the amount of $1,040,000, and that the EEOC should solely determine the identity of the claimants. *Id.* at *9-10. *Id.* at *9-10. Accordingly, the Court approved the consent decree. *Id. at *2.*

***EEOC v. V&J Foods, Inc.*, 2015 U.S. Dist. LEXIS 88620 (E.D. Wis. July 7, 2015).** While investigating a disability discrimination charge filed by Defendant's employee, Glen Shaw, the EEOC served a subpoena seeking that Defendant produce all communications of any kind; telephone records, personnel records,

performance reviews, leave records, attendance records, return to work records, work assignment records, calendars or schedules; including any of such records kept by Shaw's supervisor, Todd Wittenberg, Defendant's Human Resources Department, or any other managers. *Id.* at *1-2. The subpoena also sought a variety of files, including Shaw's personnel file. *Id.* at *1. The EEOC subsequently brought a subpoena enforcement action, claiming that Defendant did not comply completely, with its request. The Court granted the EEOC's application to enforce the subpoena. *Id.* at *3. Defendant argued that the EEOC did not make a reasonable attempt to explain its theory of liability. The Court, however, found this argument to be tangential to the relevance requirement, which was easily satisfied. *Id.* The Court remarked that the EEOC's request to produce documents relating to Shaw could "cast light" on his allegations of disability discrimination. *Id*. at *2. Moreover, the subpoena was within the EEOC's authority and not indefinite. Therefore, the Court held that it must be enforced. *Id.* Because Defendant played coy as to whether it had more responsive documents, the Court directed it to certify under penalty of perjury that it had produced all responsive documents. *Id.* Accordingly, the Court granted the EEOC's application and ordered Defendant to produce all the relevant documents and a declaration of compliance, and further ordered that the EEOC is entitled to costs. *Id.* at *3-4.

(viii) Eighth Circuit

***EEOC v. Audrain Health Care, Inc.,* 2015 U.S. Dist. LEXIS 71582 (E.D. Mo. June 3, 2015).** The EEOC brought an American With Disabilities Act action on behalf of Cynthia Hodges, a former nurse, alleging that Defendant discriminated against her by terminating her on the basis of her disability. While the EEOC contended that Hodges was able to perform the essential functions of her job with a reasonable accommodation, Defendant argued that there were no reasonable accommodations that could be made that would allow Hodges to perform the essential functions of her job. *Id*. at *1-2. Both parties cross-moved for summary judgment. The Court denied both motions. *Id.* at *1. The parties did not dispute that Hodges possessed the requisite skills, education, certification, or experience necessary for the job as a nurse. The parties, however, disputed whether Hodges could, despite her impairments, perform the essential functions of the job either with or without reasonable accommodation. *Id*. at *3. The Court found that the record established that issues of fact remained as to whether Hodges requested reasonable accommodations, whether the proposed accommodations were reasonable, and whether Defendant participated in an interactive process to determine possible accommodations that could be made. *Id*. at *6. The Court thus concluded that summary judgment was not appropriate for either party, and denied the cross motions for summary judgment. *Id.* at *7.

***EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).** On September 27, 2007, the EEOC filed a lawsuit on behalf of Monika Starke and a class of similarly-situated female employees of Defendant pursuant to § 706 of Title VII. *Id.* at *2. On August 13, 2009, the Court found that EEOC was barred from seeking relief on behalf of 67 individuals because the EEOC "wholly abandoned its statutory duties" by: (i) failing to investigate those individuals' claims until after the EEOC filed the complaint; (ii) not including the 67 individuals as members in the EEOC's letter of determination until after the EEOC filed the complaint; (iii) failing to make a reasonable cause determination as to the specific allegations of any of the 67 individuals; and (iv) not attempting to conciliate the specific allegations of the 67 individuals prior to filing the complaint. *Id.* at *2-3. On appeal, the Eighth Circuit affirmed, and after remand, the Court entered a fee sanction award against the Commission. While the parties continued to litigate the fee award rendered against the Commission, the EEOC did not seek U.S. Supreme Court review of the Eighth Circuit's decision regarding the order of dismissal based on the EEOC's lack of compliance with the pre-suit requirements. Shortly after the U.S. Supreme Court's ruling in *Mach Mining v. EEOC*, 135 S. Ct. 1645 (2015), the EEOC filed a motion for relief pursuant to Rule 60(b)(6) seeking to vacate the Court's 2009 decision; the EEOC asserted that *Mach Mining* "clarified the EEOC's pre-suit obligations" and that the Court's decision dismissing the 67 allegedly aggrieved individuals was contrary to *Mach Mining*. *Id.* at *4. The Court noted that relief under Rule 60 is "an extraordinary remedy for exceptional circumstances" and that "a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance warranting Rule 60(b) relief from a final judgment." *Id.* at *5. The Court rejected the EEOC's argument that *Mach Mining* "changed the governing law and established the incorrectness of the dismissal of the case." *Id.* at *6. First, the Court

noted that the issue in *Mach Mining* was to what extent a Court may inquire into the EEOC's conciliation process. The so called "class definition" – which was at issue in *EEOC v. CRST* – was not a contested issue in *Mach Mining*. *Id.* at *7. Therefore, the Court held that "*Mach Mining* is inapplicable to the instant action, insofar as it concerns inquiry into the specifics of the EEOC's conciliation process." *Id.* The Court determined that "it is the Court's opinion that *Mach Mining*'s statement that the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance does not necessarily prevent a Court from dismissing a case where no investigation occurs" as "the issue in *Mach Mining* was limited to the sufficiency of the EEOC's conciliation process and the permissible level of judicial inquiry into that process. *Mach Mining* did not address the appropriate remedy when the EEOC fails to engage in any investigation of claims prior to the conciliation process." *Id.* at *7-8. The Court therefore held that " to grant relief in the instant action would open the floodgates for countless other decisions that were issued based on laws that may have changed in the interim. This scenario is the basis for the importance of the finality of judgments and the need for limiting relief under Rule 60(b) to truly extraordinary cases, cases where the denial of relief offends justice." *Id.* at *12.

***EEOC v. Cummins Power Generation, Inc.,* 2015 U.S. Dist. LEXIS 131462 (D. Minn. Sept. 28, 2015).** The EEOC brought an action alleging that Defendant violated the Americans With Disabilities Act ("ADA") and the Genetic Information Non-Discrimination Act ("GINA") by discriminating and retaliating against Grant P. Habighorst, an employee. The EEOC claimed that as part of a fitness-for-duty assessment, Defendant, through its vendor Cigna and Dr. Charles Pearson ("Pearson"), required Habighorst to sign various medical release forms that sought information not related to his work, including Habighorst's family medical history. *Id.* at *4-5. Defendant also informed Habighorst that he had to sign a release before taking the assessments, and when he objected, Defendant terminated him. *Id.* at *5. The EEOC asserted that Defendant made unlawful disability-related inquiries under the ADA, made unlawful requests for genetic information under the GINA, engaged in a retaliatory discharge by terminating Habighorst for his objection, and unlawfully interfered with Habighorst's exercise of his rights under the ADA. *Id.* at *6-7. In its answer, Defendant asserted numerous affirmative defenses, including that the EEOC failed to join indispensable parties, specifically Cigna and Pearson. The EEOC and Habighorst moved for judgment on the pleadings, contending that the joinder of Pearson or Cigna was not necessary because Defendant was liable for the alleged ADA and GINA violations no matter what role Cigna or Pearson played in drafting or sending the allegedly offending forms. *Id.* at *8. The EEOC also contended that the interests of Cigna and Pearson would not be impaired by their absence from this action because Defendant had no claim for contribution or indemnification against them. *Id.* The Court granted the motion for judgment on the pleadings, finding that Defendant's indispensable parties' defense failed as a matter of law. *Id.* at *13. The Court determined that complete relief would be possible amongst the present parties without joining Cigna or Pearson because an employer is not necessarily shielded from liability by the fact that a third-party engaged in the discriminatory practices that formed the basis for the EEOC's lawsuit against the employer. *Id.* at *14. The Court explained that both the ADA and the GINA make it an employer's responsibility to conduct fitness-for-duty exams in a non-discriminatory manner, and Defendant was thus required to ensure that Habighorst's assessment conformed with applicable laws, regardless of third-parties' involvement in the discrimination. *Id.* at *17-18. The ADA has a broad remedial purpose in preventing and remedying discriminatory employment practices, and according to the Court, it would be inconsistent with this purpose if Defendant were allowed to avoid liability by claiming Cigna or Pearson failed to abide by the ADA or the GINA. *Id.* at *18-19. The Court further reasoned that the resolution of this action would not impair on either Cigna's or Pearson's interests, and the fact that Defendant might later seek indemnification or contribution from Cigna or Pearson did not create an interest that made them necessary parties. *Id.* at *22. The Court therefore concluded that Defendant, as the employer, bore the burden of ensuring Habighorst's assessment was conducted in a lawful manner. Accordingly, the Court granted the motion for summary judgment of the EEOC and Habighorst.

***EEOC v. JBS USA,* Case No. 10-CV-318 (D. Neb. Jan. 28, 2015).** The EEOC brought an action alleging that Defendant, a meat packing company, discriminated against a group of Somali Muslim employees by failing to accommodate their requests for prayer breaks. The EEOC also alleged that Defendant unlawfully fired 80 Muslim employees who participated in work stoppage over the issue, and retaliated against them

for complaining about the lack of accommodations. On April 15, 2011, the parties agreed to bifurcate discovery and trial into two phases. The parties agreed to address the EEOC's pattern or practice claims in Phase I and to address all individual claims for relief, as well as any claims for which no pattern or practice was found, in Phase II. *Id.* at 4. From May 7, 2013 through May 13, 2013, the Court held a trial on the EEOC's Phase I pattern or practice claims, and found that: (i) Defendant did not discipline or discharge any of its Muslim employees for praying; (ii) Defendant terminated Somali-Muslim employees who "walked out" of the plant for withholding work and violating the collective bargaining agreement ("CBA"); and (iii) the workers' requested religious accommodations would impose an undue hardship on Defendant. *Id.* at 5-6. Defendant then moved for partial summary judgment on two grounds. First, it argued that the Court's findings in Phase I precluded the EEOC from pursuing claims of religious discrimination and retaliation in Phase II. Second, it argued that the EEOC failed to meet the pre-conditions for bringing its Phase II claims. Specifically, Defendant contended that the Court's findings established that its reasons for the terminations were legitimate and non-discriminatory and precluded the EEOC from arguing that Defendant terminated or otherwise retaliated against the workers for requesting religious accommodations. *Id.* at 6. The Court granted in part Defendant's motion with respect to issue preclusion and denied the motion without prejudice with respect to pre-conditions to suit. The Court noted that a party asserting issue preclusion must demonstrate that the non-moving party was in privity with a party to the original lawsuit, that the issue it seeks to preclude is the same as an issue actually litigated in the prior action, was determined by a valid and final judgment, and was essential to the prior judgment. *Id.* First, the Court found privity between the EEOC and the individual workers because, even though the EEOC could not seek damages for the individual workers in Phase I, the interests of the EEOC and those of the individual workers did not diverge. *Id.* at 7-8. Second, the Court found identity of issues because the underlying facts supporting the EEOC's patterns or practice claims in Phase I formed the basis for the individual workers' claims, as the EEOC had previously asserted that the claims "are closely related and stem from essentially the same factual allegations." *Id.* at 9. Third, the Court found that the parties fully litigated Defendant's undue hardship defense and that its findings with respect to that issue were essential to the Phase I judgment. *Id.* at 11. Fourth, the Court, however, determined that its other findings with respect to the remaining individual claims were not essential to its Phase I judgment, and thus would remain. *Id.* at 12. Although the Court determined that Defendant did not discipline Somali-Muslim employees for praying, and terminated them for violating the CBA, it held that it "did not need to address all the EEOC's claims because [Defendant] proved its undue hardship defense." *Id.* at 13. The Court therefore concluded that Defendant established each element necessary for issue preclusion as to religious accommodation claim. Defendant also moved for summary judgment on the ground that the EEOC failed to adequately conciliate each individual worker's claim prior to bringing suit. The Court refused to resolve the issue because in *Mach Mining, LLC v. EEOC*, 134 S. Ct. 2872 (2014), the U.S. Supreme Court was currently considering the question of whether and to what extent the EEOC's duty to conciliate may be examined and enforced. *Id.* at 18. The Court held that it would not preclude Defendant from reasserting its position following the Supreme Court's ruling. Accordingly, the Court partly granted Defendant's motion for partial summary judgment.

***EEOC v. JBS USA, LLC,* 2015 U.S. Dist. LEXIS 61368 (D. Neb. May 11, 2015).** The EEOC brought an action alleging that Defendant engaged in unlawful employment practices and discriminated against its Somalian Muslim employees on the basis of religion, national origin, and race in violation of Title VII of the Civil Rights Act of 1964. The Court bifurcated the action into two phases; Phase I addressed claims based on Defendant's alleged pattern or practice of religious discrimination and Phase II addressed individual claims for relief. *Id.* at *5. After a bench trial of Phase I, the Court entered a final judgment and resolved numerous post-trial issues. *Id*. Defendant filed a bill of costs, to which the EEOC partially objected. The Court granted the EEOC's motion in part. *Id.* at *16. The EEOC argued that the Court should not rule on the bill of costs because it was premature as the litigation was still pending. The Court observed that Rule 54 provides that costs should be allowed to the prevailing party, and here, Defendant was the prevailing party because it successfully defended Phase I claims and received a final judgment, and avoided all of the relief sought by the EEOC. *Id*. at *7. Accordingly, the Court concluded that the issue of costs for the Phase I proceedings could be settled in the litigation. *Id*. Defendant sought $43,757.33 for printed or electronically recorded transcripts. Defendant also sought $20,373 associated with 17 videotaped

depositions. Defendant contended that both video and paper transcripts were necessary in this case for the Somali-speaking witnesses because they were listed as potential testifying witnesses, and they neither read nor spoke English. *Id*. at *9. The Court agreed with Defendant and ruled that it was reasonable to believe that both recordings and paper transcripts could be necessary for the case. *Id.* The Court, however, noted that there was only one English speaking witness, whose deposition need not have been recorded in both forms. Accordingly, the Court reduced Defendant's bill of costs in the amount of $475, representing the cost the videotaped deposition of the English speaking witness. *Id*. at *12. Similarly, the Court allowed Defendant's bill of costs as to costs associated with delivery, deposition transcripts, and an interpreter's compensation. *Id*. at *12-17. In all, the Court granted in part and denied in part Defendant's bill of costs, and taxed the EEOC with costs in the amount of $83,487.95. *Id.* at *15.

***EEOC v. JBS USA, LLC,* 2015 U.S. Dist. LEXIS 96946 (D. Neb. July 24, 2015).** The EEOC brought an action alleging that Defendant violated Title VII of the Civil Rights Act of 1964 by discriminating against Muslim employees on the basis of religions by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying its Muslim employees reasonable religious accommodations. On May 26, 2011, the Court bifurcated the case into two phases. Phase I addressed the EEOC's pattern or practice claims under § 707, and Phase II proposed to address all individual claims for relief under § 706 and any claims for which no pattern or practice liability was found in Phase I. *Id.* at *5. At trial in May 2013, the Court found that the EEOC had satisfied its initial burden of proving a *prima facie* case of religious discrimination, but concluded that Defendant had established its affirmative defense of undue hardship, and entered judgment in Defendant's favor. *Id.* at *6. Defendant subsequently filed motion of judgment on the pleadings and a motion to dismiss for failure to state a claim. Defendant argued that the EEOC's complaint should be dismissed because it failed to identify the individuals for whom the EEOC was bringing each type of claim, and failed to describe the factual circumstances surrounding the discharge of any individual employees. *Id.* at *16. The Court granted both motions. *Id.* at *33. The Court found that the allegations in the EEOC's complaint and the aggrieved individuals on the list for whom the EEOC sought relief, taken together, rendered the EEOC's Phase II claims unclear. *Id.* at *21. The Court ruled that neither it nor Defendant could reasonably determine which Phase II claims were associated with particular individuals, and the EEOC failed to provide adequate indication of the size and scope of the class of individuals for whom it sought relief. *Id.* at *21-22. The Court also found that the EEOC's dependence upon facts supporting pattern or practice claims rendered the EEOC's complaint ambiguous and potentially confusing for purposes of the § 706 allegations of Phase II. *Id.* at *22-23. The Court noted that, other than an indirect reference to Ramadan 2008, the allegations failed to provide a timeframe in which the alleged § 706 violations occurred; instead, the EEOC, provided only a general indication of the types of conduct to which the named claimants and the unidentified class members were subjected. *Id*. at *23. Nevertheless, the Court granted leave to the EEOC to amend the complaint, reasoning that Defendant was generally aware of the EEOC's principal allegations and the amendment would streamline discovery to allow Defendant to respond and to defend only those allegations related to Phase II claims. *Id.* at *23-24. Accordingly, the Court granted Defendant's motions for judgment on the pleadings and for dismissal for failure to state a claim while allowing Plaintiff, EEOC, and interveners to amend their complaints. *Id.* at *33.

***EEOC v. Mayo Clinic,* 2015 U.S. Dist. LEXIS 104031 (D. Minn. Aug. 7, 2015).** The two consolidated matters concerned the enforceability of a subpoena *duces tecum* issued by the EEOC to the Mayo Clinic in the course of its investigation of a charge of employment discrimination. *Id*. at *1. Previously, the Magistrate Judge had denied Mayo Clinic's petition to quash the subpoena *duces tecum*, and granted the EEOC's application for order to show cause why a subpoena should not be enforced. *Id*. at *1-2. Because Mayo Clinic did not oppose the report and recommendation, the Court adopted it in its entirety.

***EEOC v. New Prime, Inc.,* 2015 U.S. Dist. LEXIS 167496 (W.D. Mo. Aug. 31, 2015).** The EEOC brought an action alleging that Defendant, a trucking company, discriminated against female truck driver applicants by adopting a same-sex driver policy that stated that the women who applied to be student or entry-level trainees would be assigned to a female trainer only, resulting in delaying or denying them employment, in violation of Title VII of the Civil Rights Act of 1964. The EEOC sued on behalf of 63 women who applied for

driving positions with the Defendant and were placed on a waiting list, a practice which the Court found to be discriminatory based on the gender of the applicants. *Id*. at *2. The Court entered an order appointing Jeff Schaeperkoetter to serve as Special Master "for the purpose of determining the availability and amount of any back pay due to the claimants in this case." *Id.* at *1. Consequently, the Special Master conducted a hearing, received testimony from four expert witnesses, and received other evidence in the form of transcribed depositions of those witnesses and some of the claimants and other documentary evidence. *Id.* The Special Master then performed a claimant-by-claimant review, as suggested by the experts' testimony and the parties' pre-hearing briefs, and described the methodology adopted in making the recommendations for back pay for each claimant. Specifically, the special maser: (i) used the application date and start date contained in Dr. Mullins' "estimation of earnings differential" to determine the beginning day for any period back pay eligibility; (ii) determined the end day for any period of back pay eligibility after a complete review of the evidentiary documents for each claimant and after consideration of a broad range of factors relevant to the issue of mitigation; (iii) determined the period of eligibility or qualifying period, expressed in a specified end date and by the number of quarters; (iv) determined each claimant's "but-for earnings" based upon Dr. Mullins' present value of "but for" earnings plus benefit for the specific period of eligibility; (v) determined specific period of eligibility by subtracting each claimant's off-setting earnings from other employment, including imputed earnings when appropriated from the claimant's "but-for earnings;" and (vi) determined each claimant's back pay award and adjusted claimed out-of-pocket expenses for some claimants. *Id.* at *37-39. The Special Master asserted that his methodology was reasonable because it provided an attrition element to each claimant that were based on the facts of each claimant's circumstances, and because applying separate industry or firm-specific attrition rates would be duplicative and punitive to the claimants. *Id.* at *40-42. The Special Master also provided that the report and recommendations, if adopted, would have no *res judicata* or collateral estoppel effect on the claimants. Thus, providing a list of back pay amount and total damage awards to be made to each claimant based on his detailed methodology adopted, the Special Master submitted his report and recommendations for the Court's approval.

***EEOC v. New Prime, Inc.,* 2015 U.S. Dist. LEXIS 166656 (W.D. Mo. Dec. 14, 2015).** The EEOC brought an action alleging that Defendant, a trucking company, discriminated against female truck driver applicants when it adopted a same-sex driver policy which stated the women who applied to be student or entry-level trainees would only be assigned to a female trainer, unless she had a pre-existing relationship with a male instructor or trainer. *Id.* at *2. The policy resulted in qualified female applicants being placed on a waiting list due to a lack of female trainers, thus delaying or denying them employment. *Id.* On August 14, 2014, the Court entered an order finding Defendant's policy was facially discriminatory in violation of Title VII of the Civil Rights Act of 1964. *Id.* Later, the Court entered an order appointing a Special Master for the purpose of determining the availability and amount of any back pay due to any allegedly injured applicants. *Id.* at *3. After three days of evidentiary hearings, the Special Master submitted a report and recommendation summarizing the total back pay as the difference between the claimants' adjusted "but for" earnings, including fringe benefits, and a claimant's "interim" earnings, which consisted of the claimant's actual earnings during the quarter or any earnings imputed by the Special Master to the claimant during the quarter. *Id.* at *4-5. The Special Master also included claimants' alleged out-of-pocket expenses in the final back pay award. *Id.* at *5. Both parties filed objections to the report and recommendation. While the EEOC objected to the pre-judgment interest rate used by the Special Master to bring the "but for" earnings to present value and to the imputation of income, Defendant objected to the Special Master's refusal to apply the pre-judgment interest rate to the claimants' "interim" earnings in addition to their "but for" earnings. *Id.* The Court adopted in part and rejected in part the Special Master's report and recommendations. The Court overruled the EEOC's objection to the pre-judgment interest rate adopted by the Special Master. The Special Master employed Defendant's expert's method of "interest off-set" by using the weekly average 1-year constant maturity Treasury yield rather than the IRS underpayment tax penalty rate as suggested by the EEOC's expert. *Id.* at *10. The EEOC argued that the IRS underpayment tax penalty rate employed by its expert was more "in line" with both economic reality and the purposes for awarding pre-judgment interest, and the Treasury rate did not make the victims of discrimination whole in this case. *Id.* The Court, however, found that the Treasury rate was widely accepted to determine back pay in discrimination cases, and because the interest off-set calculation of

Defendant's expert, which was adopted by the Special Master, also applied consumer price indexes on top of the Treasury rate to account for inflation, it was sufficient to make the victims whole without punishing Defendant. *Id.* at *11. The Court, however, sustained the EEOC's objection to the Special Master's imputation of earnings, finding that reduction of back pay for amounts the claimants could have earned with reasonable effort was inappropriate in light of the Special Master's findings that each of the claimants, until the date specified as their back pay eligibility cut-off date, made "a good faith effort to minimize damages" and the Special Master was "unable to find that the lengthy period of unemployment in some fashion resulted in a failure to mitigate damages." *Id.* at *19. The Court also sustained Defendant's objection to the Special Master's refusal to apply the pre-judgment interest rate to the claimants' interim earnings, finding that the correct procedure for calculating back pay would be to calculate the total amount of back wages due by subtracting the interim earnings from the "but for" earnings and then applying the appropriate interest rate to that amount, and thus, the pre-judgment interest should apply to both the claimants' "but for" earnings and the claimants' interim earnings. *Id.* at *13-14. The Court then addressed each party's objections to the amount of back pay calculated for specific claimants, and recommended re-calculation of the back pay for each claimant. Accordingly, the Court adopted in part and rejected in part the Special Master's report and recommendations.

***EEOC v. Old Dominion Freight Line, Inc.*, 2015 U.S. Dist. LEXIS 81977 (W.D. Ark. June 24, 2015).** The EEOC brought an action against a trucking company on behalf of Charles Grams, Defendant's employee, alleging that Defendant discriminated against him in violation of the Americans With Disabilities Act ("ADA"). After trial, the jury found that Defendant violated the ADA by terminating Grams' employment as a driver because he was an alcoholic and refused to accommodate him when Grams self-reported his alcohol abuse. The jury awarded $119,612.97 to Grams in back pay. *Id.* at *2. In its post-trial motions, the EEOC asked the Court to: (i) determine whether Defendant's self-reporting policies violated the ADA; (ii) enjoin Defendant from continuing to enforce those policies; (iii) order Defendant to reinstate Grams and pay him pre-judgment interest; and (iv) reimburse the EEOC for certain litigation costs. *Id*. The Court granted the EEOC's motions. *Id.* *49-51. Defendant sought to overturn the verdict in a motion for judgment notwithstanding the verdict. *Id.* at *51. At the outset, the Court remarked that given the jury's verdict, it must determine whether Defendant's company-wide policy violated the ADA. The Court observed that under the ADA, an employer is not permitted to summarily decide, without engaging in any interactive process, that no accommodation is potentially available to permit an alcoholic employee to return to driving. *Id*. at *16-17. The Court found that Defendant violated the ADA, particularly in light of the fact that the Department of Transportation ("DOT") regulations expressly contemplate the possibility of a return to driving even after a clinical diagnosis of alcoholism. *Id*. The Court held that Defendant improperly believed that it could fashion its policy with respect to its employees in safety-sensitive positions without any reference at all to the ADA. *Id.* at *17. The Court reasoned that this belief came from a misreading of the ADA's safe harbor provision, which exempts employees employed in a transportation industry subject to DOT regulations, including complying with such regulations that apply to employment sensitive positions in such an industry. *Id.* The Court found that safe harbor does not apply, however, when an employee engages in some aspect of safety-sensitive employment that is not regulated by the DOT. *Id.* The Court, therefore, concluded the ADA makes clear that any employee in a safety-sensitive position who is subject to DOT regulations regarding the use of alcohol must comply with those regulations without reference to the ADA. *Id*. at *19-20. However, when an employer's policies impose burdens on disabled employees that are not mandated by the DOT due to safety concerns, a close look at those policies is warranted in order to determine whether the policies otherwise comply with the ADA. *Id*. at *20. Under the circumstances, the Court held that Defendant created a policy that imposed greater restrictions on drivers who self-reported alcohol abuse than those restrictions imposed by the DOT. *Id.* Accordingly, the Court ruled that Defendant's policies violated the ADA, and that it failed to provide at least the possibility of a reasonable accommodation once the driver had been given a current clinical diagnosis of alcoholism. *Id*. at *24. The Court also found that Defendant's policy of offering drivers disabled by alcoholism an accommodation that did not provide the driver with at least the possibility of a return to his former job was not reasonable as a matter of law and violated the ADA. *Id*. Accordingly, the Court permanently enjoined Defendant from enforcing such a policy. *Id.* The Court further denied Defendant's alternative requests for judgment as a matter of law or for a new trial, finding that there was sufficient evidence presented at trial

for a reasonable jury to conclude that Grams was disabled and suffered an adverse employment action due to disability discrimination. *Id*. at *25. Having made this finding, the Court also granted the EEOC's request to reinstate Grams as a driver. *Id*. at *35. Since EEOC was the prevailing party, the Court also granted its request for costs, and directed Defendant to reimburse $5,438.16 to the Commission for its costs. *Id.* at *48. Accordingly, the Court granted the EEOC's motions for reinstatement and costs. *Id.* at *50-51.

***EEOC v. PMT Corp.,* 2015 U.S. Dist. LEXIS 113882 (D. Minn. Aug. 24, 2015).** The EEOC brought an action against Defendant under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA") alleging that Defendant engaged in a pattern or practice of discrimination on the basis of sex by failing to hire females for sales representative positions and on the basis of age by failing to hire applicants over the age of 40 for sales representative positions. *Id.* at *1-2. The EEOC also alleged that Defendant failed to make and preserve records in accordance with Title VII and the ADEA. *Id.* at *2. The parties disputed how discovery and trial should proceed in this matter. The EEOC moved to bifurcate the action into two phases. The EEOC proposed to have a first phase to determine whether Defendant was liable for a pattern or practice of sex and age discrimination, whether Defendant was liable for punitive damages under Title VII and liquidated damages under the ADEA, and whether Defendant liable for record-keeping violations. *Id.* at *10. The EEOC asserted that the second phase would occur only if there was a finding of liability against Defendant regarding one or both of the EEOC's pattern-or-practice claims, and it would address the issues of whether Defendant could meet its burden of proof as to each class member, the remedies to which that class member was entitled, and Defendant's defenses such as failure to mitigate damages on individual claims. *Id.* at *10-11. The Court denied the EEOC's motion to bifurcate the trial without prejudice. *Id.* at *13. According to the Court, the issue could be more appropriately addressed to the judge who would actually try the case, and thus it need not determine at this stage which issues would be tried in which phase to resolve the current dispute over how discovery should proceed in this matter. *Id.* at *11. The Court, however, granted the EEOC's motion to bifurcate discovery, finding that phased discovery would increase the efficiency in the case by focusing the parties' efforts first on whether Defendant engaged in a pattern or practice of discrimination and issues pertaining to the class as a whole. *Id.* at *29. The Court noted that if the EEOC was not able to establish that Defendant engaged in a pattern or practice of discrimination, the case would be over and the parties would not waste time and resource on the more costly and time-intensive discovery on damages that each class member might have suffered. *Id.* at *25-26. Moreover, the Court reasoned that Defendant would not be prejudiced by the phased discovery. *Id.* at *30. Accordingly, the Court granted the EEOC's motion to bifurcate discovery and ordered the parties to prepare a joint proposal for the first phase of discovery addressing issues pertaining to the class as a whole. *Id.* at *30-31.

(ix) Ninth Circuit

***EEOC v. BNSF Railway Co.,* 2015 U.S. Dist. LEXIS 10517 (W.D. Wash. Jan. 29, 2015).** The EEOC brought an Americans With Disabilities Act ("ADA") action alleging that Defendant withdrew its offer of employment to an applicant, Russell Holt, when he refused to procure an MRI at his own expense after being cleared by a company doctor. Defendant offered Holt a position as a patrol officer, contingent upon Holt passing a post-offer, pre-employment medical examination. The EEOC alleged that Defendant discriminated against Holt when, after Defendant's contract doctor cleared Holt for the position based on a routine medical examination required of all applicants, it demanded that Holt procure a follow-up MRI. *Id*. at *2. The EEOC contended that the MRI was an improper additional inquiry not required of all entering employees. Defendant moved to dismiss the EEOC's ADA claim, which the Court denied. The EEOC argued that the MRI requirement, because of its cost, functioned as a screening criterion that screened out Holt, and that screening out Holt in such a manner was impermissible because the criterion was not job-related or consistent with business necessity, thereby violating sections 42 U.S.C. § 12112(d)(3)(A) and (C) of the ADA. *Id*. at *5. The Court opined that the statute does not authorize an employer to require that an entering employee pay for the follow-up examination where only applicants with disabilities are asked to provide the follow-ups, especially where a company doctor had already cleared that employee as fit for the position. *Id*. at *6. The Court noted that a company doctor had already cleared Holt for work, and at the time of his application, Holt had been performing patrolman duties as a police officer for 11 years without

any accommodation. *Id*. at *7. Although Defendant cited case law authority in support of its interpretation of the statute, none of the cases relied on whether the employer required the applicant to pay for a follow-up examination or required a follow-up after its doctor had already cleared the applicant for work. *Id*. at *7-8. Thus, the Court found that the EEOC stated a plausible claim upon which relief could be granted, and accordingly, denied Defendant's motion to dismiss.

***EEOC v. City Of Richmond,* 2015 U.S. Dist. LEXIS 540 (N.D. Cal. Jan. 2, 2015).** The EEOC commenced an administrative investigation against the City of Richmond based upon an employee's charge of discrimination for gender, race, religion, and age; unlawful disclosure of confidential medical information; failure to accommodate a disability; and retaliation. The EEOC moved to enforce an investigative subpoena directed to the City after it declined to produce information that the EEOC sought in its investigation. *Id.* at *1. The Court granted the EEOC's motion. *Id.* at *4. At the onset, the Court noted that an administrative subpoena is enforceable only if the EEOC demonstrates that: (i) the subpoena is within the agency's authority; (ii) the agency has satisfied its own procedural requirements; and (iii) the information sought is relevant to its investigation. *Id*. at *2. The Court found that through the sworn declarations of the EEOC's employees (including the EEOC's regional director, an attorney, and a staff member), the EEOC had established the elements of authority, procedure, and relevance. *Id*. First, the Court observed that the EEOC had statutory authority to issue administrative subpoenas during the course of investigations into charges of discrimination and retaliation under Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. *Id*. Second, the Court found that the EEOC had complied with all procedural requirements set forth the Commission's regulations, most of which pertained to the inclusion of certain information in the subpoena itself. *Id*. at *3. Finally, the Court observed that the EEOC had also established that the evidence sought – notably, personnel records and documents reflecting the City's policies and procedures, disciplinary records, and employee complaint records – was relevant to the discrimination and retaliation charge that the EEOC was investigating. *Id*. Thus, the Court held that the EEOC had demonstrated that it had authority to issue the administrative subpoena, had followed the necessary procedural requirements, and that the subpoena itself sought documents relevant to the discrimination investigation. *Id*. at *4. For these reasons, the Court concluded that the administrative subpoena was enforceable, and additionally fees and costs in relation to the instant motion. *Id.*

***EEOC v. Global Horizons, Inc.*, Case No. CV-11- 3045 (E.D. Wash. Feb. 3, 2015).** The EEOC brought an action alleging that Defendants violated Title VII of the Civil Rights Act of 1964 by discriminating against Thai and Asian individuals hired to perform agricultural work. The EEOC primarily alleged claims of discrimination, hostile work environment, constructive discharge, and retaliation on behalf of the Thai workers. The EEOC and one Defendant, Global Horizons, Inc., cross-moved for summary judgment. The Court granted the EEOC's motion in part, and denied Global's motion. *Id*. at *2. The question before the Court was whether the EEOC presented evidence sufficient enough to show that Global had a pattern or practice of discrimination based on race and national origin against the Thai workers it brought to work in Washington at Valley Fruit Orchards ("Valley Fruit") and Green Acre Farms ("Green Acre") through the H-2A program. In addition, both the EEOC and Global asked the Court to resolve Global's affirmative defense of laches in their favor as a matter of law. The Court observed that to establish laches, Global must prove that the: (i) EEOC unreasonably delayed in filing this action; and (ii) that Global was prejudiced by the EEOC's delay. The Court found that the record was insufficient to make a conclusive ruling on the laches defense, and left it for trial. *Id*. at *59. In order to prove a pattern or practice of discrimination, the EEOC was required to establish that the discriminatory actions were Global's standard operating procedure, and not unusual practice or the mere occurrence of isolated or accidental or sporadic discriminatory acts. *Id*. at *66. It was undisputed that Global took the Thai worker's national origin into account when hiring them through the H-2A program and then returning Thai workers to Thailand when their visa had expired or when work was no longer available. *Id*. at *66-67. However, the Court observed that it was disputed whether Global's other conduct, including providing housing that failed to comply with state law housing requirements, was based on the Thai workers' race or national origin. *Id*. at *67. The Court proceeded to analyze each of claims under the *prima facie* burden shifting factors. As to the disparate treatment claims, the Court found that each of the allegations – including (i) paying different pay

scales to Thai workers; (ii) that Thai workers were forced to reside in unsafe and filthy housing; and (iii) meting different treatment between Thai and Latino workers – fell short of being a pre-text for discrimination. *Id*. at *70. The Court determined that the EEOC failed to show that the Thai workers could have been provided better working conditions vis-à-vis Latino workers, but were not due to racial profiling. Accordingly, the Court ruled that summary judgment was inappropriate as to disparate treatment claim. Similarly, the Court opined that genuine disputes of material fact existed as to whether Global had a pattern or practice of subjecting the Thai workers to an objectively and subjectively severe work environment because of their race or national origin. *Id*. at *72. Finding similar discrepancies in the EEOC's evidences to establish claims of constructive discharge and retaliation, the Court denied the EEOC's motion.

***EEOC v. Global Horizons, Inc.,* 2015 U.S. Dist. LEXIS 37674 (E.D. Wash. Mar. 19, 2015).** The EEOC brought an action on behalf of Thai workers that Defendants hired pursuant to a federal H-2A guest-worker program. In 2004 and 2005, Thai individuals were brought to the United States by Defendant Global Horizons to work at Defendants Green Acre Farms and Valley Fruit Orchards, as well as other agricultural businesses. *Id*. at *9. Many of the Thai workers later filed charges of discrimination with the EEOC claiming that Defendants discriminated and retaliated against them on the basis of their national origin. *Id*. at *10. Almost a year after the lawsuit was filed, the EEOC served its Rule 26(a) initial disclosures, and attached a list of Thai claimants, including 87 claimants as to Green Acre, and 37 claimants as to Valley Fruit. *Id*. at *29. The EEOC asserted that it sought $300,000 in emotional distress and punitive damages for each of the 140 claimants as to Green Acre with a total of $42 million in damages, and for the 85 claimants as to Valley Fruit, a total of $25.5 million in damages. *Id*. Subsequently, the Court granted the Grower Defendants' motion for summary judgment as to untimely claimants and ruled that the EEOC could not pursue relief on behalf of untimely claimants. *Id*. at *33. The Court ordered the EEOC to disclose the names of the claimants on whose behalf it timely sought relief. The EEOC later filed declarations of various Thai workers relative to their experiences at the Grower Defendants' orchards. *Id*. In these declarations, the Thai workers declared that they were paid late, worked less than 40 hours a week, and were threatened with deportation if they did not meet their quotas. *Id*. at *34. After reviewing the declarations and other evidence, the Court granted summary judgment to the Grower Defendants. Thereafter, the Grower Defendants filed motions for attorneys' fees, which the Court also granted. At the outset, the Court observed that this case presented challenges to the EEOC, such as numerous non-English speaking Thai individuals working at a variety of farms in the U.S., and residing at various locations in the U.S. or Thailand. The Court noted that detailing what conduct and events occurred at what farm may have been challenging, but that could not be an excuse for the EEOC to forego a reasonable diligent investigation of the allegations of discrimination as to each business before bringing the lawsuit. *Id*. at *35. The Court remarked that the EEOC's unpreparedness was highlighted by the ever changing number of Thai claimants throughout the lawsuit. The Court determined that the EEOC could not claim that it was unaware of such deficiencies in its investigation against the Grower Defendants as their counsel repeatedly advised the EEOC that the charges of discrimination, and the subsequent letters or determination, failed to alleged the purported discrimination with sufficient specificity. *Id*. at *37. Further, the Court opined that the EEOC frivolously sought back pay and reinstatement for the Thai claimants, when by then it knew that Defendant Global was no longer approved to provide H-2A guest workers to American farms and that many Thai individuals were not lawfully in the United States. *Id*. at *43. Accordingly, an award of back pay was inappropriate and reinstatement of the workers was impossible relative to the Grower Defendants. Accordingly, the Court concluded that an award of attorneys' fees for the Grower Defendants was justified.

***EEOC v. Global Horizons, Inc.,* Case No. 11-CV-3045 (E.D. Wash. Sept. 24, 2015).** The EEOC brought an action against Defendant and eight farms in Hawaii and Washington, including Green Acre Farms Inc. and Valley Fruit Orchards ("Grower Defendants"), alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII") for engaging in a pattern or practice of harassment and discrimination against Thai workers. The Court had previously granted the Grower Defendants summary judgment on all of the EEOC's Title VII liability claims, finding that the EEOC failed to provide evidence that the Grower Defendants subjected the Thai workers to hostile work environment. The Court had also determined that the Grower Defendants were entitled to seek reasonable attorneys' fees and costs incurred in defending the action, finding that the EEOC failed to conduct an adequate investigation to ensure that its Title VII

claims could be brought against the Grower Defendants, and pursued a frivolous theory of joint-employer liability. *Id.* at 2. While the Grower Defendants moved for an award of attorneys' fees of $1,041,188 and costs of $80,577.94, totaling $1,211,765.90, the EEOC moved for reconsideration of the Court's ruling that the Grower Defendants were prevailing parties entitled to recover their reasonable attorneys' fees and expenses. First, the Court denied the EEOC's motion for reconsideration, finding that the EEOC's lawsuit against the Grower Defendants was unfounded and frivolous, and the EEOC failed to present any newly discovered evidence or highlight a clear error that warranted reconsideration. *Id.* at 4. Further, the Court granted in part, denied in part, and held in abeyance in part the Grower Defendants' motion for an award of attorneys' fees and costs. In support of their motion, the Grower Defendants submitted time charts listing the date, attorney, or paralegal performing the work, the individual's hourly rate, and work performed, for each of the three law firms – Stokes Lawrence, Seyfarth Shaw LLP, and Freeman – retained by the Grower Defendants. *Id.* at 1. The Grower Defendants also filed a chart summarizing their costs, as well as copies of the related receipts and billing statements. *Id.* at 2. The Court reviewed the time charts, especially in light of the EEOC's concern that the Grower Defendants overstaffed this action by having multiple attorneys and out-of-state law firms, and conducted an hour-by-hour analysis, to conclude that the vast majority of the hours were reasonable and necessary. *Id.* at 12-13. The Court noted that the action involved a number of motions, ranging from motions to dismiss, motions to stay, a motion to intervene by the U.S. Department of Justice, discovery motions, motions for sanctions, and summary judgment motions, and the Grower Defendants reasonably required the assistance of a number of attorneys, who necessarily spent time conferring with one another and the Grower Defendants to determine the best strategic defense. *Id.* at 13-14. The Court found the requested hourly rates for attorneys of Stokes, Lawrence, and Freeman as set forth in the time chart to be reasonable based on its familiarity with rates charged in the District. *Id.* at *15. The Court, however, was unable to determine based on the evidence before it whether the other attorney rates were reasonable. *Id.* at 17-18. Although the Grower Defendants filed declarations from experts to support its hourly rates, the Court noted that none of it stated whether the hourly rate charged was the prevailing market rate for an attorney of comparable skill, experience, and reputation within the community where the particular attorney worked. *Id.* at 17. Further, the Grower Defendants provided no declaration by other lawyers working in the same legal community who could attest the reasonableness of the charged rate. *Id.* The Court therefore ordered the Grower Defendants to supplement its fee request with declarations establishing the attorneys' hourly rates and cautioned that if failed, the Court would utilize the District's hourly rates for attorney and paralegals engaging in similar work to determine the attorneys' fees. *Id.* at 18. Accordingly, the Court granted in part, denied in part, and held in abeyance the Grower Defendants' joint motion for an award of attorneys' fees and costs.

***EEOC v. Global Horizons, Inc.,* Case No. 11-CV-3045 (E.D. Wash. Oct. 21, 2015).** The EEOC brought an action against Defendants, Global Horizons, Inc. and eight farms in Hawaii and Washington, including Green Acre Farms Inc. and Valley Fruit Orchards ("Grower Defendants") alleging violation of Title VII of the Civil Rights Act of 1964 for engaging in a pattern or practice of harassment and discrimination against Thai workers. The Court previously ruled on the majority of the issues raised in the Grower Defendants' joint motion for award of attorneys' fees and costs, in which the Grower Defendants requested attorneys' fees of $915,734.07 of Stokes Lawrence, $124,859 of Seyfarth Shaw LLP, and $595.00 of Freeman Freeman & Smiley. *Id.* at 1. The EEOC objected to the award of attorneys' fees for work performed by defense counsel at an out-of-district rate. *Id.* The Court, therefore, held the Grower Defendants' motion for attorneys' fees in abeyance. *Id.* The Court found that it was reasonable for the Grower Defendants to have retained Seyfarth Shaw to associate with Stokes Lawrence, as this was challenging and complicated case, and Seyfarth Shaw had a national reputation for defending EEOC litigation. *Id.* Thus, the Court found that the Grower Defendants prudently associated Seyfarth Shaw in the case. *Id.* The EEOC argued that the Seyfarth Shaw hourly rates were higher than those charged in the U.S. District Court for the Eastern District of Washington for attorneys of similar skill. *Id.* The Court agreed in part with the EEOC that the Grower Defendant's Declaration failed to provide a basis for an award of claimed fees at the rates sought for the out-of-district attorneys. *Id.* Subsequently, the Court ordered the Grower Defendants to submit a revised time chart reflecting the awarded hourly rates to enable the Court to determine a reasonable fee. *Id.* at 4. Accordingly, the Court held the Grower Defendants' motion in abeyance.

***EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 148410 (E.D. Wash. Nov. 2, 2015).** The EEOC brought an action against Defendants, Global Horizons, Inc. and eight farms in Hawaii and Washington, including Green Acre Farms Inc. and Valley Fruit Orchards (the "Grower Defendants") alleging violation of Title VII of the Civil Rights Act of 1964 for engaging in an alleged pattern or practice of harassment and discrimination against Thai workers. The Court rejected the EEOC's case theory and evidence, and granted Defendants' motions for summary judgment. Previously, the Court had analyzed the fee request of the attorneys for the Grower Defendants and the EEOC's objections to the fee request. The Court found that it was reasonable and necessary for the Grower Defendants to retain counsel outside the U.S. District Court for the Eastern District of Washington given the nature of the case. The Court determined that it was particularly reasonable to retain Seyfarth Shaw, LLP, because of its familiarity with both EEOC litigation and the related EEOC litigation in Hawaii against Global Horizons. *Id*. at *3. Additionally, the Court also found that the hours claimed by the attorneys at Stokes Lawrence, Seyfarth Shaw, and Freeman, Freeman & Smiley were reasonable given the complexity of the case and the intensity of the litigation. *Id*. The Court reduced only Stokes Lawrence fee request of $915,734.07 by $9,189.50. *Id*. at *4. In this order, the Court contemplated its lodestar analysis. The Court first observed that because the lodestar is strongly presumed to be a reasonable fee, any enhancement to the lodestar is appropriate only in rare and exceptional circumstances. *Id*. After carefully considering the hourly rates and the number of hours claimed, the Court found them to be reasonable. *Id*. at *8. Given the complexity of the issues and the intensity of the litigation between the Grower Defendants and the EEOC and involving the large amount of damages claimed, and the time and skill required by counsel for the Grower Defendants to properly represent them, the Court found that the reduced fee award of $886,881.82 to Stokes Lawrence was reasonable and proper. *Id*. For the same reasons, the Court also found that a fee award of $85,156.50 to Seyfarth Shaw, and an award of $595 to Freeman, Freeman & Smiley was also reasonable and proper.

***EEOC v. GNLV Corp.*, 2015 U.S. Dist. LEXIS 71186 (D. Nev. June 1, 2015).** The EEOC brought an action alleging that Defendant subjected its employees to a hostile work environment based either on sex or race, and retaliated against them. The EEOC filed a motion for summary judgement on Defendant's affirmative defenses. Defendant's third affirmative defense claimed that the EEOC's complaint was barred because Defendant's conduct at all times was privileged as it had always engaged in conduct within its rights in a permissible way. The Court allowed the defense to the extent it related to Defendant's claim that it exercised reasonable care in preventing harassment and that the claimants unreasonably failed to take advantage of corrective opportunities. *Id.* at *8-9. Defendant's next affirmative defense contended that the EEOC failed to allege facts sufficient to give rise to a claim for punitive damages. *Id.* at *9. Because the complaint asserted that Defendant acted with malice or with reckless indifference to the employees' federal protected rights, the Court found that this conformed with the applicable standard in awarding punitive damages. *Id.* at *9. The Court also denied the EEOC's motion as to the tenth affirmative defense, which alleged that the damages suffered by the individual employees were caused by their own willful acts, negligence, or omission. *Id.* at *10-11. One of the issues was whether Defendant knew or should have known about the discriminatory comments directed at Susie Fein, an employee. The Court remarked that if Fein's alleged failure to report the instances of discrimination prohibited Defendant from discovering and addressing the offensive conduct, then Fein's damages would be a result of her own omissions. *Id.* at *11. Defendant also asserted defenses that claimed that the EEOC failed to exhaust administrative remedies before filing the action. The Court observed that the EEOC can pursue any violations of Title VII of the Civil Rights Act of 1964 ("Title VII") that are ascertained in the course of a reasonable investigation of a charge. *Id.* at *12-13. Here, in the course of investigation into the claims alleging racial harassment and retaliation by the charging party, Robert Royal, the EEOC had discovered that Defendant also allegedly retaliated against other employees, and had subjected them to racial and sexual harassment. *Id.* at *13. The Court thus disagreed with Defendant that the EEOC failed to follow procedure or exhaust remedies and accordingly, granted the motion in this respect. Defendant's affirmative defenses also asserted that the doctrine of laches barred the EEOC's claims. *Id.* The Court found that the three-and-a-half year gap between the time the EEOC received Royal's complaint and the filing of this action was unjustified, and denied the motion as to this defense. *Id.* at *14-15. Defendant's fourteenth affirmative defense contended that the EEOC's complaint was untimely. Because the statute of limitations does not apply to Title VII claims brought by the EEOC, and Defendant's interest in having this case timely pursued was better

protected under its laches defense, the Court granted the motion as to the EEOC's Title VII claims. *Id.* at *15. The Court, however, denied the motion as to the emotional distress claim and any other claim for damages arising from state law. *Id.* at *15-16. Finally, Defendant's affirmative defenses also reserved its right to amend its answer to assert any applicable, additional, or other defenses constituting an avoidance or affirmative defense at such time as the nature of the EEOC's claims and facts related to them were revealed to Defendant. Because an affirmative defense must give the EEOC fair notice of the defense, and because this defense of Defendant offered no specific defense thereby failing the pleading requirement, the Court granted the motion for summary judgment on Defendant's affirmative defenses. *Id.* at *20-21. Accordingly, the Court granted in part and denied in part the EEOC's motion.

***EEOC v. McLane Co.,* 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).** An employee, Damiana Ochoa, filed a charge of discrimination against Defendant. Ochoa alleged that when she tried to return to work after taking maternity leave, Defendant informed her that she could not resume her position unless she passed a physical capability strength test. *Id.* at *2. Ochoa attempted the test three times. *Id.* Each time she failed, and, as a result, Defendant terminated her. *Id.* The EEOC undertook an investigation into the charge, requesting certain information from Defendant, including information on the strength test and the employees who had been required to take the test. *Id.* at *4. Defendant complied with most of the EEOC's requests, but refused to disclose pedigree information of its employees and the reasons it terminated employees who took the test. *Id.* The EEOC filed a subpoena enforcement action against Defendant seeking this information. The District Court denied the EEOC's request for this information and the EEOC appealed. In considering whether the EEOC was entitled to employee pedigree information, the Ninth Circuit opined that the EEOC is entitled to "virtually any material that might cast light on the allegations against the employer." *Id.* at *9. Under this loose standard, the Ninth Circuit held that employee pedigree information was relevant to the EEOC's investigation because such information could be used by the EEOC to speak with other employees who took the test and determine whether there was any truth to Ochoa's allegations. *Id.* at *11-12. The Ninth Circuit rejected Defendant's arguments against the enforcement of the subpoena. *Id.* at *12-17. First, it rejected Defendant's argument that pedigree information was not relevant to the charge because Ochoa only alleged a disparate impact claim, not a disparate treatment claim. *Id.* at 12. The Ninth Circuit found such information was nonetheless relevant, reasoning that Ochoa's charge was framed "general enough" to support either theory. *Id.* Second, it rejected Defendant's argument that pedigree information was not necessary to the EEOC's investigation. The Ninth Circuit stressed that the governing standard was relevance, not necessity, and noted that the pedigree information was clearly relevant to Ochoa's charge. *Id.* at *13. Third, the Ninth Circuit rejected Defendant's position that pedigree information was not relevant because the strength test was neutrally applied, which, Defendant argued, cannot, by definition, give rise to disparate treatment, systemic or otherwise. *Id.* at *15. The Ninth Circuit reasoned that even if the strength test applied to everyone, the test still could be applied in a discriminatory manner. *Id.* at *15-16. For example, Defendant could fire the women who failed the test, but not the men who failed. *Id.* Finally, the Ninth Circuit turned to the issue of whether the EEOC was entitled to the reasons Defendant terminated employees who took the test. *Id.* at *17-18. Although it determined that this information was relevant to the EEOC's investigation, it noted that Defendant did not have to produce this information if it would be unduly burdensome. *Id.* The Ninth Circuit thus remanded this issue to the District Court for further consideration.

***EEOC v. Parker Drilling Co.,* 2015 U.S. Dist. LEXIS 34937 (D. Alaska Mar. 20, 2015).** The EEOC brought an action alleging that Defendant, an Alaska-based oil drilling company, violated the Americans With Disabilities Act ("ADA") when it refused to hire a worker based on his visual impairment. Although Defendant extended a conditional offer of employment to the worker, who was blind in his left eye, it withdrew that offer after it received a post-offer medical evaluation report. *Id*. at *2. Defendant moved for partial summary judgment, asserting that the EEOC's claims should be dismissed due to the EEOC's failure to meet its prerequisite obligation to conciliate prior to filing the suit. *Id.* at *4. The Court denied Defendant's motion, finding that the EEOC met its burden to conciliate the matter. *Id.* at *20. The Court noted that, in a letter dated September 14, 2012, the EEOC had notified Defendant of its determination that the worker was a "qualified individual" under the ADA, and that his work history and demonstrated ability to work in the position undermined Defendant's explanation for denying him employment. *Id.* at *8-9. The

Court found that the EEOC's letter had adequately outlined to Defendant the reasonable cause for its belief about a potential Title VII of the Civil Rights Act of 1964 violation. *Id.* at *9. The Court further determined that the EEOC and Defendant had exchanged formal communications through counsel regarding conciliation, and in a letter dated December 7, 2012, the EEOC had outlined its initial offer of settlement. In the offer, the EEOC sought $354,617.74 in estimated back pay and $150,000 in compensatory and punitive damages. *Id*. at *9. Defendant responded to the EEOC by stating that the proposal greatly exceeded everything the EEOC could potentially recover even if successful in litigation. *Id.* at *10-11. Subsequently, the parties exchanged numerous letters on the proposal for resolution, and finally, in a letter dated April 12, 2013, the EEOC informed Defendant that the efforts to conciliate had been unsuccessful, and further conciliation efforts would be futile. *Id.* at *14. Defendant asserted that the EEOC did not conciliate in a meaningful manner as it did not provide the basis of the alleged damages or the settlement demand. *Id.* at *16. According to Defendant, the EEOC could not generically respond to an employer's request for a basis for the EEOC's calculations by stating that the demand was comprised of "back pay, compensatory damages and front pay" without setting out a basis for its calculations. *Id.* The Court, however, noted that Defendant had sufficient information to be able to evaluate the reasonableness of the EEOC's settlement proposal because the EEOC's letter had set out the factors it included in its back pay calculation. *Id.* at *17. The Court also reasoned that the record indicated that during the conciliation process, the EEOC had adequately explained its position and exchanged multiple letters with Defendant. *Id.* at *19. The Court opined that the EEOC's obligation to seek conciliation in good faith did not require it to convince Defendant of the merits of its position or to compromise claims it considered meritorious for the sake of avoiding litigation. *Id*. The Court therefore concluded that the EEOC's approach to conciliation was reasonable and responsive in light of all the circumstances. *Id.* at *20. Accordingly, the Court denied Defendant's motion for partial summary judgment.

***EEOC v. Parker Drilling Co.,* 2015 U.S. Dist. LEXIS 69608 (D. Alaska May 29, 2015).** The EEOC brought an action alleging that Defendant discriminated against Kevin McDowell for his monocular vision by rescinding a job offer to him in February 2010 for a manager position on an oil rig. The EEOC proceeded to trial on the claim. The jury concluded that the EEOC had proven the disability claim but the jury did not award non-economic damages for that claim. *Id.* at *2. The jury also found that Defendant had violated the Americans With Disabilities Act ("ADA") and awarded McDowell $15,000 in non-economic damages for that claim. *Id.* at *2-3. The jury did not award punitive damages. The Court then set forth its findings of fact and conclusions of law on the award of economic losses and an injunctive remedy. Regarding the award of back pay, the Court noted that if McDowell had been hired by Defendant as a junior rig manager in 2010, he would have received 11 months of income during that year for a salary of $114,989, and started working as a senior rig manager in 2011 and continued in that position through trial. *Id.* at *5. For the first three months of 2014, McDowell earned $55,908 as a rig manager while working for Inlet Drilling. In May 2014, McDowell became a consultant for an oil company and continued in that position throughout most of 2014. *Id.* at *7. McDowell introduced consulting invoices for work performed through October 2014 and for additional consulting work through December 2014. The Court thus estimated that McDowell's income for 2014 was $200,033. McDowell, however, did not receive any employee benefits after the first three months of the year. *Id.* at *7-8. The Court opined that McDowell was entitled to back pay from February 2010 to the date of trial because he remained steadily employed through most of that time, and continued to look for work after December 2014, when the consulting job ended, up until trial and because McDowell had used reasonable diligence in seeking and retaining employment. *Id.* at *8. The Court awarded back pay based on the difference between the actual earnings and the value of Defendant's benefits McDowell would have received. *Id.* at *9-10. As to other monetary relief, the Court declined to award front pay. *Id.* at *10-11. Based upon McDowell's job history, the evidence regarding the volatility of employment in the oil industry in Alaska, and the average tenure at which McDowell had stayed at various positions during his career, the Court found it more likely than not that McDowell would not have continued working at Defendant after March 2015 if he had begun there in February 2010, a period of over five years. *Id.* at *11. Moreover, based upon his 2014 earnings, the Court noted that with reasonable diligence, and beginning in April 2015, McDowell was more likely than not to find employment at an earnings level commensurate to what he would have earned had he been working at Defendant. *Id*. Further, the Court reasoned that reinstatement was not warranted because the award of

the approximate five years in back pay was the appropriate remedy to make McDowell whole. *Id.* Finally, because there was no evidence of any other instances of disability discrimination at any time since February 2010, and because there was no risk of future disability-based discrimination against job applicants, the Court ruled that injunctive relief was unnecessary. *Id*. at *12. Accordingly, the Court awarded McDowell $230,619 in back pay and denied an award of front pay and injunctive relief. *Id.* at *17-18.

***EEOC v. Peters' Bakery,* 2015 U.S. Dist. LEXIS 26601 (N.D. Cal. Mar. 4, 2015).** The EEOC brought an action alleging that Defendant had subjected an employee to racial and ethnic slurs and terminated her on the basis of race and/or national origin in violation of Title VII of the Civil Rights Act of 1964. On December 22, 2014, the Court had disqualified Defendant's counsel and stayed proceedings for 30 days to allow Defendant to retain new counsel. Although the Court had granted Defendant an extension of the stay in order to prepare a petition for writ of mandamus to challenge the ruling, the extended stay expired by its own terms on February 13, 2015. Defendant thereafter filed its second motion to extend the stay, whereby it sought to continue the stay pending resolution of its petition for writ of mandamus. *Id.* at *1-2. The Court denied Defendant's motion. *Id.* at *2. The Court found that Defendant had not demonstrated a likelihood of success on the merits of its petition for writ of mandamus. *Id*. at *3. Given the extraordinarily high standard for mandamus, the Court found that Defendant had not raised any serious question on the merits of its petition. *Id*. at *3-4. Although the Court noted that the disqualification of a party's first-choice counsel was unquestionably harmful, it found that fact discovery in this action had not concluded (in fact, the Court had stayed discovery on October 30, 2014, pending resolution of the disqualification motion, which disrupted a number of scheduled depositions). *Id*. at *4. The Court reasoned that any potential harm to Defendant from having to retain new counsel could be mitigated through adjustments to the case schedule. Moreover, the Court found that the EEOC had an interest in completing discovery and "obtaining timely justice," and it would be extremely prejudicial to stay this action indefinitely. *Id*. Accordingly, the Court denied Defendant's second motion to extend the stay. *Id.* at *4-5.

***EEOC v. Peters' Bakery*, 2015 U.S. Dist. LEXIS 86920 (N.D. Cal. July 2, 2015).** The EEOC brought an action alleging that Defendant harassed and discriminated against an employee, Marcela Ramirez, based upon her race and national origin, and retaliated against her in violation of Title VII of the Civil Rights Act of 1964. Defendant had previously terminated Ramirez's employment, and then reinstated her following an union arbitration. *Id*. at *2. The EEOC claimed that Defendant continued to harass and retaliate against Ramirez following reinstatement. The EEOC sought a temporary restraining order ("TRO") and a preliminary injunction enjoining Defendant from terminating Ramirez once again and from disciplining or harassing her, which the Court granted in part. The EEOC presented evidence that following her reinstatement, Ramirez was told that she was being fired for lying. *Id*. at *3-4. The Court noted that in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the U.S. Supreme Court found that a party seeking preliminary injunction must show: (i) he is likely to succeed on merits; (ii) he was likely to face irreparable harm; and (iii) the balance of equity was in his favor. *Id*. at *4. As to the EEOC's allegations of threatened termination, the Court found the language that Defendant used in the meeting with Ramirez, coupled with offering no legitimate business reason for terminating her, was sufficient to satisfy the first factor. *Id*. at *6. The Court found that the second factor also favored the EEOC because Ramirez stated in her declaration that if she lost her job, she would not have enough money to pay her mortgage and keep her children in private Catholic school. *Id*. The Court similarly found that the third and fourth factors also favored the EEOC as to the threatened termination claim. As to the EEOC's discipline and harassment claims, the Court remarked that the EEOC failed to establish a likelihood that such conduct was likely to cause irreparable injury absent a TRO. *Id*. at *7. The Court observed that Ramirez's declaration focused upon the repercussions of losing her job rather than the effects of Defendant's day-to-day conduct. Accordingly, the Court granted TRO as to the threatened termination claim, but denied as to discipline and harassment.

***EEOC v. Peters' Bakery*, 2015 U.S. Dist. LEXIS 96432 (N.D. Cal. July 22, 2015).** In September 2013, the EEOC filed suit against Defendant alleging that it subjected an employee, Marcela Ramirez, to harassment and discrimination based upon her race/national origin and that Defendant had retaliated

against Ramirez after she engaged in protected activity of filing a charge with the EEOC. The EEOC also alleged that Defendant terminated Ramirez' employment in August 2011, but was forced to reinstate her after an arbitrator ordered Defendant to do so in a union grievance proceeding. On June 30, 2015, Defendant informed Ramirez that she was being fired, effective July 3, 2015. When asked why, Defendant allegedly stated that Ramirez "knew why," and that it did not have to give Ramirez "a fucking reason." *Id.* at *3. The EEOC filed an application for a temporary restraining order ("TRO") and an order to show cause for entry of a preliminary injunction on July 2, 2015. The Commission sought to enjoin Defendant from terminating, disciplining, threatening, or harassing Ramirez. The Court granted the TRO in part, thereby enjoining Defendant from terminating Ramirez pending a hearing on the motion for preliminary injunction. *Id.* at *4. On July 22, 2015, following oral argument, the Court granted the EEOC's request for a preliminary injunction in part, thereby enjoining Defendant from terminating Ramirez' employment pending resolution of the lawsuit. The Court first addressed Defendant's argument that the EEOC was seeking a mandatory injunction reinstating Ramirez, and thus the EEOC has a heavier burden. *Id.* at *6. The Court rejected this argument, noting it was not supported by the evidence because Ramirez had not been fired before the TRO of July 2, 2015. *Id.* at *6-7. Rather, the Court found that Ramirez had been given notice that she would be fired effective July 3, 2015. *Id.* at *7. Additionally, the Court held that even if the EEOC was requesting reinstatement, the EEOC would be entitled to such relief under the Court's broad authority to grant preliminary injunctive relief and due to the fact that reinstatement is a form of relief specifically provided for by Title VII of the Civil Rights Act of 1964. *Id.* at *8. The Court applied the four part test for a preliminary injunction set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Under this four part test, a Plaintiff seeking a preliminary injunctive relief must establish: (i) that he is likely to succeed on the merits; (ii) that he is likely to suffer irreparable harm in the absence of preliminary relief; (iii) that the balance of equities tips in his favor; and (iv) that an injunction is in the public interest. *Id*. at *5. The Court found that the EEOC satisfied its burden to establish each of these four elements with regard to the threatened termination, but not with regard to the harassment and discipline. *Id.* at *13. The Court found the EEOC established the first *Winter* factor – likelihood of success on the merits – because the EEOC submitted evidence that Defendant previously terminated Ramirez in August 2011 without cause, refused to comply with an arbitrator's order to reinstate her; used language on July 30, 2015 giving rise to an inference of improper motive; and gave no legitimate business reason for terminating Ramirez. *Id.* at *8. The Court also found that the EEOC satisfied the second factor – likelihood of irreparable harm – citing Ramirez' declaration, which stated that if she was fired, Ramirez would not have enough money to pay her mortgage, keep her children in private school, lose healthcare benefits, lose the positive relationships she developed with co-workers over the last 14 years working at Peters' Bakery, and lose her seniority in the union. *Id.* at *9. The Court also noted that terminating Ramirez may have a chilling effect on other employees who might wish to file charges with the EEOC and could interfere with the EEOC's mission. *Id.* at *9-10. As to the third and fourth *Winter* factors – the balance of equities and whether an injunction is in the public interest – the Court found that the equities tipped in the EEOC's favor. *Id.* at *10. The Court denied the EEOC's request for a preliminary injunction to enjoin discipline and harassment. *Id.* at *13. The Court noted that the EEOC did not present specific evidence regarding the irreparable harm Ramirez would suffer if the harassment and discipline was not enjoined. Id. Further the Court found the injunction would be hopelessly vague to the point of threatening Defendant's due process rights. *Id.* Accordingly, Plaintiff's application for a preliminary injunction was granted in part. *Id.* at *13-14.

***EEOC v. Placer Arc*, 2015 U.S. Dist. LEXIS 90736 (E.D. Cal. July 13, 2015).** The EEOC brought an action on behalf of a deaf employee, Homeyra Kazerounian, alleging that Defendant retaliated against her for seeking an accommodation on the basis of her disability and constructively discharged her in violation of the Americans With Disabilities Act ("ADA"). *Id*. at *2. Defendant was a not-for-profit organization that provided programs for the support, education, and well-being of individuals with intellectual and developmental disabilities, and Defendant hired Kazerounian as an instructional aide. *Id*. at *7-8. Defendant produced e-mails to Kazerounian noting and detailing her performance deficiencies, including that she: (i) failed to implement the training she received through an interpreter; (ii) failed to follow her daily schedule; and (iii) failed to effectively communicate with Defendant's clients. *Id*. at *12. In addition, one of Kazerounian's supervisors testified that she often needed to be led through her daily tasks, and needed more guidance than other staff members. *Id*. at *13. Kazerounian subsequently terminated her

employment because she felt that she might get fired since Defendant had given her negative feedback. Defendant moved for summary judgment, and the Court granted the motion in part. At the outset, the Court noted that in order to establish a *prima facie* case under the ADA, a Plaintiff must show that she was able to perform the essential functions of a job requirement. *Id*. at *17. Here, the essential functions included instructing classes in areas of general life skills, teaching independent living skills, and helping consumers to increase their communications skills. *Id*. at *18. Defendant contended that Kazerounian failed to perform her job duties. The Court found that the EEOC raised a triable issue as to Kazerounian's ability to perform her essential job duties with sworn declarations from five co-workers stating that she was "very good with clients," and a "great team member." *Id*. at *19-20. The Court observed that the Ninth Circuit has held that co-workers' testimony was relevant and probative in employment discrimination claims. *Id*. at *20. Accordingly, the Court concluded that the EEOC raised a genuine dispute of material fact as to Kazerounian's capability of performing the essential functions of her job. Defendant next sought summary judgment on the ground Kazerounian's requested accommodation of an ASL interpreter at every staff meeting was an undue hardship. *Id*. at *22. Defendant submitted declarations supporting its position that hiring Kazerounian a certified ASL interpreter posed a financial hardship. *Id*. at *23. The Court, however, noted that as Defendant had retained an interpreter for at least some staff meetings from 2005 to 2008, and hired Sheila Maas in part to serve as an interpreter, which undermined a showing of hardship. *Id*. Accordingly, the Court concluded that the EEOC had established a triable fact as to Defendant's undue hardship defense. The EEOC claimed that Defendant retaliated against Kazerounian when she filed an internal complaint and retained an attorney, who contacted Defendant in 2008 about her allegations of discrimination. Defendant argued that the EEOC failed to point to any causal link between Kazerounian's complaints and Defendant's allegedly adverse actions in March 2009. *Id*. at *28. The Court noted that the disciplinary write-up in March 2009, the letter in April 2009, and the subsequent warnings in September and October 2009 occurred after Kazerounian contacted an attorney in October 2008, and after she lodged an internal complaint in February 2009. *Id*. The Court remarked that although causation can be inferred from the temporal proximity, the fact that Kazerounian received negative performance feedback going back to 2007 showed that Defendant's actions were not a pre-text for discrimination. *Id*. at *30. Accordingly, the Court granted summary judgment to Defendant on the EEOC's retaliation claim. The Court however, denied summary judgment to Defendant on the EEOC's constructive discharge claim, finding a genuine dispute as to whether Defendant's failure to accommodate led to Kazerounian's resignation. *Id*. at *31.

***EEOC v. Placer Arc,* 2015 U.S. Dist. LEXIS 159585 (E.D. Cal. Nov. 25, 2015).** The EEOC brought an action on behalf of a deaf employee, Homeyra Kazerounian, alleging that Defendant retaliated against her for seeking an accommodation on the basis of her disability and constructively discharged her in violation of the Americans With Disabilities Act ("ADA"). *Id.* at *2-3. Defendant, a non-profit organization that provides programs for the support, education, and well-being of individuals with intellectual and developmental disabilities, hired Kazerounian as an instructional aide in 2005. During her first three years, Kazerounian worked at a facility under the supervision of certified sign language interpreters. Later, Defendant transferred her to another facility, and hired Sheila Mass as an instructional aide with the understanding that Mass would provide interpretation services to Kazerounian. *Id.* at *3. Kazerounian, however, found Mass' interpretation services unsatisfactory and left Defendant in May 2010. The EEOC alleged that Defendant did not reasonably accommodate Kazerounian's disability because it did not provide qualified sign language interpreters or other reasonable and affective accommodations after her transfer to new facility. *Id.* at *4. The EEOC also alleged that Defendant retaliated against Kazerounian for asserting her rights under the ADA, and that her work conditions became so intolerable that she was forced to resign. *Id.* Defendant moved for summary judgment, which the Court granted in part on the claim of retaliation in violation of the ADA. *Id.* at *4-5. Defendant then filed motions *in limine* seeking to exclude the EEOC's expert witness, Shana Williams, from offering an opinion about Kazerounian's functional ability to communicate in American Sign Language ("ASL") and in English. *Id.* at *5. Defendant argued that Williams' testimony was inadmissible because: (i) Williams' 2014 testing could not establish Kazerounian's communicative and cognitive skills during the time she worked at Defendant's facility between 2005 and 2010; (ii) Williams' opinions about the reasonableness of Defendant's accommodation in those years would be speculative because Williams lacked facts and data about Kazerounian's cognitive and language abilities between 2008 and 2010; and (iii) Williams' opinion about the deaf culture did not account for either

Kazerounian's immigration from Iran in 2000 or the differences between the Iranian deaf culture and the deaf culture in the United States. *Id.* at *13. Denying Defendant's motion, the Court found that Williams' opinions were reliable, despite her reliance on test results that post-dated Kazerounian's employment. *Id.* The Court noted that no evidence suggested that Kazerounian's communicative and cognitive abilities transformed between 2005 and 2014, or that she experienced head trauma, sinus conditions, or changes in her physical health or environment. *Id.* at *14. The Court found that Williams' opinions had a reliable factual basis because she read Kazerounian's deposition, spoke to Kazerounian, reviewed her job description, and considered other documents from Kazerounian's time at Defendant's facility. *Id.* at *15. Williams also considered the results of the tests she conducted and found that with certain specific accommodations, Kazerounian would likely have been able to perform the tasks listed in her job description. *Id.* Regarding Williams' comparison of the deaf culture in Iran and the U.S., the Court found that although Defendant's argument was plausible as a general matter, Defendant offered no evidence to illustrate the differences, and thus failed to show that Williams' testimony was unreliable or irrelevant. *Id.* at *16. Defendant also moved to exclude testimony by Lindy Hicks, a former employee, about her role in hiring Kazerounian, including inquiries about reasonable accommodations she would need to perform her job and other related topics. *Id.* at *18. The Court held that Hicks could offer testimony about Kazerounian's ability to perform the essential functions of an instructional aide, reasoning that if Hicks testified that Kazerounian could perform the essential functions of her job in 2007, it was more likely the EEOC would establish that Kazerounian could also perform those same essential functions in 2008. *Id.* at *21. Accordingly, the Court denied Defendant's motions *in limine*.

***EEOC v. Pioneer Hotel, Inc.,* 2015 U.S. Dist. LEXIS 6561 (D. Nev. Jan. 13, 2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 action alleging that charging party Raymond Duarte and a class of similarly-situated individuals suffered harassment constituting a hostile work environment on the basis of their national origin. During discovery, Defendant sought to depose the two EEOC investigators were responsible for conducting the investigation. The EEOC moved for a protective order seeking to prevent Defendant from deposing the investigators, which the Magistrate Judge granted. *Id*. at *3. Defendant filed an objection to the Magistrate Judge's order per Rule 72, which the Court remanded to the Magistrate Judge. Defendant contended that the Magistrate Judge's order was erroneous because after the order, the EEOC changed its position on the relevancy and admissibility of its Letter of Determination, which was created after the EEOC investigation. *Id*. at *3-4. The EEOC stated that the letter was irrelevant to the underlying charge of discrimination and thus it would not seek to use the letter as evidence at trial. *Id*. at *4. The Court, however, observed that the EEOC had not stated that it intended to offer the letter at trial and in support of forthcoming motions for summary judgment. *Id.* The Court noted that the EEOC's initial statement during the hearing that it would seek to enter the Letter of Determination as evidence was part of the Magistrate Judge's reasoning in granting the protective order. *Id*. Although the EEOC argued that offering the Letter of Determination into evidence in this action would not affect the Magistrate Judge's ruling, the Court concluded that only the Magistrate Judge could make such a determination. *Id*. Accordingly, the Court remanded Defendant's Rule 72 objection to the Magistrate Judge for further proceedings consistent with this order. *Id.*

(x) Tenth Circuit

***EEOC v. Beverage Distributors Co., LLC,* 780 F.3d 1018 (10th Cir. 2015).** The EEOC brought an action under the Americans With Disabilities Act ("ADA") alleging that Defendant withdrew its conditional offer of employment to applicant Michael Sungaila after it learned that he was legally blind. The EEOC proceeded to trial. Although the jury found that Defendant was liable for discrimination and that Sungaila did not pose a direct threat (thereby rejecting the employer's defense), the jury eventually awarded the EEOC a reduced back pay award, finding that Sungaila had failed to mitigate his damages. *Id*. at 1020. After considering the EEOC's post-trial motions, the District Court reinstated the full damage award, finding that Defendant had failed to prove as a matter of law that Sungaila failed to mitigate his damages, and also granted the EEOC's motion for a tax penalty off-set to compensate Sungaila for the additional tax liability resulting from the lump-sum award of back pay. *Id*. On appeal, Defendant argued that the direct threat instruction constituted reversible error, and that the District Court abused its discretion in awarding the tax off-set. *Id*. The Tenth Circuit reversed, finding that the direct threat jury instruction constituted reversible error. *Id.*

The Tenth Circuit, however, remarked that if the EEOC prevailed upon retrial, Sungaila could be entitled to a tax off-set. First, the Tenth Circuit agreed with Defendant that the direct threat instruction constituted reversible error because the instruction inaccurately conveyed the direct threat standard. *Id*. The Tenth Circuit noted that under the ADA, although an employer cannot discriminate on the basis of a disability, an employer may decide not to hire disabled individuals if they pose a "direct threat" to the health or safety of themselves or others. *Id*. Further, a "direct threat" involves a significant risk of substantial harm to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation. *Id*. at 1020-21. The Tenth Circuit found that the instruction was erroneous. *Id.* at 1022. While the first part of the instruction inaccurately stated that Defendant had to prove that Sungaila posed a direct threat, the second part of the instruction did not cure the error by directing the jury, without explanation, to consider the reasonableness of Defendant's belief. *Id*. The Tenth Circuit concluded that the jury might have relied on the erroneous direct threat standard. *Id.* Because the instruction and verdict form could have misled the jury on the standard, the Tenth Circuit reversed the order. *Id*. The Tenth Circuit, however, declined to address Defendant's argument that the evidence could have allowed the jury to find a failure to mitigate damages. *Id*. The Tenth Circuit reasoned that the District Court did not err in awarding a tax off-set because the award fell within the District Court's discretion. *Id*. at 2013. The Tenth Circuit observed that Sungaila obtained a lump-sum damage award that would increase his tax liability, and that the District Court acted within its discretion in compensating Sungaila for the added tax burden. *Id*. Accordingly, the Tenth Circuit concluded that the District Court did not err in awarding a tax off-set. *Id.*

***EEOC v. Blinded Veterans Association*, 2015 U.S. Dist. LEXIS 118730 (D. Colo. July 7, 2015).** The EEOC brought an action alleging that Defendant discriminated against two employees, Suzanne Matthews and Lazaro Martinez, on the basis of their age in violation of the Age Discrimination in Employment Act ("ADEA"). Defendant filed a motion to dismiss, arguing that: (i) the EEOC did not make a good faith attempt to conciliate, and (ii) the EEOC did not conduct independent investigations of the charges of discrimination at issue. The Court denied the motion. At the outset, the Court noted that § 7(b) of the ADEA requires that the EEOC should attempt to eliminate the discriminatory practice, and to effect voluntary compliance with the ADEA through conciliation before filing an action. *Id*. at *5-6. The Court observed that the text of the ADEA does not contain a clear statement that § 7(b)'s conciliation requirement was jurisdictional. *Id*. at *8. The Court noted that § 7(b) requires that the EEOC take certain actions before instituting any action under this section, but it does not indicate that the failure to comply deprives a Court of jurisdiction. *Id*. In addition, the Court noted that the legislative history of the 1978 amendments to the ADEA confirmed that conciliation was not a jurisdictional prerequisite to maintaining a cause of action under the act. *Id*. at *9. Moreover the Court reasoned that in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), the U.S. Supreme Court ruled that a private ADEA action may be stayed to allow an opportunity for conciliation and settlement, even if the EEOC has not begun conciliation efforts. *Id*. at *14. The Court remarked that *Holowecki* showed that conciliation was a non-jurisdictional prerequisite to the suit. *Id*. at *15. Accordingly, the Court concluded that the Defendant's motion was improper. The Court, however, remarked that if it ruled on Defendant's motion under the summary judgment standard, neither party would be prejudiced, and it would also give Defendant a benefit of the doubt to consider whether it was entitled to relief. *Id*. at *19-20. As the ADEA and Title VII of the Civil Rights Act of 1964 ("Title VII") contained similar language, the parties agreed that the standard of review used in Title VII also applied to the ADEA's conciliation requirements. *Id*. at *20. The Court observed that the EEOC communicated its claims to Defendant, allowed Defendant to respond, engaged in discussions, and decreased its requests for monetary relief in response to Defendant's counter-offers. *Id*. at *21-22. Defendant did not dispute these facts, but argued that the EEOC did not adhere to the intent of the conciliation requirement. Defendant argued that when the parties reached an impasse with respect to one of the employees' claims, the EEOC should have engaged in separate conciliation as to the other employees. *Id*. The Court rejected this argument, finding that it was undisputed that the EEOC engaged in conciliation efforts, and gave Defendant all opportunities to remedy the issues. *Id*. at *23. The Court concluded that this was sufficient to show that the EEOC satisfied its statutory duty to conciliate. *Id*. at *27. Defendant also contended that the EEOC failed to independently investigate the charges, and that an investigation was mandatory prerequisite to the action. Based on the records, the Court observed that the EEOC gathered information, conducted interviews, reviewed charges, and issued letters of determination based on the investigative

record. *Id*. at *28. The Court remarked that Defendant failed to point to any facts supporting its assertion that the EEOC failed to investigate. *Id*. at *31. Accordingly, the Court denied Defendant's motion to dismiss.

***EEOC v. BNSF Railway Co.*, 2015 U.S. Dist. LEXIS 3790 (D. Kan. Jan. 13, 2015).** The EEOC brought a disability discrimination action against Defendant under the Americans With Disabilities Act on behalf of a job applicant who was denied employment after a medical examination revealed that because of a physical impairment in one hand, he was unable to perform the essential functions of the job. The EEOC and Plaintiff-Intervener jointly moved to compel Defendant to answer the request for admissions filed by them, which the Court granted in part. *Id.* at *1. First, Defendant objected to the timeframe as to several requests for information concerning job requirements, which included periods beyond Plaintiff-Intervener's employment. The EEOC argued that such evidence would be relevant to a determination of whether job requirements were or were not essential. *Id.* at *2. The Court observed that parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, and that discovery ordinarily should be allowed unless it is clear that the information sought can have no possible bearing on the subject matter of the action. *Id.* The Court opined that these questions were within the scope of discovery, and thus, granted the motion as to these objections. *Id.* at *4. Defendant also objected as to the relevance of two requests that asked for an admission that certain documents produced in discovery were not provided to the EEOC during its administrative investigation. The Court remarked that neither the EEOC's investigation nor its conclusions were relevant in this case, and observed that it had previously denied similar discovery. *Id.* Because the EEOC failed to demonstrate the relevance of these requests, the Court sustained Defendant's objections and struck the answers. *Id.* The Court observed that if an answer is not admitted, the answer must specifically deny the request or state in detail why the answering party cannot truthfully admit or deny it. *Id.* Although the EEOC challenged certain qualifications added to Defendant's admission of requests, the Court stated that they were not good faith qualifications as required by the rule. *Id.* at *5. Thus, each of those requests remained admitted and the Court remarked that it would need to decide whether the qualification comments were irrelevant surplusage or should be included with the response if submitted to the jury. *Id.* Accordingly, the Court granted in part and denied in part Plaintiffs' joint motion to compel Defendant to answer its request for admissions. *Id.*

***EEOC v. BNSF Railway Co.,* 2015 U.S. Dist. LEXIS 110830 (D. Kan. Aug. 21, 2015).** The EEOC brought an action alleging that Defendant violated the Americans With Disabilities Act ("ADA") by discriminating against a job applicant on the basis of the applicant's actual or perceived disability and by revoking a conditional offer of employment based on the results of a post-offer medical evaluation. *Id.* at *1-2. The EEOC also alleged that Defendant violated the ADA by using the result of the pre-employment medical examination to disqualify the applicant from the position. The job applicant intervened in the action alleging additionally that Defendant failed to engage in an interactive process with him to assess adequately his abilities to perform the job and to address Defendant's safety concerns. *Id.* at *2. Defendant moved for summary judgment on all claims, which the Court granted. *Id.* While it was undisputed that the job applicant had a physical impairment and functional limitations relating to his right hand, there was no evidence in the record that his impairment prevented him from doing activities that were of central importance to most people's daily lives. *Id.* at *14-16. The Court noted that the job applicant's impairment did not substantially limit his ability to perform manual tasks, and he had admitted that he could perform tasks with his right hand that involved holding, grasping, turning and pulling; and he did not need any assistance with any activities of daily living. *Id.* at *21. The Court thus held that the EEOC failed to present sufficient evidence to permit a jury to find a severe restriction in the job applicant's ability to perform a range of manual tasks, and thus could not satisfy the rigorous standard for proving an actual disability under the ADA. *Id.* at *23-24. The EEOC also contended that Defendant believed, based on the applicant's impairments to his right arm and hand, that he was substantially limited in the major life activities of performing manual tasks and working. *Id.* at *25. In support of its argument, the EEOC contended that Defendant's medical director had reported that the applicant's impairment prevented him from firmly gripping tools with both hands and from climbing ladders in compliance with an industry-wide three-point contact safety rule, which showed that Defendant regarded the applicant as substantially limited in working those jobs. *Id.* at *31. The Court, however, declined to find that a perceived inability to grip

tools firmly was sufficient to support a claim that Defendant regarded the job applicant as substantially limited in the major life activity of working. *Id.* at *35. Similarly, the Court declined to find that the statements of Defendant's medical director linked to the applicant's impairment relative to the job tasks of climbing on and off locomotives was sufficient to create a factual issue on whether Defendant regarded him as substantially limited in performing a class of jobs or a broad range of jobs in various classes. *Id.* at *38-40. The Court found no evidence to conclude that Defendant regarded the job applicant as significantly limited in his ability to perform any job other than the locomotive electrician job because of the safety concerns implicated by his perceived inability to comply with Defendant's three-point contact rule as it related to that job. *Id.* at *42. According to the Court, the evidence reflected only that Defendant, at most, believed that the job applicant's impairment disqualified him from any job which required the ability to comply with its three-point contact rule, but not that he would be disqualified from any other jobs. *Id.* at *50. Because no reasonable jury could conclude that Defendant believed that the job applicant's impairment substantially limited his ability to work in a class of jobs or a broad range of jobs in various classes, and because the EEOC failed to establish that the job applicant was a qualified individual with a disability or that an accommodation was necessary for the job applicant or possible with respect to Defendant's medical evaluation process, the Court concluded that the EEOC failed to establish a *prima facie* case of employment discrimination under the ADA. *Id.* at *50-57. Accordingly, the Court granted Defendant's motion for summary judgment. *Id.* at *58.

***EEOC v. CollegeAmerica Denver, Inc.,* 2015 U.S. Dist. LEXIS 127808 (D. Colo. Sept. 21, 2015).** The EEOC brought an action alleging that Defendant denied its former campus director, Debbi Potts, and other employees the right to exercise their rights under the Age Discrimination in Employment Act. The EEOC also alleged that Defendant retaliated against Potts by filing a state court action against her. After the Court ruled on the dispositive motions, only the retaliation claim remained. *Id*. at *2. The EEOC claimed that Potts exercised her statutorily-established right to file a charge of discrimination and that Defendant retaliated against her for doing so by filing the state lawsuit against her. Defendant filed a motion to compel the EEOC to provide Defendant its responses to its request for production of documents ("RFP") numbers 8, 9, and 10, which the Court granted. As to RFP numbers 9 and 10, Defendant limited the scope to information contained in Potts' Facebook and LinkedIn messages and in RFP number 8, Defendant limited the scope of the responsive messages from September 1, 2012 to March 21, 2013. *Id.* at *2. Defendant argued that the information requested was relevant to the EEOC's remaining claim and may lead to the discovery of admissible evidence. Defendant contended that Potts' e-mails and other social media communications could address relevant issues in the case. *Id.* at *5. The Court considered the arguments of the parties and held that the information that Defendant sought was relevant, discoverable, and may lead to admissible evidence at trial. *Id.* at *8. Accordingly, the Court granted Defendant's motion to compel.

Editor's Note: The Court's ruling manifests the ever increasing frequency of discovery into social media postings in EEOC litigation.

***EEOC v. CollegeAmerica Denver, Inc.,* 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015).** The EEOC brought an action alleging that Defendant discriminated against Debbi Potts, an employee, in violation of the Age Discrimination in Employment Act ("ADEA") and sought to use an unlawful and invalid waiver to interfere with Potts' protected rights under the ADEA. *Id.* at *5. The EEOC's letter of determination requested Defendant to revise its "form severance agreement" to comply with the ADEA and make it clear that employees retain the right to file charges and cooperate with the EEOC. *Id.* at *5-6. In response, Defendant sent a letter to the EEOC in which it noted the requested changes to its "form severance agreement" and clarified that the agreement Potts signed following her resignation was distinguishable from its form severance agreements ("separation agreements"). *Id.* at *6. Defendant eventually moved to dismiss the EEOC's claim that the separation agreements that Defendant provided to the EEOC in connection with the EEOC's investigation of Potts' charge of discrimination denied employees other than Potts the full exercise of their rights under the ADEA and interfered with the statutorily assigned responsibility of the EEOC to investigate charges of discrimination under the ADEA. *Id.* at *1-2. The Court granted Defendant's motion, finding that it had no jurisdiction over the claim as a result of the EEOC's

failure to satisfy the ADEA requirements of notice and conciliation. *Id.* at *2. The EEOC moved to reconsider the dismissal based on the subsequent U.S. Supreme Court ruling in *Mach Mining, LLC v. EEOC,* 135 S. Ct. 1645 (2015), which considered whether and to what extent the EEOC's efforts at conciliation under Title VII of the Civil Rights Act of 1964 may be reviewed. The Court denied reconsideration because it ruled that the dismissal of the EEOC claim was proper. The Court noted that, after receiving Defendant's response to the EEOC's letter of determination, there was no evidence that the EEOC revised or supplemented the letter or otherwise notified Defendant that the scope of its investigation had expanded beyond Potts' charge of discrimination to include the separation agreements. *Id.* at *6. Further, there was no evidence that the parties addressed the separation agreements at their conciliation meeting or that EEOC provided the requisite notice to Defendant that the agreements were part of the EEOC's investigation. *Id.* at *7. The Court therefore concluded that the EEOC failed to satisfy both the notice and conciliation requirements of the ADEA, and it efforts with respect to the separation agreements remained inadequate even under the standards set forth in *Mach Mining. Id.* at *8. In addition, the Court found that even if it had jurisdiction, the EEOC's claim as to the separation agreements failed as a matter of law. *Id.* at *12-13. The Court noted that Potts did not sign any of the separation agreements that formed the basis of the EEOC's claim, and the EEOC failed to identify any instance in which the waiver provisions in the separation agreements affected its rights and abilities to enforce the ADEA for the benefits of any other of Defendant's employee or to justify interfering with an employee's right to file an EEOC charge or participate in an EEOC investigation or proceeding. *Id.* at *12. Accordingly, the Court denied the EEOC's motion for reconsideration of the dismissal order.

***EEOC v. CollegeAmerica Denver, Inc.*, 2015 U.S. Dist. LEXIS 163816 (D. Colo. Dec. 3, 2015).** The EEOC brought an action alleging that Defendant filed a retaliatory lawsuit against an employee, Debbi Potts, for filing a charge of discrimination with the EEOC alleging violations of the ADEA. The EEOC filed a motion to compel Defendant to respond fully to the EEOC's interrogatories and request for production as to its electronically-stored information, which the Court granted in part. The Court overruled Defendant's objections to the EEOC's discovery, finding that Defendant only responded in a generic fashion as to its information technology team. The Court granted the EEOC's motion in part, and directed Defendant to provide specific names and titles. *Id*. at *3-4. As to the remaining disputes, the Court found that Defendant has responded completely, and sustained the objections. *Id*. at *4.

***EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 32827 (D. Colo. Mar. 17, 2015).** The EEOC brought an action on behalf of Somali, Muslim, and black workers at Defendant's meat packaging plant, for alleged violations of Title VII of the Civil Rights Act of 1964. The EEOC asserted several pattern or practice claims alleging discriminatory harassment, disparate treatment, denial of religious accommodation, retaliation, and discipline and discharge. *Id*. at *28. The Court ordered to conduct trial in two phases: in Phase I EEOC would present its claim that Defendant engaged in a pattern or practice of denial of religious accommodation, retaliation, and discipline and discharge, and in Phase II EEOC would present claims for hostile work environment and pursue individual damages for claims presented in Phase I. *Id*. at *29. The Court also granted the EEOC's request to bifurcate discovery, and entered a scheduling order governing Phase I. Section 8(d)(2) of the scheduling order specifically provided deadlines for the parties to identify witnesses. *Id*. at *31. Defendant deposed 103 witnesses who were not identified within the deadlines stipulated in § 8(d)(2). Accordingly, the Court struck those witnesses as they were not identified pursuant to § 8(d)(2). *Id*. at *32. Defendant then moved to amend the scheduling order, and sought leave to identify those witnesses after the pre-discovery deadline, which the Court granted. The Court granted Defendant's motion. Defendant argued that the Court misapprehended its position because the Court treated the disclosures at issue as identification of witnesses made pursuant to § 8(d)(2) or Rule 26. Defendant maintained that permitting it to list witnesses would be consistent with the unique features of this case, including the fact that EEOC itself served supplemental witness disclosures without complying with § 8(d)(2). Defendant also offered the declaration of its counsel Heather Vickles and attached a variety of exhibits purporting to show how each witness was identified during Defendant's investigation into the incidents at issue in this litigation. *Id*. at *39. The EEOC argued that Defendant failed to show a good cause for the amendment. At the outset, the Court noted that Rule 16(b) allows for amendment of scheduling order deadlines for good cause and with the judge's consent. *Id*. at *43. The Court observed

that through the Vickles declaration and the chart, Defendant offered evidence that it did not know the details of specific witnesses' testimony and could not identify by the § 8(d)(2) deadline every specific person or important subject area that would become significant during the course of the depositions and require responsive witnesses. *Id*. at *44. Vickles explained that as the depositions continued, Defendant continued to investigate allegations in testimony, particularly certain inconsistencies that were becoming apparent, or new information about people than what had been provided in previously produced documents. *Id*. The Court observed that Vickles also explained that after the parties made the § 8(d)(2) witness identification, new topics became important or increased in importance and that, as a result, Defendant continued to investigate and identify additional witnesses. *Id*. at *46. These topics included how other companies accommodated religious prayer breaks, Defendant's pre-suit internal investigation of the Muslim worker's complaints, and workplace conduct on the production line. *Id*. The Court accordingly found that Defendant showed good cause to amend the Phase I witness list under § 8(d)(2) of the scheduling order. *Id*. Accordingly, the Court granted Defendant's motion to amend the scheduling order to include the 103 witnesses.

***EEOC v. JBS USA, LLC,* 2015 U.S. Dist. LEXIS 93244 (D. Colo. July 17, 2015).** The EEOC brought an action alleging that Defendant, JBS USA, LLC, discriminated against its Muslim employees at its Colorado beef processing facility on the basis of religion by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying reasonable religious accommodations in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *28. The issues in the case started during Ramadan in 2008, when Muslim employees requested that Defendant accommodate their need to leave the production line to pray at or near sundown, and Defendant refused, leading to suspension and termination of a large number of Muslim employees. *Id.* at *27. On August 8, 2011, the Court bifurcated the case wherein Phase I proposed to address the EEOC's religious accommodation and retaliation and discrimination claims. *Id.* Defendant then moved for summary judgment, arguing that the U.S. District Court for the District of Nebraska's dismissal of a similar action brought by Muslim employees at Defendant's Nebraska plant collaterally estopped the EEOC from re-litigating the issues. Defendant argued that the evidence relevant to the EEOC's proposed accommodations theory and Defendant's undue hardship defense in both cases was virtually identical. *Id.* at *63. While granting summary judgment to Defendant, the Court in Nebraska had ruled that Defendant's termination of 80 Muslim employees as a one-time event was insufficient as a matter of law to establish a pattern or practice of unlawful termination or retaliation. *Id.* at *54-55. The Court in Nebraska had also found that the proposed accommodations would create undue hardship to Defendant as uneven work periods and shorter work periods would place a greater than *de minimis* burden on non-Muslim co-workers. *Id.* at *56. Accordingly, in this case, the Court denied Defendant summary judgment, finding differences in the two plants. The Court opined that Defendant failed to establish that the factual differences between this action and the Nebraska case were legally insignificant. *Id.* at *68-69. The EEOC identified multiple differences between the Colorado and Nebraska plants, including that over-crewing occurred at higher levels in Colorado, which meant that, when combined with other measures, it could have effectuated the unscheduled break accommodation at the Colorado Plant without undue hardship. *Id.* at *64. The evidence also showed that staffing levels differed between the plants, and the collective bargaining agreement ("CBA") in operation at the Colorado plant, unlike the Nebraska CBA, had a larger time window in which management could schedule breaks during the shift. *Id.* at *65-66. Further, the Nebraska case was premised on transforming a rolling meal break into a mass break at a different time, whereas Plaintiffs here did not request an additional mass break but asked that the normal rolling meal break be moved to an earlier time during Ramadan, which did not implicate additional costs, food safety concerns, or overcrowding issues. *Id.* at *67. Moreover, as the EEOC was not permitted to present evidence related to the Colorado plant in the Nebraska case, the Court concluded that the EEOC was denied a full and fair opportunity to litigate the undue hardship with respect to the Colorado plant. *Id.* at *69. Defendant also failed to make any meaningful attempt to establish the identity of issues with respect to the EEOC's retaliation and discrimination claims. The Court held that the ruling in Nebraska could not have "actually and necessarily determined" the question of whether the events of Ramadan 2008 constituted a pattern or practice of retaliation or discrimination as a matter of law. *Id.* at *72-73. The Court therefore ruled that the EEOC was not collaterally estopped in litigating the claims raised in this action. Because a genuine dispute of material fact remained as to the issue of the

reasonableness of the EEOC's proposed accommodations theory, the Court denied Defendant's motion for summary judgment.

***EEOC v. Jetstream Ground Services, Inc.,* 2015 U.S. Dist. LEXIS 131386 (D. Colo. Sept. 29, 2015).** Defendant had a cabin cleaning contract with United Airlines at Denver International Airport. Defendant offered job interviews to employees of its predecessor contractor. *Id.* at *3-4. Defendant used several criteria in its hiring process, one of which was the applicant's willingness to wear a gender neutral uniform of pants, shirt, and hat. *Id.* at *8. Five Muslim women of Ethiopian or Somali nationality ("Interveners"), applied for the position of aircraft cleaner, but were not offered employment. The Interveners filed charges of discrimination with the Colorado Civil Rights Division, alleging that Defendant discriminated against them on the basis of their sex (female) and religion (Muslim), and denied them the religious accommodations of wearing a hijab to cover their hair, ears, and neck, and of wearing long skirts to cover the form of their bodies. *Id*. at *3. After the charges were filed, Jetstream amended its uniform policy "based on legal issues regarding the burka headgear" to allow secured headscarves within specifications for dimension and color. *Id.* at *7. The Colorado Civil Rights Division transferred the charges to the EEOC, which broadened its investigation through a series of requests for information. On August 29, 2012, the EEOC issued a letter of determination as to each Intervener's charge, stating that it had found reasonable cause to believe Jetstream had violated Title VII of the Civil Rights Act of 1964 by: (i) refusing to provide Interveners and a "class" of other female Muslim employees or applicants a reasonable accommodation based on their religion; (ii) refusing to hire Interveners "and others like" them for the position of aircraft cleaner based on sex or religion; and (iii) by retaliating against them for engaging in protected activity. *Id.* at *9. A number of conciliation proposals were exchanged between the EEOC and Jetstream, and the parties met once. *Id.* at *11. During the conciliation process, the EEOC identified two other women it characterized as "aggrieved," and submitted a conciliation proposal including: (i) a lump sum demand for $775,000 in damages; (ii) the creation of a settlement fund of $436,500 to be paid to other aggrieved individuals identified by the EEOC in the course of its investigation; and (iii) Defendant's development of a plan for accommodating deviations from its uniform policy. Subsequently, the EEOC reduced its demand twice. *Id*. Defendant, however, offered $75,000 for back pay and compensatory damages, and conciliation was terminated. *Id.* at *12. The EEOC subsequently brought its lawsuit against Defendant on August 20, 2013. In the lawsuit, the EEOC also asserted individual claims on behalf of the two "aggrieved" individuals who had been employed by Defendant and who had not filed charges. On October 13, 2014, Defendant made offers of full-time employment to Interveners, stating that the Interveners "may wear a headscarf at work that meets their religious requirements but does not present safety risks," but also requiring that they "wear pants at work, as they claim they are willing to do." *Id.* at *20. Defendant filed a motion for summary judgment arguing that: (i) the EEOC failed to satisfy its pre-suit conciliation obligations; (ii) the claims of Interveners Oba and Haji were deficient for various reasons; and (iii) the damages alleged were limited by Defendant's offers of employment to the Interveners. The EEOC filed a cross-motion for summary judgment regarding Defendant's defenses of exhaustion of administrative remedies and prerequisites, statute of limitations, waiver, estoppel and laches, and undue burden. *Id.* at *2. The Court granted and denied each motion in part. Defendant sought summary judgment against the EEOC on the basis of its failure to meet its pre-suit conciliation obligation. The Court rejected Defendant's arguments that the EEOC did not conduct a "sincere and reasonable conciliation" by negotiation a fund for aggrieved individuals the EEOC had not yet identified, and that the EEOC acted in bad faith by making an "unsubstantiated" lump sum demand rather than individual demands for each Intervener. *Id*. at *32. Relying on the recent decision of the U.S. Supreme Court in *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645, 1655-56 (2015), the Court reasoned that the scope of its judicial review of the EEOC's conciliation efforts was "narrow." *Id*. The Court further determined that the EEOC need only show that it endeavored to conciliate, that the EEOC is not required to engage in any specific steps or measures in its conciliation process, and that it is up to the EEOC to decide when conciliation has failed. *Id.* at *31-33. The Court then turned to Defendant's motion for summary judgment on the EEOC's claims for Amina Oba, an employee who never requested accommodation. Co-workers observed Oba change from her headscarf and long skirt to the company's uniform while at work, and who subsequently was laid-off. Relying on *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031 (2015), the Court determined that an employee need only show that his or her need for accommodation was a motivating factor in the employer's decision. *Id.* at *36. Denying

summary judgment on the EEOC's claims for disparate treatment and discrimination, the Court ruled there was a triable issue of fact as to whether Defendant knew "or, at the very least, suspected" that Oba desired an accommodation. *Id*. at *39. Turning to the EEOC's claim for retaliation, which requires an employee to engage in "protected activity" under Title VII to be actionable, the Court considered "as a matter of first impression" whether Oba engaged in protected activity merely by wearing religious clothing on the employer's premises but during her breaks. *Id.* at *50. On this issue, the Court granted Defendant summary judgment on the grounds that Oba did not actually convey to Defendant any concern about unlawful practices. *Id*. at *52. Regarding the EEOC's individual claims for Milko Haji, who allegedly had her hours reduced on account of her religion and desire to wear a hajib and pants, the Court observed that the EEOC had failed to accurately establish Haji's actual start date at Defendant, limiting the EEOC's provable loss to eight hours of pay. Finding this potential amount of loss to be "*de minimis*," the Court granted Defendant summary judgment on the EEOC's claims for discrimination, failure to accommodate, and retaliation. *Id.* at *54. Finally, the Court rejected Defendant's contentions that the EEOC's claims for Oba should be dismissed because Oba had not filed a charge and not exhausted her administrative remedies, on the grounds that the EEOC has enforcement power to bring suit in its own name on behalf of others. *Id*. at *62. In rejecting Defendant's motion for summary judgment as to damages, the Court observed that only "unconditional" offers of employment could end on-going liability for back pay. *Id*. at *70. Accordingly, the Court found there was a triable issue as to whether a reasonable person would have rejected the terms of Defendant's offers of employment. *Id.* The Court then addressed the EEOC's cross-motion for summary judgment. Finding that Defendant, through expert evidence, raised a triable issue of fact as to whether wearing a long skirt climbing steps constituted a "task interference" that could increase the risk of injury, the Court denied the EEOC's motion for summary judgment regarding Defendant's defense of undue hardship in accommodating long skirts in the workplace. However, based on Defendant's own actions in amending its policy to allow hijabs to specifications and making offers of employment that conceded wearing hijabs on-duty, the Court granted summary judgment to the EEOC regarding the defense of undue hardship in allowing hijabs in the workplace. *Id*. at *82. The Court further granted summary judgment to the EEOC on Jetstream's defenses of failure to exhaust administrative remedies, statute of limitations, waiver, and estoppel.

***EEOC v. Patterson-UTI Drilling Co. LLC*, Case No. 15-CV-600 (D. Colo. Mar. 24, 2015).** In this case, the EEOC received a number of charges of discrimination filed by employees and former employees of Defendant, a Texas-based oil and gas drilling company, alleging discrimination based on race or national origin. The EEOC concluded that there was reasonable cause to believed that Defendant engaged in nationwide discrimination against its minority employees. On March 24, 2015, the EEOC filed a lawsuit against Defendant, alleging that individuals of Hispanic, Latino, African-American, American Indian, Asian, and Pacific Islander race and/or national origin were subject to harassment, a hostile work environment, and disparate treatment. Specifically, the EEOC alleged that Defendant's minority employees were subject to racial and ethnic slurs, jokes, and comments and verbal harassment and intimidation. The EEOC further alleged that Defendant's minority employees were relegated to lower-level positions, were denied training, and were subject to disparate treatment in discipline. In addition, the EEOC alleged that Defendant retaliated against employees who complained about discrimination or harassment. The EEOC asserted that Defendant engaged in this prohibited conduct on a nationwide basis. Defendant and the EEOC entered into a settlement on the same day the Complaint was filed. To that end, the parties filed a proposed consent decree with the Court. Under the terms of the settlement, Defendant agreed to pay $12,260,000 to a settlement administrator to provide compensation to Defendant's purportedly aggrieved minority employees. Such compensation will be available to any minority employee who worked for Defendant from January 1, 2006, to the date the proposed consent decree is entered. In addition to agreeing to provide monetary relief, Defendant also consented to wide-ranging equitable relief. Among other things, Defendant agreed to be enjoined from engaging in any employment discrimination practice which discriminates on the basis of race or national origin. It also agreed to develop new equal employment opportunity policies and to annually train its employees on its equal employment opportunity policies. It also agreed to create a Vice President position dedicated implementing the consent decree and ensuring Defendant's employees were protected from unlawful discrimination. The Court accepted and approved the consent decree.

***EEOC v. PJ Utah LLC,* 2015 U.S. Dist. LEXIS 51928 (D. Utah April 3, 2015).** The EEOC brought an action alleging that Defendants failed to accommodate the charging party, Scott Bonn, who had Down's Syndrome, in violation of the Americans With Disabilities Act. Bonn sought leave to intervene into the action, and Defendants moved to compel arbitration. The Court denied Bonn's leave to intervene and granted Defendants' motion to compel arbitration. *Id.* at *2. At the outset, the Court observed that Bonn's mother, who was also his legal guardian, had executed an arbitration agreement with Defendants on Bonn's behalf at the beginning of his employment. *Id*. The Court held that Bonn's mother, as a guardian of a developmentally disabled teenage son, had the power to execute the agreement, and therefore Bonn was bound to the arbitration agreement. *Id*. The Court noted that in *EEOC v. Woodmen of the World Life Insurance Society*, 479 F.3d 561 (8th Cir. 2007), the Eighth Circuit found that an employee has a right to intervene in a EEOC enforcement lawsuit, but the employee also has a right to execute a contract to arbitrate his or her claims, which is enforceable in the context of an EEOC lawsuit. *Id*. at *2-3. Similarly, the Court held although Bonn had a right to intervene into this action, he contracted with Defendant to arbitrate his claims. *Id*. Accordingly, the Court denied Bonn's motion for leave to intervene into the action, and ordered him to submit his claims to arbitration. *Id.* at *3.

***EEOC v. Safia Abdulle Ali,* 2015 U.S. Dist. LEXIS 131386 (D. Colo. Sept. 29, 2015).** The EEOC brought an action alleging that Defendant, JetStream Ground Services, Inc., discriminated against female Muslim cabin cleaners on the basis of their religion when it failed to hire them based on their request to wear hijabs and long skirts. *Id.* at *1-2. In December 2008, Defendant assumed overnight and daytime cleaning operations from AirServ Corp. ("AirServ") and interviewed AirServ's prior employees for its new operations. *Id.* at *3. Defendant's uniform policy required cabin cleaners to wear pants while working, and five of AirServ's female cabin-cleaning employees filed EEOC charges claiming that Defendant did not hire them during the transition because their religious beliefs required them to cover their hair, ears, and neck with a hijab. *Id.* at *4. The EEOC issued a letter of determination notifying Defendant that it had reasonable cause to believe that Defendant had violated Title VII of the Civil Rights Act of 1964 in refusing to provide the female employees a reasonable accommodation based on their religion. *Id.* at *15. The EEOC initially proposed a settlement of $775,500, as well as the creation of a $436,500 settlement fund, which would be paid to other "aggrieved individuals" identified by the EEOC in the course of its investigation. *Id*. at *18-19. The EEOC concluded that the conciliation was unsuccessful after Defendant terminated the negotiations by making a last offer to pay $75,000 to cover the employees' back pay and compensatory damages. *Id.* at *19. The EEOC then filed its complaint on August 30, 2013. Defendant argued that the EEOC failed to satisfy its conciliation requirements and filed a motion for summary judgment. *Id.* at *31-32. Defendant contended that the EEOC's negotiations on behalf of employees evidenced its bad faith because the EEOC did not negotiate in an individualized manner, but rather demanded an unsubstantiated lump sum of $755,500, while rejecting Defendant's individualized offers, and because the EEOC demanded that Defendant reinstate all other aggrieved individuals that it could identify. *Id.* at *32. The Court denied summary judgment, finding that Defendant's objections to the EEOC's efforts all related to the substantive terms of the bargaining and not to the process of conciliation, and it was undisputed that the EEOC engaged in substantive conciliation efforts by exchanging multiple settlement offers and in meeting in person with Defendant. *Id.* at *32-34. Defendant also moved for summary judgment on claims asserted by the EEOC as to two other employees, Milko Haji and Amina Oba, whom the EEOC identified during discovery as "aggrieved individuals." *Id*. at *35. The EEOC had claimed that these two women were laid-off or given reduced hours because of their religious beliefs. *Id.* at *25-26. Although it was undisputed that Plaintiff Intervener Oba never requested an accommodation, did not discuss her religion during her interview, and always wore pants and never wore a hijab while working for Defendant, the Court agreed that there was sufficient evidence to create a dispute issue of fact as to whether Defendant's decision-makers knew or suspected that Plaintiff Intervener Oba desired an accommodation and laid her off to avoid giving her one because she consistently wore religious garments in the workplace during non-work hours, including during work breaks and when she arrived and left for the day. *Id.* at *39-40. The Court, however, dismissed Plaintiff Intervener Haji's claim finding that her *de minimis* reduction in hours over the course of only three shifts did not qualify as an adverse action. *Id.* at *61. Accordingly, the Court granted in part and denied in part Defendant's motion for summary judgment. *Id.* at *95.

***EEOC v. Smokin' Spuds, Inc.,* 2015 U.S. Dist. LEXIS 48805 (D. Colo. April 14, 2015).** The EEOC brought an action alleging that Defendants engaged in unlawful discrimination by creating a hostile work environment based on sex and retaliating against women who complained about or otherwise opposed Defendants' alleged discrimination, or who participated in an investigation or other proceeding under Title VII of the Civil Rights Act of 1964. Three interveners moved to intervene as Plaintiffs in the action, which the Court granted. *Id.* at *6-7. Defendant Farming Technology, Inc. ("FTI") argued that the proposed interveners should not be permitted to intervene because they failed to exhaust their administrative remedies against FTI specifically. *Id*. at *3. FTI maintained that any claims against it were unexhausted because the proposed interveners' EEOC charges each identified Defendant Smokin' Spuds, Inc. d/b/a MountainKing Potatoes ("Smokin' Spuds") as the sole employer and only claimed that a "MountainKing" employee subjected the proposed interveners to a hostile work environment. *Id*. at *4. The Court found that the EEOC's amended complaint alleged that FTI and Smokin' Spuds both did business as "MountainKing Potatoes," operated as a single integrated and/or joint employer, and used the trade name "MountainKing Potatoes" to refer to the branded potatoes they grew and packaged. *Id*. at *5. Although Defendants denied these allegations, they failed to demonstrate that FTI did not operate under the trade name "MountainKing Potatoes." *Id*. Thus, the Court found that the proposed interveners' reference to "MountainKing Potatoes" in their respective charges of discrimination constituted an informal reference to FTI, which was sufficient to exhaust their administrative remedies with respect to FTI. *Id*. at *6. Accordingly, the Court allowed the proposed interveners to intervene as Plaintiffs. *Id.* at *6-7.

***EEOC v. Unit Drilling Co.,* 2015 U.S. Dist. LEXIS 41441 (N.D. Okla. Mar. 31, 2015).** The EEOC brought an action on behalf of female job applicants alleging that Defendant wrongfully denied them employment in violation of Title VII of the Civil Rights Act of 1964. Defendant operated drilling rigs in various locations in the United States, and the intervening Plaintiff, Patsy Craig, applied for rig position in September 2008. Defendant did not hire Craig, and allegedly told her that the men on the rig "would look at her instead of working." *Id.* at *5. Another rig manager indicated that Defendant did not have housing for her, and a hiring manager stated that Defendant could not afford to provide her housing. *Id.* Defendant allegedly denied employment to four other female applicants, stating that it could not accommodate females working on a rig, and that one of them was "too pretty" and that the men "wouldn't get anything done" with her around. *Id.* at *8-10. Craig filed a discrimination charge, and the EEOC's investigation became national in scope, resulting in this action. Defendant moved for partial summary judgment as to the four applicants who did not intervene, arguing that the EEOC could not establish a *prima facie* case of discriminatory failure to hire. The Court denied Defendant's motion. The Court found that the EEOC could establish that Defendant's legitimate non-discriminatory reason of hiring more qualified candidates was a pre-text for discrimination. The Court noted that the EEOC had demonstrated inconsistencies in the reasons cited by Defendant for refusing to hire the applicants. *Id.* at *22-23. Defendant originally told Craig that having a woman on a rig would distract the male employees. Defendant later told Craig that it could not hire her because it did not have any housing available for women, and now claimed that it hired more qualified candidates. *Id.* at *23. The Court found that, in light of these conflicting reasons, a jury could reasonably conclude that Defendant's legitimate, non-discriminatory reason was simply an after-the-fact justification for its discrimination. *Id.* The Court further determined that the EEOC had created a question of fact as to whether Defendant hired more qualified men than female applicants. The parties disagreed as to the proper pool of comparators. Defendant argued that the pool should be limited to only individuals who applied at the same locations and were hired within 30 days. *Id.* at *24. The EEOC, however, submitted evidence that Defendant had no uniform process for removing an application from consideration after 30 days and that the hiring officials often disregarded the "location where applying" field on the application. *Id.* According to the Court, this evidence left the identities and qualifications of the comparators uncertain, and thus an issue of fact remained as to Defendant's offer of a legitimate, non-discriminatory reason. *Id.* The Court also held that the EEOC's statistical evidence was probative of pre-text because it suggested a "gross disparity in hiring practices" that could ultimately support findings of individual discrimination as to each claimant. *Id.* at *25-27. The evidence showed that, despite applications by females, Defendant did not hire any females out of the 1,600 floor hands hired during the two-year period across three divisions. *Id.* at *27. The Court stated that, "[w]hen the numbers are this stark and the job description itself does not

render females inherently less qualified, the statistics can be probative of individual discrimination." *Id.* Accordingly, the Court denied Defendant's motion for summary judgment.

(xi) Eleventh Circuit

***EEOC v. AJ 3860, LLC*, 2015 U.S. Dist. LEXIS 62099 (M.D. Fla. May 12, 2015).** The EEOC brought an action against Defendant alleging employment discrimination and retaliation. After the EEOC filed its second amended complaint ("SAC"), Defendant requested for extension of time to respond to the SAC as its counsel moved to withdraw from the case on the basis of irreconcilable differences between counsel and client. *Id*. at *2. The Court granted the motion to withdraw, asked Defendant to file a notice of appearance of new counsel within a prescribed period of time, and informed Defendant that a corporation must be represented by counsel and cannot appear *pro se*. *Id*. Because Defendant failed to secure representation of counsel and to respond to the SAC within the prescribed time, the Court subsequently issued an order finding Defendant in default, and warned that it would enter a default judgment. *Id.* at *3. Out of an abundance of caution, however, the Court further extended the time and warned Defendant that any further failure would result in striking its pleadings. *Id*. In spite of repeated warnings from the Court, Defendant failed to retain new counsel and also failed to respond to the SAC. *Id.* at *4. Accordingly, the Court struck Defendant's pleadings, and directed the EEOC to move for the entry of a clerk's default against Defendant. *Id.* at *5.

***EEOC v. AJ 3860, LLC,* Case No. 14-CV-1621 (M.D. Fla. Aug. 10, 2015).** The EEOC brought an action alleging that Defendants discriminated against black employees and retaliated against a manager who objected to alleged workplace racism by terminating him in violation of Title VII of the Civil Rights Act of 1964. Defendants operated several adult entertainment clubs in Florida, and in February 2012, Patrick Franke, a manager, hired Quatavia Harden to work as a bartender. A couple of days later, the regional manager instructed Franke to terminate Harden because Defendants did not want black employees working at their clubs. Although Franke resisted, he terminated Harden, and Harden subsequently filed a charge of discrimination with the EEOC. Defendants suspended Franke after receiving Harden's discrimination charge. Defendants failed to respond to the EEOC's lawsuit and the Court entered a default judgment. Subsequently, the Court determined that Defendants were liable for discriminatory conduct and awarded the EEOC monetary relief totaling $365,024.47, including punitive damages, compensatory damages, back pay, interest, and tax penalty off-sets for Franke and Harden. *Id.* Additionally, the Court granted injunctive relief requiring Defendants' multiple adult entertainment clubs to cease their discriminatory practices, to adopt non-retaliation and non-discrimination polices, and to report applicant flow and hiring data for the EEOC to monitor compliance. *Id.* at 3.

***EEOC v. Darden Restaurants, Inc.,* 2015 U.S. Dist. LEXIS 149897 (S.D. Fla. Nov. 3, 2015).** The EEOC brought an action on behalf of a group of job applicants alleging that Defendants engaged in unlawful employment practices on the basis of age and denied them employment in violation of the Age Discrimination in Employment Act ("ADEA"). A group of non-parties to the action filed a motion to intervene, which the Court denied. At the outset, the Court noted that the non-parties had no conditional or unconditional right to intervene in the ADEA action because the ADEA expressly eliminates such a right upon the EEOC's filing of an action on a person's behalf. *Id*. at *4. The Court cited 29 U.S.C. § 626(c)(1), which provides that a person's right to bring civil action under the ADEA terminates when the EEOC brings an action to enforce the right of such employee. *Id*. at *5. The Court also noted that 28 U.S.C. § 1367(a) provides that where a District Court has original jurisdiction, it shall also have supplemental jurisdiction over all other claims that are related to claims in the action within the original jurisdiction that formed part of the controversy. *Id*. at *5-6. The Court further observed that the Eleventh Circuit has clarified that § 1367(a) allows supplemental jurisdiction only when there is already original jurisdiction. *Id*. at *6. As the Court did not have original jurisdiction over the non-parties' age discrimination claims, the Court concluded that the non-parties could not justify intervention by alleging age discrimination claim under the Florida Civil Rights Act. *Id*. Therefore, the Court denied the request for intervention.

***EEOC v. Darden Restaurants, Inc.*, 2014 U.S. Dist. LEXIS 151742 (S.D. Fla. Nov. 9, 2015).** The EEOC brought an action on behalf of two applicants alleging that Defendants discriminated against them on the

basis of their age and denied them employment in violation of the ADEA. The EEOC moved to bifurcate the trial and discovery into two phases. Phase I would encompass the pattern or practice of liability and a determination of whether liquidated damages were appropriate; Phase II would deal with individual liability and damages. The Court denied the motion. *Id*. at *4. The EEOC maintained that splitting the case into two phases of discovery and trial would be an efficient and convenient way to handle pattern or practice claims because it would permit the determination of whether there is a pattern or practice of discrimination prior to investigating and proving damages for individual instances of discrimination. *Id*. at *6. Defendants argued that the EEOC's speculative statement that bifurcation would put off hundreds or thousands of mini-trials was unsupported by any factual basis, and the bifurcation scheme unduly prejudiced Defendants because it allowed the EEOC to limit discovery to only a small number of individuals selected by the EEOC. *Id*. Though Defendants were adamantly against bifurcating discovery, as to the bifurcation of trial request, Defendants indicated that the Court could deny the current motion without prejudice to renewal after the completion of discovery and once the issues for trial have been narrowed. *Id*. The Court concluded that discovery should proceed consistent with the current scheduling order. The Court also denied the EEOC's request to bifurcate the trial.

***EEOC v. Doherty Enterprises, Inc.,* 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).** The EEOC brought an action seeking to enjoin Defendant from using its arbitration agreement, which the Commission alleged had deterred employees from filing charges or cooperating with the EEOC or State Fair Employment Practices Agencies ("FEPAs"). *Id*. at *1. The EEOC asserted that Defendant's arbitration agreement constituted a pattern or practice of resistance to the full enjoyment of rights secured in § 707(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"). *Id*. at *3. Defendant moved to dismiss the EEOC's complaint, and the Court denied the motion. Defendant first argued that the EEOC lacked standing to bring this action in the absence of an underlying charge of discrimination. The Court observed that Title VII sets forth two mechanisms by which the EEOC may challenge unlawful employment practices pursuant to §§ 706 and 707. *Id*. at *7. The Court noted that § 706 grants the EEOC authority to bring an action on behalf of the aggrieved persons, and § 707 grants the EEOC the power to bring suit against any person when that person is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured under Title VII. *Id*. The Court observed that the Fifth Circuit's decision in *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), and the statutory language of § 707(a) provides that the EEOC only needs reasonable cause before filing a complaint. *Id*. at *11. In other words, the Court opined that § 707 does not require the EEOC to receive a charge before suing. *Id*. Defendant contended that the EEOC did not possess authority to proceed under § 707(a), and that the EEOC may only proceed under § 707(e), which requires conformance with the prerequisites of § 706. Defendant relied on *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), claiming that it overruled *Allegheny-Ludlum*, and required that a charge be filed as a prerequisite to all EEOC enforcement cases. *Id*. at *13. Defendant also contended that § 707(a) only applied to the Attorney General's right to bring a pattern or practice claims against federal, state, and local governmental units. The Court found that the issue in *Shell Oil* was not the EEOC' authority under § 707; instead, it examined the EEOC's authority to request judicial enforcement of its subpoenas, including whether the EEOC included adequate factual information in a charge to obtain judicial enforcement of its subpoena. *Id*. The Court accordingly reasoned that *Shell Oil* did not overturn *Allegheny-Ludlum*, and rejected Defendant's argument that the EEOC cannot bring an action under § 707(a) without an underlying charge. Defendant also challenged the concept of a separate cause of action under § 707(a) for a pattern or practice of resistance to the full enjoyment of any rights secured by Title VII. Defendant contended that § 707(a) cases were limited to unlawful employment practices. The Court relied on *U.S. v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), which enjoined the KKK (*i.e.*, a group of private individuals) from engaging in threats and violence to deter African-Americans from seeking employment and deter employers from hiring them. *Id*. at *15. The Court found that those acts by non-employers were determined to constitute a pattern or practice of resistance to Title VII rights, and that case did not involve discrimination or an adverse employment action by an employer against African-Americans. *Id*. Defendant also cited to *EEOC v. CVS Pharmaceuticals, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014), which ruled that the EEOC could bring an action under § 707(a) without a charge of discrimination, but the EEOC may sue only after it attempted to secure a pre-suit conciliation agreement. *Id*. at *17. The Court noted that *CVS* relied upon the procedures set forth in § 706 as authority for the

requirement to conciliate, despite the fact that Seventh Circuit precedent did not require the filing of a charge of discrimination. *Id*. at *18. The Court remarked that the holding in *CVS* was internally inconsistent, and relied on Supreme Court case law that did not discuss § 707. *Id*. at *8-9. Accordingly, the Court concluded that *CVS* was not binding, rejected Defendant's argument, and denied Defendant's motion to dismiss.

***EEOC v. Fannin County, Georgia,* 2015 U.S. Dist. LEXIS 133881 (N.D. Ga. July 16, 2015).** The EEOC brought an action alleging that Defendant Fannin County violated the Age Discrimination in Employment Act ("ADEA") by terminating its employees pursuant to a reduction-in-force ("RIF") on the basis of their age. *Id.* at *1. Defendant employed several kinds of employees, including laborers, bush hog operators, motor grader operators, and mechanics, and it maintained personal policy and procedures manuals which included an anti-discrimination policy. *Id.* at *5-6. In November 2011, Defendant decided to reduce its workforce due to budget deficit and chose to lay-off 11 employees, seven of whom were older than 60 years of age. *Id.* at *24-26. Subsequently, when Defendant's revenues improved, Defendant re-hired three of the four employees who were under 60 years of age within a few months of being laid-off; however, it did not re-hire some of the employees who were older than 60. *Id.* at *26-27. The EEOC alleged that Defendant unlawfully discharged the employees who were above 60 years of age in violation of the ADEA. *Id.* at *31. Defendant moved for summary judgment, arguing that the EEOC could not make out a *prima facie* case because the record did not show that Defendant intended to discriminate on the basis of age when it included employees Weldon Thomas and Donnie Green, both over the age of 60, in the 2011 RIF. *Id.* at *37. The Court granted Defendant's motion, finding that the EEOC failed to create a genuine issue of material fact concerning whether Defendant's articulated legitimate, non-discriminatory reasons for terminating Thomas and Green during the November 2011 lay-offs were a pre-text of age discrimination. *Id.* at *38. Defendant presented evidence that it identified the employees for lay-off by considering: (i) who performed mostly seasonal work as opposed to others who were cross-trained on equipment used regularly year around; (ii) who held certifications in skills such as flagging, soil and water erosion control, or who held commercial driver's licenses; and (iii) who had volunteered to be on after-hours call-in list indicating a willingness to come in for emergencies. *Id.* at *40. Defendant included Green in the lay-off list because he was going to retire in the spring, he was not cross-trained on equipment other than the motor grader, he was not on the class-in list, and he did not have any certifications. *Id.* Similarly, Defendant included Thomas in the RIF because Thomas had never done anything besides running a bush hog. *Id.* at *40-41. The Court thus found that Defendant demonstrated a legitimate, non-discriminatory reason for deciding to terminate various employees, including Green and Thomas, in November 2011. *Id.* at *41. The EEOC argued that Defendant's offered reasons – the budget issues – were pre-textual because there was no budget issue that required lay-offs, and it was a subterfuge to get rid of older employees. *Id.* at *42. The Court noted that the EEOC, however, failed to make a showing that Defendant was not having any issues in 2011 as Defendant had experienced an economic downturn in 2010 and 2011. *Id.* at *56-58. Regardless of the discrepancies in how Defendant created the lay-off list, the EEOC failed to show that Defendant did not focus on the seasonal nature of employees' work or their ability to work while selecting the employees for inclusion in the list. *Id.* at *63. The EEOC did not raise a genuine issue of fact concerning the reasons Defendant selected Green and Thomas for the lay-off list. *Id.* Although there was a correlation between Green's retirement and his age, the Court found that Defendant's reliance on his stated intention to retire as a factor in deciding to include him in the RIF did not by itself constitute age discrimination, especially given that Green met Defendant's other criteria for determining whom to lay-off. *Id.* at *65-66. Further, because the EEOC did not show that Defendant retained younger employees in spite of the fact that they met the criteria for lay-off, the Court could not make a meaningful statistical comparison between the employees that Defendant retained and those who were laid-off based on their relative ages for purposes of determining that the EEOC demonstrated pre-text. *Id.* at *68-69. Accordingly, the Court granted Defendant's motion for summary judgment. *Id.* at *22.

***EEOC v. J & R Baker Farms, LLC*, 2015 U.S. Dist. LEXIS 104821 (M.D. Ga. Aug. 11. 2015).** The EEOC brought an action alleging that Defendants discriminated against a group of employees on the basis of their national origin and/or their race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). Defendants moved to dismiss, arguing that the complaint provided a factually insufficient basis to support

the purported claims of alleged discrimination. Defendants argued that the complaint did not allege specific events of alleged discrimination or the identities of the individuals involved in the alleged acts of discrimination. *Id*. at *5. Defendants claimed that the vague and speculative conclusions drawn by the EEOC in the complaint failed to meet the requisite pleading standard and neglected to place Defendants on notice of claims raised against them pursuant to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Id*. at *6. At the outset, the Court noted that a Plaintiff proceeding under a theory of disparate treatment must establish that Defendant had a discriminatory intent or motive for taking the job-related action. *Id*. at *6. The Court observed that such an exacting standard of proof is not required at the pleadings stage, and there was no requirement that the complaint allege facts sufficient to withstand the classic Title VII burden-shifting framework. *Id*. The Court observed that the EEOC's complaint set forth sufficient factual allegations to raise a facially plausible claim for disparate treatment. *Id*. at *7. The complaint alleged that the discrepancy in the treatment experienced by African-American workers was premised on their national origin and resulted in them receiving fewer hours of compensable work and less pay than the foreign-born workers employed by Defendants. *Id*. at *8. Accordingly, the Court concluded that the EEOC had presented enough factual matter to suggest that Defendants subjected the charging parties to disparate treatment. *Id*. at *9. Defendants also sought dismissal of the EEOC's termination claims. The Court reasoned that the complaint offered illustrations of Defendants' practice of disproportionately terminating African-American workers based on their national origin and/or their race. *Id*. at *11. The Court held that this was sufficient to withstand a motion to dismiss, and accordingly, denied Defendants' motion to dismiss in its entirety.

***EEOC v. J & R Baker Farms, LLC,* 2015 U.S. Dist. LEXIS 153469 (M.D. Ga. Nov. 13, 2015).** The EEOC brought an action alleging that Defendant discriminated against a group of employees on the basis of their national origin and/or their race in violation of Title VII of the Civil Rights Act of 1964. Defendants filed a motion to compel discovery responses from the EEOC seeking a list of all individuals who allegedly had been either involuntarily terminated or constructively discharged by Defendants, along with information pertaining to the circumstances of the alleged discharges. The EEOC contended that, considering the vast size of the approximately 2,000 allegedly injured individuals, it would be an insurmountable task to comply with Defendants' discovery requests. *Id*. at *3. The Court directed the EEOC to set forth anecdotal information of at least 250 individuals. *Id.* The EEOC subsequently filed a motion for reconsideration seeking to revise the terms of the order to reduce the number of allegedly injured individuals for whom the EEOC had to produce discovery. The Court denied the motion. The EEOC contended that it mistakenly had represented the the number of allegedly injured individuals to the Court, and the "new" number was accurately measured at 332 members. *Id.* at *5. The EEOC asserted that providing anecdotal information for 75% of those persons would impose an injustice and hardship on the EEOC. *Id*. at *5. The Court noted that it was disinclined to revise its previous ruling, finding that it was the EEOC's responsibility to review its own documentation diligently and to be prepared to provide accurate information to the Court. *Id.* The Court further explained that there was no evidence that the information used to arrive at the revised number was somehow unavailable to the EEOC at the time of the prior hearing, and the EEOC's inability to manage its case was an error of its own making, and not of the Court's making. *Id.* Finally, the Court opined that the EEOC simply reiterated arguments that it already had considered, and the Court was not persuaded that its previous ruling was clearly erroneous. *Id.* at *6. Accordingly, the Court denied the EEOC's motion to reconsider.

***EEOC v. Jacksonville Association Of Firefighters, Local 122*, 2015 U.S. Dist. LEXIS 137651 (M.D. Fla. Oct. 8, 2015).** The EEOC, the U.S. Department of Justice ("DOJ"), and a group of African-American and Native-American firefighters, all brought lawsuits against the City of Jacksonville and a local union to stop what they alleged to be a racially discriminatory process of promoting firefighters. Previously the Court entered an order denying the EEOC's motion to partially lift the stay in this case. *Id*. at *1. At the same time, the Court ruled in a related lawsuit of *United States v. City of Jacksonville*, Case No. 12-CV-451 (M.D. Fla.), that the DOJ had established its *prima facie* case in phase one of the litigation. *Id*. Based on the Court's ruling on a disparate impact issues, the EEOC renewed its motion to lift the stay to permit limited discovery, which the Court denied. *Id*. at *1-2. The Court remarked that in its finding on the motion to stay, it referenced the disparate impact ruling, stating that notwithstanding the *prima facie* case established by

the DOJ, it was premature for the EEOC to litigate a claim against the union for its role in negotiating in favor of the promotion practice at issue unless the City's promotion practice was found unlawful. *Id*. at *2. The Court explained that for the reasons explained on in its earlier orders, it remained convinced that a stay as to the EEOC's case was the best way to manage those cases. *Id*. The Court also remarked that it had previously directed the union to retain all documents that could potentially relate to the issues raised by this case, which would remain in place, thereby mitigating the EEOC's concern that discovery would be made more difficult by the passage of time. Accordingly, the Court denied the EEOC's renewed motion to lift the stay.

***EEOC v. Outokumpu Stainless, USA, LLC*, 2015 U.S. Dist. LEXIS 129228 (M.D. Ala. Sept. 25, 2015).** The EEOC brought an action alleging that Defendant engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 ("title VII"). Defendant filed a motion to transfer venue from the U.S. District Court for the Middle District of Alabama to the Southern District of Alabama, which the Court granted. Defendant sought the transfer pursuant to 28 U.S.C. § 1404(a), which requires that the alternate venue be one in which Plaintiff could have brought the case originally. *Id*. at *5. Defendant contended that the case could have been brought in the Southern District of Alabama because a Title VII case is properly brought in any judicial district in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records were maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the unlawful practice. *Id*. The EEOC conceded this point, and the Court found that the case could have been brought originally in the Southern District of Alabama. *Id*. The EEOC cited case law from outside the Eleventh Circuit for the proposition that Plaintiff's choice of forum should be given special deference in a Title VII case. The Court, however, noted that in the Eleventh Circuit, a Title VII case is subject to the same analysis under 28 U.S.C. § 1404(a) as other cases, pursuant to which Plaintiff's choice of forum is its home forum. *Id*. at *8. Because the Middle District of Alabama is not the EEOC's home forum, the Court concluded that the EEOC's choice to file its case in the Middle District of Alabama, while legally proper, was not entitled to great weight in the overall § 1404(a) analysis. *Id*. at *9. The Court noted that the parties were in agreement that the residence of the majority of the material witnesses was an important factor to consider. The Court found the charging parties and Defendant's decision-maker all lived in the Northern District of Alabama. *Id*. at *12. The Court determined that eight witnesses lived in the jurisdiction of the Southern District of Alabama. The Court, accordingly, concluded that the convenience of the witnesses over the charging parties weighed in favor of the transfer. *Id*. at *13. The Court also noted that the other factors such as the location of documents, the availability of compulsory process, the forum's familiarity with the governing law, and the public interest all weighed in favor the transfer. *Id*. at *14. Accordingly, the Court granted Defendant's motion to transfer venue.

***EEOC v. St. Joseph's Hospital, Inc.*, 2015 U.S. Dist. LEXIS 19272 (M.D. Fla. Feb. 18, 2015).** The EEOC brought an action alleging Americans With Disabilities Act ("ADA") violations on behalf of Defendant's former employee, Leokadia Bryk. Bryk worked for Defendant as a nurse in the Behavioral Health Unit ("BHU") and was demoted from a Clinical Nurse III ("CN III") position to a Clinical Nurse II ("CN II") due to her admission to an accreditation surveyor that she allowed patients to sleep in the hallway during staff shortages. *Id*. at *2. In 2009, Bryk underwent a hip replacement surgery, and began using a cane on her return to work. The Director of Behavioral Health Operations, Susan Wright, began supervising Bryk, and determined that it was unsafe for Bryk to use the cane, as it posed a risk to Bryk, other employees, and patients. *Id*. at *4. Defendant notified Bryk that it could not accommodate her and terminated her employment. The parties cross-moved for summary judgment and the Court granted each motion in part. The EEOC moved for summary judgment, arguing that Bryk had a disability in the form of stenosis, which significantly impaired her ability to walk, but she was able to perform all of her work duties while using the cane, and never had an incident where a patient attempted to grab her cane. *Id*. at *7. Defendant argued that because Bryk never informed it of her stenosis, it could not be the underlying disability from which the EEOC could claim a failure to accommodate. The Court found that Bryk's primary physician indicated that she had a gait dysfunction due to her hip replacement. The Court noted that Bryk's hip replacement along with her obesity caused her to walk with a severe limp, and that the cane helped in diminishing her risk of falling. *Id*. at *10. The Court opined that gait dysfunction was sufficient to

establish that Bryk was a disabled person under the ADA at the time of her termination and therefore granted the EEOC's motion for summary judgment on that issue. *Id*. at *12. The Court also observed that it was undisputed that performing her duties in a safe manner and generally keeping patients safe was an essential function of Bryk's position as a CN II nurse. The EEOC contended that Defendant had two options to accommodate Bryk's disability, including: (i) permit her to use a lightweight cane; or (ii) reassign her to a vacant position outside the BHU. The Court noted that the EEOC had not demonstrated that Bryk could use the cane safely in the BHU, as it admitted that given her age and size, she was a likely target in the event a patient wanted to use her cane as a weapon. *Id*. at *17. The Court therefore held that Bryk's use of a case was not a reasonable accommodation as a matter of law. The Court reasoned that Bryk applied for three vacant positions and was not assigned to any of those positions. *Id*. at *21-24. The Court, however, found that the issue of why Bryk was or not was assigned to any of the three vacant positions are issues for a jury to determine.

***EEOC v. St. Joseph's Hospital, Inc.,* 2015 U.S. Dist. LEXIS 106041 (M.D. Fla. Aug. 12, 2015).** The EEOC brought an action alleging that Defendant discriminated against its employee, Leokadia Bryk, in violation of the Americans With Disabilities Act. The EEOC asserted that Bryk, a nurse, was terminated from her position because she started using a cane due to a hip surgery and other health problems affecting her mobility. Defendant advised Bryk to secure an alternate position within 30 days. Bryk applied to a seven open positions, three of which were at issue at trial, including education specialist, care transition coordinator, and home health clinician II. *Id.* at *3. Defendant ultimately terminated Bryk's employment, stating that she did not have the requisite experience needed for the positions and instead hired other candidates. At trial, the jury found that Defendant failed to provide a reasonable accommodation by not assigning Bryk to one of the three positions. The jury also found that Defendant made good faith efforts to identify and make a reasonable accommodation for her. *Id.* at *5. Neither party made specific objections to the jury's verdict. The EEOC argued that the evidence in the record was insufficient to support the jury's finding that Defendant made good faith efforts to identify and make a reasonable accommodation for Bryk. The Court, however, held that the evidence at the trial supported the jury's finding that Defendant acted in good faith to accommodate Bryk. *Id.* at *9. The Court remarked that Bryk failed to apply for any positions for three weeks after being notified that she had 30 days to locate a new position. Thus, the Court held that under the factual circumstances, the jury acted reasonably in finding that Defendant engaged in good faith efforts, even though it did not result in an accommodation. *Id*. at *11. The EEOC moved to alter the judgment, arguing that the judgment entitled Bryk to damages including equitable and injunctive relief, back pay in the amount of $184,425.20, pre-judgment interest in the amount of $11,594.98, and a tax penalty off-set in the amount of $13,043.90. *Id.* at *12-13. The EEOC contended that the good faith defense applied only to compensatory and punitive damages and therefore, it did not absolve Defendant from liability or other damages. Defendant argued that it was not liable as it acted in good faith and the employee's lack of participation resulted in a failure to accommodate. The Court found that an employer's defense based on good faith alone precluded only compensatory and punitive damages, not liability. *Id.* at *18. Thus, the Court granted the EEOC's motion for alteration of the judgment. Further, the Court denied the EEOC's request for equitable relief, stating that the facts in the case did not support the requested relief for the same reasons the Court denied the EEOC's motion for judgment as a matter of law. The Court also found that the evidence justified denial of back pay and front pay and held that Defendant should not be responsible for back pay in an amount exceeding $100,000, where it acted in good faith. *Id.* at *21. Moreover, the Court also denied front pay, concluding that Bryk was entitled to an opportunity for reinstatement. Thus, the Court ordered that Bryk must identify and apply for vacant positions and Defendant shall reinstate Bryk if a position was found for which she was equally or better qualified than other applicants. Accordingly, the Court denied the EEOC's motion for judgment as a matter of law and granted in part the EEOC's motion for alteration of judgment and equitable relief.

***EEOC v. West Customer Management Group, LLC*, 2015 U.S. Dist. LEXIS 76943 (N.D. Fla. June 15, 2015).** The EEOC brought an action alleging that Defendant discriminated against the charging party, Derrick Roberts, based on his national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). After the Court denied Defendant's motion for summary judgment, the case proceeded to trial. The jury returned a verdict for Defendant, finding that Roberts was not qualified for the customer service

representative position for which he applied. In an amended Report and Recommendation ("R&R") entered on July 28, 2014, the Magistrate Judge recommended that the EEOC be required to pay attorneys' fees and costs to Defendant pursuant to Title VII. The Court adopted the R&R subject to certain modifications and referred the matter to the Magistrate Judge to conduct all further proceedings in the event the parties could not agree on a reasonable award of costs. After the Court entered its order adopting and modifying the R&R, Defendant filed a supplemental motion for attorneys' fees and non-taxable expenses, seeking fees and expenses incurred in litigating the attorneys' fee issue. The Magistrate Judge found that the hours, rates, and fees requested by Defendant were reasonable. The EEOC objected to the Magistrate Judge's recommendation. The Court overruled the EEOC's objections, adopted the R&R, and granted Defendant's supplemental motion for award of attorneys' fees and non-taxable expenses. The Court opined that despite the absence in the R&R of a line-by-line review of the hours billed addressing each of the EEOC's arguments, the Magistrate Judge expressly rejected the EEOC's arguments regarding Defendant's expert affidavit, the rates and hours billed, the fact that Defendant used more than one attorney during the trial, and the EEOC's objection to compensating for attorney travel time. *Id*. at *2. The Court found that the Magistrate Judge also properly considered the contentious nature of the litigation and observed that the EEOC's conduct throughout the proceedings had been unusually aggressive, if not vexatious. *Id*. at *3. The Court also agreed with the Magistrate Judge that the requested rates and hours were reasonable based on the expert's affidavit. *Id*. Accordingly, the Court awarded Defendant $90,541.50 in attorneys' fees and $7,319.67 in non-taxable expenses incurred from the date of the pre-trial conference through the conclusion of the trial. *Id*. at *8. Moreover, the Court agreed with the Magistrate Judge's recommendation that Defendant should also be awarded its fees and expenses incurred in litigating the attorneys' fee issue. Accordingly, the Court granted Defendant's supplemental motion for award of attorneys' fees and non-taxable expenses. *Id*.

(xii) District Of Columbia Circuit

No reported decisions.

(xiii) U.S. Supreme Court

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).** The EEOC brought a Title VII of the Civil Rights Act of 1964 ("Title VII") employment discrimination action on behalf of a female job applicant alleging religious discrimination in Defendant's hiring practices. Defendant allegedly refused to hire the female applicant because she insisted on wearing a headscarf, which was against Defendant's "look policy." *Id*. at 2030. The District Court granted summary judgment, which the Tenth Circuit affirmed on the ground that failure-to-accommodate liability attaches only when the applicant provides the employer with "actual knowledge of his need for an accommodation." *Id*. On further appeal, the U.S. Supreme Court reversed. The U.S. Supreme Court noted that 42 U.S.C. § 2000e-2(a) prohibits an employer from failing or refusing to hire because of such individual's religion, and § 2000e(j) defines the word "religion" to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to" a "religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* at 2032. Defendant argued that to show disparate treatment, an applicant must first show that an employer had actual knowledge of the applicant's need for an accommodation. The U.S. Supreme Court, however, reasoned that an applicant has only to show that his need for an accommodation was a motivating factor in the employer's decision. *Id.* The U.S. Supreme Court observed that § 2000e-2(a)(1) does not impose a knowledge requirement, and that instead, the intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge. *Id.* at 2032-33. Further, the U.S. Supreme Court opined that an employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive, and that conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. *Id.* at 2033. The U.S. Supreme Court further noted that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. *Id.* Alternatively, Defendant argued that a claim based on failure to accommodate an applicant's religious practice must be raised as a disparate impact claim, not a disparate treatment claim.

Because Congress, however, defined "religion," for Title VII's purposes, as including all aspects of religious observance and practice, as well as belief, the U.S. Supreme Court held that a religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated. *Id.* at 2033-34. Accordingly, the U.S. Supreme Court reversed the grant of summary judgment to Defendant.

***EEOC v. Mach Mining, LLC*, 135 S. Ct. 1645 (2015).** In December 2013, the U.S. Court of Appeals for the Seventh Circuit ruled that an alleged failure to conciliate is not an affirmative defense to the merits of an employment discrimination suit brought by the EEOC. In essence, the Seventh Circuit determined that the EEOC's pre-lawsuit conduct in the context of conciliation activities was immune from judicial review. The U.S. Supreme Court subsequently granted *certiorari* to determine whether that was correct and, if not, what standard federal courts should use to review the EEOC's conciliation efforts. The U.S. Supreme Court unanimously rejected the Commission's position that its conciliation activities are beyond judicial review. It began by discussing the fact that Title VII of the Civil Rights Act of 1964 ("Title VII") requires the EEOC to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* at 1647 (quoting 42 U.S.C. § 2000e-5(b)). The U.S. Supreme Court observed that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," and that, for that reason, the U.S. Supreme Court would "appl[y] a strong presumption favoring judicial review of administrative action." *Id*. at 1651. The U.S. Supreme Court reasoned that "[c]ourts routinely enforce . . . compulsory prerequisites to suit in Title VII litigation." *Id*. As an example, the U.S. Supreme Court pointed to the fact that courts routinely dismiss discrimination complaints of parties that failed to file a timely charge of discrimination with the EEOC. *Id*. The U.S. Supreme Court found that this supported judicial review of the EEOC's compliance with the conciliation requirement. *Id*. at 1652. The U.S. Supreme Court also rejected the EEOC's argument that "Title VII provides no standards by which to judge the EEOC's performance of its statutory duty," thus showing that "Congress demonstrated its intent to preclude judicial review." *Id*. The U.S. Supreme Court concluded that the EEOC's position was incorrect because, while the lack of a standard might indicate Congress' intent to give the EEOC wide latitude in conducting the conciliation process, it did not give the EEOC the authority to ignore the conciliation process. *Id*. Specifically, the U.S. Supreme Court opined that, if the Commission's position were correct, the EEOC could file suit without any attempt at conciliation, and federal courts could do nothing to remedy the failure to engage in conciliation. *Id*. The U.S. Supreme Court then addressed the proper scope of judicial review to determine whether the EEOC had met its conciliation obligation. The U.S. Supreme Court declined to adopt the standard offered by Mach Mining as well as the Commission. The U.S. Supreme Court began its analysis with the plain language of the statute, noting that Title VII describes the statutory obligation as requiring "conference, conciliation, and persuasion." *Id.* Those specified methods must therefore involve communication between the parties, including an exchange of information and views about the alleged unlawful employment practice. In sum, the EEOC must "tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id*. In defining the scope of judicial review, the U.S. Supreme Court threaded a line between the EEOC's position and the position of the defense. The EEOC argued for the most minimal review possible based on facial examination of documents prepared and submitted by the agency itself. In this case, the EEOC argued that the U.S. Supreme Court should be satisfied with two letters sent from the Commission to Defendant, including: (i) the reasonable cause letter, which informed the company that the EEOC would contact the party to initiate the conciliation process; and (ii) a second, later letter, which simply stated that the conciliation process had occurred and failed. *Id.* at 1653. The U.S. Supreme Court rejected the EEOC's proposed level of review, holding that it simply failed to prove what the government claims, namely, whether the agency actually did what it said it did. Defendant argued for a more searching review. In its briefs, the company had argued that a federal court should satisfy itself that the EEOC had negotiated conciliation in good faith. Working off of a standard set forth in the National Labor Relations Act ("NLRA"), the company argued for some minimum prerequisites as to what "good faith" negotiation would look like, including setting forth the factual and legal basis for its positions and refraining from making "take-it-or-leave-it" offers. *Id.* at 1653-54. The U.S. Supreme Court rejected that approach, holding that the NLRA is directed toward the process of negotiation itself. The law's purpose is to create a sphere of bargaining to address labor disputes. *Id.* at 1654. Title VII, on the other hand, is about compliance with the law. While the law favors cooperation and

voluntary compliance, it gives the EEOC wide latitude to pursue that goal, since "Congress left to the EEOC such strategic decisions as whether to make a bare minimum offer, to lay all its cards on the table, or to respond to each of an employer's counter-offers, however far afield." *Id.* The U.S. Supreme Court also held that the company's proposed standard of review would fall afoul of Title VII's protection of the confidentiality of the conciliation process. A detailed review of that process would necessitate public disclosure of information in violation of the statute's non-disclosure obligations. *Id.* at 1656. The U.S. Supreme Court held that a sworn affidavit from the EEOC – stating that it has performed its obligations – often should be enough to show that it met its conciliation efforts. *Id.* But if employers counter with a credible affidavit of their own or other evidence that demonstrates that the EEOC "did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim," then a court must conduct the fact-finding necessary to decide that dispute. *Id.* If the EEOC's efforts were inadequate, the court must then order the agency to undertake the necessary efforts to ensure that it has satisfied its conciliation obligations. *Id.*

Editor's Note: The U.S. Supreme Court's ruling forcefully rejected the EEOC's position that it is above judicial review.

IV. Significant Collective Action Rulings Under The Age Discrimination In Employment Act

Multiple-plaintiff age discrimination claims under the Age Discrimination in Employment Act ("ADEA") are not governed by Rule 23. Instead, these claims are known as "collective actions," and are governed by the litigation procedures in the Portal-to-Portal Act at 29 U.S.C. § 216(b). Courts and litigants commonly refer to these lawsuits as "§ 216(b) actions."

Collective actions brought under the ADEA raise "opt-in" issues quite similar to those arising under the Fair Labor Standards Act ("FLSA"). In other words, class members (technically, "collective action" members, as class actions do not exist under the § 216(b) framework) do not become part of the litigation unless and until they affirmatively opt-in to the lawsuit (whereas under Rule 23, a class member must opt-out of the class action or otherwise will be bound by any judgment in the litigation).

The plaintiffs' bar typically utilizes the FLSA's two-step procedure under § 216(b) to obtain conditional certification of ADEA collective action claims. This approach, based upon the Tenth Circuit's seminal decision in *Thiessen, et al. v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), involves substituting "pattern or practice" claims for evidence of commonality and typicality. The pattern or practice vehicle by definition requires a higher threshold of proof, but plaintiffs have taken advantage of the more lenient step one process in the ADEA's two-step procedure for certifying collective actions. In the "notice" or "conditional" certification stage, there is a lower threshold of proof than in cases brought under Rule 23, where Supreme Court decisional law requires a "rigorous analysis" of a plaintiff's claims and evidence. Conditional certification under the ADEA authorizes plaintiffs to send class notices based on minimal evidentiary showings and enables them to gain leverage over employers who must then endure extensive discovery as plaintiffs seek to gather further proof of their claims.

A. Cases Certifying Or Refusing To Certify ADEA Collective Action Claims

(i) First Circuit

No reported decisions.

(ii) Second Circuit

No reported decisions.

(iii) Third Circuit

No reported decisions.

(iv) Fourth Circuit

No reported decisions.

(v) Fifth Circuit

No reported decisions.

(vi) Sixth Circuit

No reported decisions.

(vii) Seventh Circuit

No reported decisions.

(viii) Eighth Circuit

No reported decisions.

(ix) Ninth Circuit

***Stockwell, et al. v. City And County Of San Francisco*, 2015 U.S. Dist. LEXIS 61577 (N.D. Cal. May 8, 2015).** Plaintiffs, a group of San Francisco Police Department ("SFPD") officers, brought a class action alleging that Defendants denied them advancement opportunities because of their age. Each of the Plaintiffs was an SFPD officer with extensive investigative experience, who took and passed the test for a Q-35 Assistant Inspector position. *Id*. at *3. Traditionally, the City filled its investigative positions by promoting officers from the Q-35 list. However, starting in 2007, the City began assigning investigative duties to newly-promoted sergeants who had taken the Q-50 exam, rather than to assistant inspectors promoted from the Q-35 list. *Id*. Plaintiffs alleged that the practice of filling investigative positions from the Q-50 list had a substantial adverse impact on officers over the age of 40. *Id*. Plaintiffs asserted causes of action under California's Fair Employment and Housing Act ("FEHA") and the Age Discrimination in Employment Act ("ADEA"). After the District Court denied Plaintiffs' motion for class certification on their FEHA claims for the second time, the Ninth Circuit reversed the decision, and remanded for the District Court to determine if the Rule 23(b) requirements were satisfied. The Ninth Circuit took no position on whether the statistical showing the officers had made was adequate to make out their merits case, but found that commonality on Plaintiffs' disparate treatment claims was met because the officers were challenging a single policy that affected them adversely. Plaintiffs renewed their Rule 23 motion after remand from the Ninth Circuit. The District Court found that the Rule 23(a) requirements were satisfied, but as to the predominance requirement, the Ninth Circuit had acknowledged that a number of issues may well show that individual issues predominated. The individual issues that the Ninth Circuit identified included: (i) whether an officer took the 2006 Sergeants exam or not; (ii) comparisons of individual rank and between the 1998 Assistant Inspector list and the 2007 Sergeants list; (iii) the relative qualifications of each officer on the list; and (iv) other factors affecting an assignment to the Investigations Bureau. *Id*. at *20-21. At a hearing, the District Court had expressed the view that individual issues predominated over the class of 133 members, because there were only 55 investigative positions filled during the class period, and the District Court would necessarily need to consider the individual qualifications of each class member to determine which of the 55 officers or individuals would have been promoted if the City had made promotions from the Q-35 list rather than the Q-55 list. *Id*. at *21. Plaintiffs acknowledged that individual issues predominated, but relied on *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014), which certified a liability class but not a damages class. *Id*. at *24. *Houser* expressly found that a damages class could not be certified under Rule 23(b)(3), and instead certified a liability-only class because Plaintiffs moved for such a class under Rule 23(b)(2). *Id*. at *27. In contrast, Plaintiffs made clear that they sought certification under Rule 23(b)(3), and nowhere did they invoke Rule 23(b)(2) as a basis for their motion. Overall, the District Court found the same problems in this case that were present in *Houser*. The District Court explained that as in *Houser*, the proposed class included individuals who were not entitled to back pay under the proposed theory of liability because they would not have been hired even absent the alleged discrimination. *Id*. at *27. The District Court remarked that, in fact, the proposed class would contain 78 members who were not entitled to any back pay because Plaintiffs admitted that only 55 of the 133 proposed class members would have been promoted in the "but-for" scenario. *Id*. In other words, the majority of the class would be made up of individuals with no claims for relief. In addition, the District Court ruled that Plaintiffs had at best shown that an individual's rank on the Q-50 list was an indicator of whether that individual was likely to receive a promotion to the rank of sergeant. However, for the purposes of class certification motion, the District Court reasoned that Plaintiffs' showing fell short in two ways. First, it did not account for the City's consideration of an individual's qualifications when making promotion decisions, and thus, did not solve the problem that plagued the class of 133 proposal. Second, Plaintiffs failed to show how the City's procedure for making Q-50 Sergeant promotions was relevant to its procedure for making "but-for" Q-35 Assistant Inspector promotions. *Id*. at *37. Accordingly, the District Court found that predominance requirement was not satisfied and denied Plaintiffs' motion for class certification.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

No reported decisions.

(xii) District Of Columbia Circuit

No reported decisions.

B. Other Federal Rulings Affecting The Defense Of ADEA Collective Actions

Numerous federal courts issued rulings in ADEA collective actions in 2015 that implicated § 216(b) certification issues. These rulings included Equal Pay Act litigation; tolling in ADEA collective action litigation; discovery in ADEA collective action litigation; experts in ADEA collective action litigation; notice issues in ADEA/EPA collective action litigation; OWBPA issues in ADEA collective action litigation; and disparate impact issues in ADEA collective actions.

(i) Equal Pay Act Litigation

***Barrett, et al. v. Forest Laboratories, Inc.*, 2015 U.S. Dist. LEXIS 51495 (S.D.N.Y. April 8, 2015).** Plaintiffs, a group of sales representatives, brought a putative collective and class action against Defendants alleging denial of equal pay and other discriminatory treatment in violation of the EPA and Title VII of the Civil Rights Act ("Title VII"). During discovery, Plaintiffs moved to compel Defendants to produce electronically-stored personnel data for sales representatives employed on or after January 1, 2008, and also sought the names of all such employees. *Id.* at *3. The Court granted Plaintiffs' motion in part. The Court noted that Plaintiffs had sought data reflecting, among other information, gender, compensation, and employment history that was designed to unearth evidence of disparate pay and other unequal treatment between genders. *Id* at *3-4. The parties disagreed on the temporal scope of any production, at least at that stage. Regarding that temporal scope, Defendants invoked the Court's prior 2014 ruling, which narrowed the scope of a Title VII class to individuals employed on or after February 6, 2010 in deferral states and July 6, 2010 in non-deferral states. *Id.* at *4. Premised on those cut-off dates, Defendants had been producing data for individuals employed on or after February 6, 2010 to enable Plaintiffs to make a statistical case in support of their forthcoming EPA conditional certification motion. *Id* at *5. Defendants argued that the additional data that Plaintiffs sought concerning employees as of January 1, 2008 was not necessary and that, in light of the Court's Title VII ruling limiting the class period, Plaintiffs' request was overbroad. Regarding Plaintiffs' request for names, Defendants argued that the scope of targeted production encompassed about 5,000 past and present employees, and that some of the data that was embodied in the production was quite sensitive, including medical information and employment terminations. *Id.* The Court found Defendants' objections regarding the timeframe for relevant ESI discovery to be unpersuasive. First, the Court pointed out that relevance, and not necessity, is the applicable standard for discovery under Rule 26(b)(1). *Id.* at *6. Second, the Court observed that the parties were pursuing merits, as well as class discovery, at the same time; and hence, Defendants' focus on what Plaintiffs needed for their motion improperly narrowed the field of data. *Id* at *6-7. Moreover, the Court found that Defendants' reliance on the cut-off dates for Plaintiffs' Title VII class was misleading because under Title VII and under the EPA, some of Plaintiffs' claims may encompass employment practices that occurred as early as 2008. *Id* at *7. In addition, the Court found Defendants' argument ignored the fact that employer behavior prior to the earliest date on which a claim may have arisen was potentially relevant and useful in a discrimination analysis. *Id*. Finally, regarding the names of the employees whose employment data was to be produced, the Court noted that some of the data to be revealed was potentially quite sensitive. *Id.* at *8. The Court concluded that although Plaintiffs would have need for disclosure of the names of collective action members if their forthcoming conditional certification motion was granted, they failed to make a persuasive case for immediate disclosure of all names at this stage.

***Barrett, et al. v. Forest Laboratories, Inc.,* 2015 U.S. Dist. LEXIS 88299 (S.D.N.Y. July 8, 2015).** Plaintiffs brought individual and collective action and class action claims under the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act ("Title VII"), alleging that Defendants discriminated against female

employees with respect to pay and promotions. In April 2013, Defendants filed a motion to dismiss Plaintiffs' second amended complaint ("SAC"), and the Court decided the motion in August 2014. In September 2014, the parties began to meet and confer and desired to seek expedited discovery of certain information and equitable tolling for the EPA claims. *Id.* at *4. Accordingly, when discovery was on-going, Plaintiffs moved to toll the statute of limitations from the date on which Defendants filed their motion to dismiss the SAC through the date conditional certification for the EPA collective action was granted. The Court denied the motion. The Court noted that in a collective action, the statute of limitations for each Plaintiff runs until he or she opts-in to the lawsuit by filing written consent with the Court, not when the named Plaintiff files a complaint, and that such signed consents do not relate back to the original filing date of the complaint. *Id.* at *6. Further, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *Id.* at *6-7. Thus, the Court opined that while Plaintiffs' institution of this action automatically tolled the claims of potential Title VII class members, it did not do so for potential EPA collective action members. Plaintiffs, however, contended that they had been assiduously pursuing potential collective action members' rights, but procedural and discovery delays forestalled them from seeking conditional certification of their EPA claims because this case was effectively stayed while Defendants' motion to dismiss was pending. *Id.* at *9. The Court, however, remarked that Plaintiffs failed to articulate any reason why they could not have at least tried to proceed with discovery during the pendency of the motion to dismiss, and noted that except in cases covered by the Private Securities Litigation Reform Act, a motion to dismiss does not automatically stay discovery. *Id.* at *10. Further, although the Court observed that the parties should meet on their own as soon as practicable after a case begins to work out a proposed discovery plan. The Plaintiffs' counsel did not begin the meet and confer process until one month after the Court decided the motion to dismiss and over two years after commencement of this action. *Id.* Although Plaintiffs attempted to shift the blame to Defendants for not producing documents before the litigation ever began, the Court opined that Defendants were under no obligation to provide any information prior to the commencement of this litigation and thus could not be faulted for not doing what they need not have done. *Id.* at *11. Additionally, although the delay in deciding a motion may in some circumstances, amount to an extraordinary circumstance justifying equitable tolling, the Court ruled that the motion to dismiss did not actually present a barrier to the discovery Plaintiffs sought. *Id.* at *15. Finally, the Court observed that equitable tolling provides the Court with limited discretion to depart from the general rule in rare and exceptional circumstances, and that there were no such circumstances here, notwithstanding the consequences of this decision for potential EPA collective action members. *Id.* at *18. The Court reasoned that to grant the exceptional remedy of equitable tolling for the pendency of a motion to dismiss, when there was nothing standing in the way of Plaintiffs pursuing conditional certification, would be tantamount to tolling the statute of limitations for FLSA claims as a matter of course for all potential Plaintiffs whenever the first Plaintiff files a complaint, which would lead to a result plainly contrary to the procedural rules that govern FLSA collective actions. *Id.* at *18-19. Accordingly, the Court denied Plaintiffs' motion to toll the statute of limitations.

***Barrett, et al. v. Forest Laboratories, Inc.,* 2015 U.S. Dist. LEXIS 117203 (S.D.N.Y. Sept. 2, 2015).** Plaintiffs, a group of female sales representatives, brought an action alleging gender-based pay discrimination claims against Defendant employer under the Title VII of the Civil Rights Act of 1964 and the Equal Pay Act ("EPA"). Following the denial, in part, of Defendant's motion to dismiss, ten of the Plaintiffs moved for certification of a collective action under the EPA. *Id.* at *3. The Court granted Plaintiffs' motion, finding that Plaintiffs' evidence presented a colorable case of gender-based discrimination. *Id.* at *27. Plaintiffs provided declarations stating that they worked for various periods of time in different regions of the country as Defendant's sales representatives; that all sales representatives operated under the same corporate standards governing skill requirements, training, the type of work performed, and compensation; and that based on their observations and experiences, Defendant paid male sale representatives more than female sales representatives. *Id.* at *6-7. Plaintiffs also provided corporate documents showing that the job description for the sales representative position, the skill sets demanded for hiring and retention, and the required training process were uniform and national; as well as documents showing that Defendant had a single set of standards for initial base pay and annual and merit raises, and that it had single set of

procedures for determining the amount of compensation and a centralized system for reviewing any proposed increases. *Id.* at *7. In addition, Plaintiffs presented evidence that Defendant maintained a centralized set of geographically-based criteria, referred to as the COLA tiers, premised on a cost-of-living factor, to determine the degree of differential in pay for different geographic regions. *Id.* Plaintiffs further submitted an expert economist's report identifying a statistically significant difference between the pay of male and female sales representatives when controlling for a series of pertinent variables, such as experience for the period from 2009 through 2014. *Id.* at *8. The Court found Plaintiffs' evidence sufficient to justify certification of a collective action under the EPA. *Id.* at *10. Defendant's declarations indicated that sales representatives needed different skills depending on where they worked, that decisions as to pay increases embodied a subjective element in evaluating the sales representatives, and that the division managers approved salaries for some Plaintiffs that compared favorably with the salaries of most or all of the male sales representatives on their respective teams. The Court found that these facts were inadequate to show that the proposed opt-in Plaintiffs were not similarly-situated in terms of skill, effort, and responsibility. *Id.* at *17-18. Moreover, the Court reasoned that Defendant's assertion that sales representatives required different skills depending on the demographic and/or geographic circumstances of a specific location was inconsistent with the documentation in the record reflecting that the stated job description and its specification of the required skills for that position did not make any distinction based on the demographic or geographic circumstances. *Id.* at *19. Further, Defendant's own expert's critique of Plaintiff's expert report failed to show that there was no basis for the statistical inference of impermissible deviations in pay by gender. *Id.* at *20-21. Although Plaintiffs listed only male comparators who were paid more than them, the Court noted that the fact that Defendant paid male sales representatives more than their female equivalents at least raised a question as to whether the disparities were inconsistent with the statutory mandate. *Id.* at *22-23. The Court therefore concluded that Plaintiffs sufficiently demonstrated that they were similarly-situated for the purposes of conditional certification. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action under the EPA. *Id.* at *29.

***Coates, et al. v. Farmers Group, Inc.,* 2015 U.S. Dist. LEXIS 165817 (N.D. Cal. Dec. 9, 2015).** Plaintiffs, a group of female attorneys, brought a putative class and collective action alleging that Defendant engaged in systemic gender discrimination against its female employees through unequal pay in violation of the Equal Pay Act ("EPA") and and other federal and state laws. *Id.* at *1-2. Defendant's Claims Litigation Department employed approximately 500 attorneys in over 40 branch legal offices nationwide, and Plaintiffs alleged that Defendant paid the female attorneys less than their male counterparts, even though the female attorneys performed the same or substantially equal work to the male attorneys. *Id.* at *3-4. Plaintiffs alleged that they and putative collective action members were similarly-situated, and moved for conditional certification of an EPA collective action pursuant to 29 U.S.C. § 216(b). In opposition, Defendant argued that the phrase "similarly-situated" must be interpreted different for EPA collective actions compared to FLSA collective actions because to be "similarly-situated" for an EPA collective action, Plaintiffs and the opt-in Plaintiffs must show that they performed "substantially equal" or "virtually identical" work to each other and the other proposed collective action members. *Id.* at *26-27. The Court rejected Defendant's argument and granted Plaintiffs' motion. The Court found no basis to adopt Defendant's "substantially equal" work as a measure of establishing the similarly-situated standard for an EPA collective action, either as a matter of statutory interpretation or due to prudential considerations such as manageability. *Id.* at *27. The Court noted that Defendant failed to point to anything in the text of the FLSA or the EPA that suggested that "substantially equal" work and "similarly-situated" were interpreted in the same manner. The Court explained that, to show an EPA violation, a female Plaintiff need to show only that she performed "substantially equal" work to a higher-paid male comparator, and thus the focus of inquiry would be on the relationship between the female employee and the male comparator. *Id.* at *27-28. Plaintiffs made a modest factual showing that the putative collective action members were the victims of a single decision, policy, or plan, and the record showed that attorneys performed the same tasks, followed the same standardized case management guidelines, and were subjected to the same compensation and relative performance evaluation polices across job titles, salary grades, and geographic area. *Id.* at *34-35. Plaintiffs also presented evidence that the policies resulted in unequal pay for female attorneys, specifically the evidence that Defendant paid female attorneys less than male attorneys, on average, and identified a higher-paid male comparator for each Plaintiff. *Id.* at *36. Defendant argued that any EPA collective action

would necessarily be unmanageable unless all of the proposed collective action members did substantially equal work. The Court disagreed and found that Defendant ignored the possibility of sub-classes, wherein each sub-class could offer common proof that the members of the sub-class performed substantially equal work. *Id.* at *29. The Court further explained that even in a case with multiple sub-classes, the entire collective action could offer proof of Defendant's uniform compensation and performance evaluation polices, and proof that such policies lead to systematic unequal pay for women. *Id.* at *30. The Court thus held that manageability could be better addressed after discovery, and after analysis of the issues of common proof, and the number, geographic location and job duties of any opt-in Plaintiffs. *Id.* at *31. The Court therefore concluded that Plaintiffs and the proposed collective action members were similarly-situated for this lenient notice stage standard for conditional certification, and accordingly, granted Plaintiffs' motion for EPA conditional collective action certification.

(ii) Tolling In ADEA Collective Action Litigation

***Barrett, et al. v. Forest Laboratories, Inc.,* 2015 U.S. Dist. LEXIS 144340 (S.D.N.Y. Oct. 5, 2015).** Plaintiffs, a group of current and former female sales representatives, brought a putative class action alleging that Defendant engaged in a pattern or practice of gender-based discrimination against its female employees in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act ("EPA"). After the Court conditionally certified a collective action under the EPA, the parties agreed on all aspects of the proposed collective notice except for the cut-off date for identifying potential members of the collective action. *Id*. at *3. The Court had previously denied tolling based on the filing of the complaint, and therefore Defendant asserted that the trigger of notice was September 15, 2015, which would cause notice to go to all female sales representatives employed by Defendant since September 15, 2012. Plaintiffs, however, asked for notice to be given to all potential opt-ins who were employed by Defendant since July 20, 2011. At the outset, the Court observed that the collective notice should be directed only to those who were employed by Defendant within three years prior to the Court's approval of notice. *Id*. at *4. Plaintiffs suggested that: (i) they intended at some point to seek equitable tolling for the period since they filed their certification motion on May 22, 2015; and (ii) they pointed to a tolling agreement between parties running from July 20, 2011 for the filing of a suit that Plaintiffs could bring, either in their individual capacity or as class representatives. *Id*. The Court observed that the case law precedents have routinely approved notice periods going back three years from the filing of the complaint even though time period can substantially exceed the statutory limitations period, which runs three years from the filing of an opt-in consent. *Id*. at *7. The Court remarked that this approach would leave room for opt-ins to pursue a request for tolling based on their own specific circumstances and that the timeliness of their claims would be determined in future proceedings. The Court held that the future opt-ins whose employment ceased before September 15, 2012 should be given notice or they will effectively be denied the opportunity to attempt to defend the timeliness of their claims and that a notice period that ran at least for three years from the filing of the certification motion, *i.e.*, from May 22, 2012 was justified. *Id*. Accordingly, the Court held that the collective notice must be provided to all females who worked for Defendant as sales representatives at any time since May 22, 2012.

***Kassman, et al. v. KPMG LLP*, 2015 U.S. Dist. LEXIS 118542 (S.D.N.Y. Sept. 4, 2015).** Plaintiffs brought a collective action alleging that Defendant paid female client service professionals less than their male counterparts in violation of the Equal Pay Act ("EPA"). Plaintiffs moved for equitable tolling of the statute of limitations for collective action members' claims under the EPA. The Court granted the motion in part. Plaintiffs sought to toll the statute of limitations for opt-in Plaintiffs from the date when Defendant filed its opposition to Plaintiffs' motion to file the second amended complaint, and asked that the claims and consent forms of opt-in Plaintiffs be deemed filed as of that date. The Court opined that Plaintiffs showed that extraordinary circumstances caused the passage of almost four years when this action was commenced and the last date on which opt-in Plaintiffs could join this action. This delay was caused by several factors, with the most significant being attributable to the Court. The case was assigned to three separate judges between its filing and the approval of notice to opt-in Plaintiffs, and the Court remarked that such circumstances were not part of the ordinary course of litigation and could not be attributed to Plaintiffs. *Id.* at *10-11. Additionally, the Court noted that probably due to the reassignment of judges, the Court spent an extraordinary amount of time considering motions, including one motion for leave to file an

amended complaint, two motions to dismiss, the first iteration of the equitable tolling motion, and the conditional certification motion. The motions were pending for about 27 months of the almost four-year delay, and the Court observed that significant delays attributable to the Court may constitute "extraordinary circumstances." *Id.* at *11. Defendant argued that equitable tolling, as a "rare and exceptional" remedy, must be strictly construed because Congress had already weighed the equities in setting limitations. *Id.* at *13. Although the Court agreed with Defendant that equitable tolling should not be routinely applied in FLSA collective actions, it opined that equitable tolling requirements are not applied mechanistically, and the exercise of the Court's equity powers must be made on a case-by-case basis, mindful that in specific circumstances, and it is often hard to predict in advance what cases warrant special treatment. *Id.* at *13-14. The Court found that Plaintiffs had exercised reasonable diligence during the time period they sought to have tolled. Plaintiffs alleged that they were paid less than their male counterparts for performing substantially equivalent work, and that they could not readily discern these pay disparities that were the basis of the EPA claims at the time of the payments. In support, Plaintiffs submitted the testimony of a senior manager, which affirmed that she did not know how much her peers made or how much her subordinates made because people did not talk about compensation. The Court observed that difficulties of uncovering the facts giving rise to pay disparity claims were widely acknowledged. *Id.* at *14. The Court remarked that it was not for lack of diligence that the opt-in Plaintiffs relied on Court-ordered notice to alert them, not only to the existence of this litigation, but also to the facts that were the basis for their claims. Further, the Court noted that the delay also was caused by not so extraordinary circumstances outside the opt-in Plaintiffs' control, such as Defendant's vigorous opposition at every juncture, as well as Defendant's resistance to providing information necessary for the conditional certification motion. The Court stated that delays caused by Defendant may warrant equitable tolling, even without any evidence of bad faith. *Id.* at *17. Accordingly, the Court granted Plaintiffs' motion, but set the date for tolling from the date on which Defendant's first motion to dismiss became fully briefed. Further, the Court held that statute of limitations was not tolled for the opt-in Plaintiffs who failed to file timely claims by the deadline stated in the notice.

***Kassman, et al. v. KPMG LLP*, 2015 U.S. Dist. LEXIS 134888 (S.D.N.Y. Oct. 2, 2015).** Plaintiff brought an action alleging that Defendant paid its female client service professionals in its tax and advisory functions less than their male counterparts in violation of the FLSA as amended by the Equal Pay Act. Plaintiffs filed a motion for equitable tolling to allow Plaintiffs who opted-in late to the lawsuit, which the Court granted in part. Defendant moved for reconsideration of the equitable tolling decision, which the Court denied. At the outset, the Court noted that Defendant did not identify any intervening change of law or newly-discovered evidence, and had simply argued that the opinion should be reconsidered to prevent manifest injustice. *Id*. at *3. Defendant asserted that the opinion impermissibly presumed diligence on the part of opt-in Plaintiffs despite controlling Second Circuit precedent requiring individualized analysis of equitable tolling. *Id*. The Court explained that as noted in its opinion, the Second Circuit had not addressed equitable tolling in a collective action, and the case law authorities had tolled the statute of limitations in FLSA cases without engaging in an individualized inquiry. *Id*. at *3-4. The Court remarked that the opinion's description of the circumstances that delayed issuing notice, and the evaluation of Plaintiffs' diligence explained why tolling was appropriate. *Id*. at *4. Defendant also argued that the opinion penalized Defendant for vigorously defending this case. The Court remarked that Defendant's vigorous opposition at every juncture, as well as its resistance to providing information necessary for the conditional certification motion, provided the context for the opinion's holding regarding Plaintiffs' diligence. *Id*. at *5. Accordingly, the Court rejected this argument as well. Similarly, the Court rejected Defendant's arguments that the tolling opinion granted an excessive tolling period and deprived Defendant its right to raise individual defenses. For these reasons, the Court refused to reconsider its previous opinion on equitable tolling.

***Romero, et al. v. Allstate Insurance Co.,* Case No. 01-CV-3894 (E.D. Pa. Jan. 6, 2015).** Plaintiffs, a group of employee agents, brought a putative class action alleging unlawful retaliation by Defendant in violation of the ADEA and other federal statutes. Plaintiffs had sought certification of a class consisting of all employee agents whose contract with Defendant was involuntarily terminated as part of its program and who executed a release in connection therewith. The Court denied Plaintiffs' motion for certification after finding that the issues surrounding the validity of the release involved numerous individual inquiries that

were so inextricably intertwined with the common question that they eliminated any benefit to certification. *Id*. at 2. On December 11, 2014, the Court clarified its order (i) denying class certification, (ii) holding that the order was not intended to and did not finally resolve whether issues going to the merits of Plaintiffs' claims could be subject to certification for resolution on a class-wide or collective action basis, and (iii) that, after concluding any currently scheduled trial with respect to release issues, any party could move for certification under Rule 23 with respect to claims or issues involving the merits of Plaintiffs' claims. Further, the Court clarified that the order restarted the running of the statute of limitations for any current or former employee agent of Defendant who, between November 10, 1999 and June 30, 2000, signed the release prepared by Defendant in connection with the "Preparing for the Future Group Reorganization Program," and who now wished to challenge the validity of the release in order to pursue substantive claims against Defendant that would otherwise be contractually barred. Plaintiffs moved for clarification or, in the alternative, for reconsideration of the Court's order of December 11, 2014, which the Court denied. Plaintiffs contended that because the release was asserted as an affirmative defense to the substantive claims, challenges to the validity of that release were not subject to any specific statute of limitations. *Id*. at 1. The Court, however, observed that Plaintiffs misunderstood both the purpose behind tolling in a putative class action and the scope of the Court's certification ruling. *Id*. The Court noted that tolling does not continue indefinitely; if the Court denies certification, or if it certifies the class but later decertifies it, tolling ceases. *Id*. at 1-2. The Court stated that the putative class members who signed the release were no longer entitled to tolling of the statute of limitations. *Id*. at 2. Accordingly, the Court denied Plaintiffs' motion.

(iii) Discovery In ADEA Collective Action Litigation

***Apsley, et al. v. The Boeing Co.,* 2015 U.S. Dist. LEXIS 1181 (D. Kan. Jan. 6, 2015).** Plaintiffs, a group of former employees of The Boeing Co., brought a collective action alleging age discrimination in hiring decisions when Boeing sold off the assets of its commercial facilities to Defendant Spirit Aerosystems in 2005. Plaintiffs were former Boeing employees who were not hired by Spirit when it bought Boeing's facility. Following the grant of summary judgment in Defendants' favor on Plaintiffs' collective action claims, Defendants filed a motion to dismiss the claims of 26 Plaintiffs who alleged individual counts of age discrimination. Defendants argued that all 26 Plaintiffs should be dismissed for failure to provide complete discovery responses to requests for production and all responsive documents. *Id.* at *5. The Court granted Defendants' motion. The Court noted that, in March 2014, Defendants had filed a motion to compel and asked for sanctions for Plaintiffs alleged failure to comply with their discovery obligations, and a week later, the Magistrate Judge had denied the motion, ordering Plaintiffs to provide a complete response to Defendants' requests for productions and all responsive documents. The Magistrate Judge also stated that if any Plaintiffs failed to respond as required by the order, their claims would be dismissed with prejudice and without further notice as a sanction for failure to comply with their discovery obligations and to prosecute their action. *Id.* Although all 26 Plaintiffs provided a verified answer to Defendants' interrogatories and responded to Defendants' requests for production, the Court analyzed the responses of each Plaintiff individually and found that none of the Plaintiffs complied with the discovery order. Specifically, none of the 26 Plaintiffs provided the tax returns for all years from 2005 to 2013, as required. Defendants sought tax returns to verify that all income had been disclosed. The Court explained that in an employment discrimination case like this, a terminated employee must mitigate damages, and post-termination income would show an employee's effort to satisfy that obligation. *Id.* at *20. While the Court acknowledged that coordinating production of nine years of tax returns for 26 Plaintiffs was a daunting task, it also noted that it was a task that Plaintiffs' counsel signed up for and agreed to complete pursuant to an agreement between the parties and the discovery order, and due to which Defendants withdrew their motion to compel and motion for sanctions. *Id.* The Court further noted that Plaintiffs had been given multiple opportunities to respond to Defendants' discovery, which they were entitled to have, and despite being warned of dismissal of the action, they fell significantly short of the obligations outlined in the discovery order. *Id.* at *22. The Court therefore concluded that dismissal with prejudice would be the appropriate sanction for all 26 Plaintiffs, and accordingly, dismissed the action.

***Apsley, et al. v. The Boeing Co.,* 2015 U.S. Dist. LEXIS 45743 (D. Kan. April 8, 2015).** In this age discrimination collective action, Defendants moved to dismiss Plaintiffs' claims due to Plaintiffs' failure to

comply with a last-chance order compelling discovery. Plaintiffs did not appear at a hearing regarding their on-going failure to adequately participate in the litigation, and the District Court dismissed Plaintiffs' claims on January 7, 2015. *Id.* at *6. Plaintiffs moved for leave to file notice of appeal out of time on February 9, 2015, asserting that on January 31, 2015, Plaintiffs' counsel received news of such a personal, sensitive, and debilitating nature that demanded immediate action such that because of excusable neglect, he was unable to file the notice of appeal until February 9, 2015, one business/counting day after the expiration of the purported last day to file the notice. *Id*. The Tenth Circuit directed Plaintiffs to make the request to the District Court, and accordingly, Plaintiffs filed motion for leave to file notice of appeal to the District Court using virtually identical language. *Id.* at *7-8. The District Court denied Plaintiff's motion. The District Court remarked that although a date missed by one day due to the excusable neglect of miscalculation could be condoned, Plaintiffs had not sought relief on those grounds. *Id.* at *9. Further, the District Court found that Plaintiffs offered nothing more than the naked assertion of an intervening event. The District Court opined that drafting a notice of appeal was a simple process that would not take more than five to ten minutes, and it does not contain lengthy legal argument, nor voluminous procedural compilation of relevant documents. *Id*. at *11. Further, the District Court expressed surprise as to how an event purported to have happened on January 31, 2015, could have prevented the preparation and filing of such a simple document six days later. *Id.* The District Court was also skeptical of the reasons for "excusable neglect" asserted by Plaintiffs' counsel and was further frustrated with Plaintiffs' inattention to the case. *Id.* The District Court noted that Plaintiffs failed to appear at the hearing on Defendants' motion to dismiss on October 22, 2014, a date that was set specifically to accommodate Plaintiffs' counsel. *Id.* at *13. Moreover, although the District Court had repeatedly warned Plaintiffs' counsel that he was in default of maintaining his active status, Plaintiffs' counsel failed to either apply for a continuance or to confer with opposing counsel on that issue. *Id.* at *15. In addition, the District Court observed that Plaintiffs' counsel did not appear at the hearing because he indicated that he had a pre-surgery appointment for his son's tonsils surgery. *Id*. Contrary to this asserted fact, information came to the Court that Plaintiffs' counsel could not attend the hearing because he was dealing with the death of his grandmother. *Id.* at *16. The District Court found this assertion dramatically at odds with what he told the District Court, and thus concluded that Plaintiffs (and, significantly, their counsel) continued to have an "apparent lack of interest in pursuing the case." *Id.* at *17. The District Court indicated that it had lost confidence in the reliability of anything Plaintiffs' counsel told it, and that loss of confidence, coupled with a complete failure to give the District Court anything other than a "naked assertion" of the grounds for excusable neglect, compelled it to conclude that Plaintiffs had not shown excusable neglect for failing to timely file their notice of appeal. *Id.* at *18. Accordingly, the District Court denied Plaintiffs' motion for leave to file notice of appeal out of time.

***Caraway, et al. v. United States,* Case No. 15-CV-434 (Fed. Cl. Sept. 29, 2015).** Plaintiffs, a group of former managers and supervisors of the Federal Aviation Administration ("FAA"), brought a collective action seeking an award of back pay under the FAA's Personnel Management System ("PMS"). *Id.* at 1. Pursuant to an agreement between FAA and the National Air Traffic Controllers Association ("NATCA") that required FAA to grade airport facilities, FAA graded Atlanta TRACON, where Plaintiffs worked, at ATC-12 in 2001. While the agreement provided that if a facility was upgraded, the pay schedule of the facility's employees would be raised to the next level, the FAA did not upgrade the facility to ATC-13 even after it became the world's business airport in 2001, and later split the Atlanta TRACON into two facilities, eliminating their eligibility for an upgrade. *Id.* at 2. The NATCA filed a grievance with the FAA, and the parties' settlement required the FAA to pay back pay to all bargaining unit employees who worked at Atlanta TRACON during the dispute periods of time, including 2011 retirees. *Id.* The FAA then unilaterally extended the settlement to non-bargaining unit employees, but in March 2011, it modified that position, deciding that non-bargaining unit employees who retired or separated at the time of the 2011 settlement would not receive settlement funds. *Id.* Plaintiffs filed a collective action in the District Court alleging that the FAA's decision discriminated against them based on age. The District Court dismissed the collective action, ruling that Plaintiffs' allegations did not give rise to any plausible inference of age discrimination, and the Eleventh Circuit affirmed the dismissal. *Id.* at 3. Plaintiffs then filed this collective action challenging their exclusion from the settlement by seeking back pay under the PMS, a regulatory regime promulgated by the FAA, and asserting jurisdiction under the Tucker Act. *Id.* Defendant moved to dismiss arguing that the PMS back pay provision vest jurisdiction exclusively in forums other than the Court of

Federal Claims, the Court of Federal Claims lacked jurisdiction because Plaintiffs did not seek presently due money, and even if it had, Plaintiffs failed to state a claim. *Id.* at 4. The Court of Federal Claims agreed and dismissed Plaintiffs' collective action. Although the PMS permitted an award of back pay, the Court of Federal Claims noted that the grievance, appeals, and the executive system appeals procedures applied only to a limited number of circumstances listed in the PMS, and an employee aggrieved under the PMS might appeal agency actions not covered by the specifically listed procedures to the Merit Systems Protection Board under the Back Pay Act. *Id.* at 5. The Court of Federal Claims thus noted that FAA employees could seek judicial review of the FAA's refusal to award back pay, if at all, only from a federal Court of Appeals or the Board, and PMS ostensibly withdrew any grant of Tucker Act jurisdiction by vesting judicial review exclusively in forums other than the Court of Federal Claims. *Id.* at 6. The Court of Federal Claims therefore concluded that it lacked subject-matter jurisdiction over Plaintiffs' claims. *Id.* at 7. To the extent Plaintiffs sought back pay on the grounds that the Atlanta TRACON should have been upgraded, and thus they should have received a pay increase, the Court of Federal Claims held that it had no jurisdiction to consider Plaintiffs' claim because Plaintiffs did not seek presently due money, and they did not allege that they were ever appointed to a higher pay grade. *Id.* at 8. Accordingly, the Court of Federal Claims granted Defendant's motion to dismiss Plaintiffs' action for lack of subject-matter jurisdiction.

(iv) Experts In ADEA Collective Action Litigation

***Karlo, et al. v. Pittsburg Glass Works, LLC*, 2015 U.S. Dist. LEXIS 90429 (W.D. Pa., July 13, 2015).** Plaintiffs brought a collective action alleging that Defendant's reduction-in-force ("RIF") in 2010 created a disparate treatment and had a disparate impact on the class in violation of the ADEA. Defendant filed motions to bar Plaintiffs' experts Anthony G. Greenwald, Michael Campion, and David Duffus, which the Court granted in part. Plaintiffs retained Dr. Greenwald to provide his opinion in the area of social psychological research on attitudes, prejudices, and stereotypes, which included the topic of implicit bias. *Id*. at *9. Dr. Greenwald explained that his original research in the area of implicit social cognition included the invention and development of a specific research method known as the Implicit Association Test ("IAT"). *Id*. at *10. Dr. Greenwald summarized his opinion based on research-established findings that had a bearing on the case, including (i) implicit biases were pervasive in more than 70% of Americans, who regarded themselves as unprejudiced; and (ii) implicit bias is scientifically established as a source of discriminatory behavior in employment. *Id*. at *13-14. Defendant sought to exclude Dr. Greenwald as an expert, arguing that (i) his methodology was unreliable, (ii) he lacked requisite qualifications to offer any opinion about a RIF, and (iii) his testimony regarding corporate culture and generalized stereotyping in the workplace was inadmissible under Rule 404 of the Federal Rules of Evidence. *Id*. at *18. The Court observed that other decisions had also barred Dr. Greenwald as an expert witness. The Court explained that Dr. Greenwald did not visit Defendant's plant or speak to any current and former employees, interview the managers who took part in the RIF, or subject any of those individuals to his self-invented IAT. *Id*. at *25. In addition, the Court found that Dr. Greenwald's methodology was unreliable, to the extent that IAT informed his analysis and provided a basis for his opinion that most people experienced implicit bias. *Id*. at *26-27. Accordingly, the Court barred Dr. Greenwald's testimony at the trial. The Court next noted that Dr. Michael Campion made a statistical analysis to examine whether there was any evidence of adverse impact by age in the RIF. Defendant contended that that Dr. Campion, a non-statistician, was not qualified to opine in the field of statistics, and that his analysis used the wrong methodology and failed to specifically examine Plaintiffs' situations. *Id*. at *42. The Court observed that Dr. Campion relied on the four-fifths rule, the reliability of which had been criticized. *Id*. at *45. The Court noted that in using this rule, Dr. Campion claimed to find evidence of disparate impact in older sub-groups despite not finding any statistical significance in the base 40-plus-age-group analysis. *Id*. Accordingly, the Court ruled that Dr. Campion's statistical report did not meet the requirements of Rule 702, and therefore, barred his testimony. Similarly, the Court barred Dr. Campion's expert opinion on reasonable human resource practices, where he found that Defendant failed to follow reasonable HR practices in many different ways when it conducted the RIF terminations. *Id*. at *48. Finally, the Court noted that Plaintiffs retained Dr. Duffus to give his opinion and to rebut Defendant's certified expert in turnaround and restructuring practices. *Id*. at *55. The Court rejected Defendant's attacks on the reliability of Mr. Duffus' opinion or his methodology because Defendant cherry picked aspects of Mr. Duffus' rebuttal of Defendant's expert with which Dr. Duffus disagreed. *Id*. at *60. The Court, however, noted that Dr. Duffus' rebuttal on Defendant's expert was filed untimely, and

thus, limited his testimony. The Court therefore granted Defendant time to respond to Dr. Duffus' rebuttal. Accordingly, the Court granted Defendant's motion to exclude Dr. Duffus' testimony in part.

(v) Notice Issues In ADEA/EPA Collective Action Litigation

***Barrett, et al. v. Forest Laboratories, Inc.,* 2015 U.S. Dist. LEXIS 144340 (S.D.N.Y. Oct. 5, 2015).** Plaintiffs, a group of female sales representatives, brought a collective action under the Equal Pay Act ("EPA") alleging that Defendants engaged in discriminatory employment decisions against women, including paying them less than the male counterparts, as well as discrimination in promotions, work assignment, and discrimination against pregnant women and mothers. In September 2015, the Court granted conditional certification to a collective action of female sales representatives employed by Defendants between 2009 and 2014. *Id.* at *3. Plaintiffs requested the Court's approval of notice to all potential opt-ins employed by Defendants since July 20, 2011. Plaintiffs argued that they were entitled to a notice period dating back to July 20, 2011, because they planned to seek equitable tolling during the pendency of their motion for conditional certification – filed on May 22, 2015 – coupled with a tolling agreement between both parties that began on July 20, 2011. *Id.* at *4. Because the Court had earlier denied tolling based on the filing of the complaint, Defendants asserted that the trigger for notice should be September 15, 2015, which would cause the notice to go to all female sales representatives employed by Defendants at any time since September 15, 2012. *Id*. at *3. The Court authorized provision of notice to all female sales representatives employed by Defendants as of May 22, 2012. The Court noted that a number of case law precedents have concluded that the determination of tolling issues for any of the eventual opt-ins should be dealt with after the notice and opt-in period had concluded, and that therefore notice might be ordered for a universe of employees that include individuals whose claims ultimately might be determined to be time-barred. *Id.* The Court also observed that the case law precedents routinely had approved notice periods going back three years from the filing of the complaint even though that time period could substantially exceed the statutory limitations period, which runs three years from the filing of an opt-in consent, and that such an approach leaves room for opt-ins to pursue a request for tolling based on their own specific circumstances. *Id.* at *7. The Court therefore declined to limit the scope of the notice based on an assumption that future opt-ins whose employment ceased before September 15, 2012 would be unable to demonstrate a basis for tolling and they should be given notice or they would effectively be denied the opportunity to attempt to defend the timeliness of their claims. *Id.* at *7-8. Accordingly, the Court ruled that collective notice would be provided to all females who worked for Defendants as sales representatives at any time since May 22, 2012.

(vi) OWBPA Issues In ADEA Collective Action Litigation

***Barnes, et al. v. Hershey Co.*, 2015 U.S. Dist. LEXIS 89947 (N.D. Cal. July 9, 2015).** Plaintiffs, a group of former employees, brought an action alleging that Defendant fired them due to their age as part of its plan to terminate older workers. The Court noted that Defendant placed one of the named Plaintiffs, Mary Frazier, on a performance improvement plan ("PIP") several times between 2007 and 2010, when she was ultimately terminated. Frazier believed that she was discriminated against because of her age, and that she signed a release only in order to receive the severance pay. *Id*. at *12. Similarly, other named Plaintiffs, including Richard Nelson, Lori DeLaRue, Mary Wasson, May Weeks, David Bolle, and James Bombeck, all claimed that Defendant terminated them after performance reviews, which invariably stated that they need improvement. *Id*. at *14, 26. Plaintiffs claimed that Defendant coerced them into signing a waiver of their age discrimination claims under the Age Discrimination in Employment Act ("ADEA") in exchange for a severance payment in violation of the Older Workers Benefit Protection Act ("OWBPA"). *Id*. at *2. Parties filed cross-motions for summary judgment on the issue of whether the waiver that each Plaintiff signed was valid. The Court denied Plaintiffs' motion, and partially granted Defendant's motion. At the outset, the Court noted that the OWBPA allows waivers only if the employer strictly complied with various statutory requirements, which include a longer waiting period and increased disclosure requirements if a waiver is executed in connection with a group termination program instead of an individual termination. *Id*. at *28. It was undisputed that the waivers complied with the statutory requirements for an individual termination. *Id*. Plaintiffs alleged that rather than being terminated in a series of individual terminations, their terminations were actually connected by the January 2010 Career

Planning Meeting that was the epicenter of Defendant's concerted effort to terminate long tenured older workers on the basis of age discrimination. *Id*. at *28-29. The Court noted that accepting Plaintiffs' best possible version of the facts, there was no genuine question of fact that Plaintiffs Frazier, Nelson, DeLaRue, Wasson, and Weeks were not part of any group termination and thus validly waived the ADEA claims they sought to press in this action. The Court observed that as for age discrimination, Plaintiffs assumed that because Defendant allegedly targeted longer-tenured workers, and the passage of years in a particular role also made those employees older, Defendant violated the ADEA. *Id*. at *34. The Court remarked that this was not a tenable ADEA theory. The Court explained that to state a valid ADEA claim, the adverse employment action must be based on age, and when an employer's decision is motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears even if the motivating factor correlates with age. *Id*. at *35. The Court further opined that age and years of service are analytically distinct, and an employer can take account of one while ignoring the other, and thus, it would be incorrect to say that a decision based on years of service is necessarily age-based. *Id*. at *36. The Court found that based on the records, it was clear that the terminations of Plaintiffs Frazier, Nelson, DeLaRue, Wasson, and Weeks were based on observations that they had stagnated in their respective positions. *Id*. at *37. Since these terminations were not part of the alleged group terminations, the Court concluded that their OWBPA waivers were valid, and granted summary judgment on those claims. *Id*. Defendant contended that Plaintiff David Bolle was terminated as part of its restructuring and not based on performance. The Court noted that at the time of Bolle's termination, Defendant cited to his PIPs in early 2009 as supporting reasons, making Defendant's offered reason a pre-text for discrimination. *Id*. at *44. Accordingly, the Court denied summary judgment to Defendant on Plaintiff Bolle's claims. The Court, however, granted summary judgment to Defendant on Plaintiff Bombeck's claim, finding that his termination was not based on his age. Accordingly, the Court granted Defendant's motion in part.

***McLeod, et al. v. General Mills, Inc.,* 2015 U.S. Dist. LEXIS 144396 (D. Minn. Oct. 23, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendant violated the Age Discrimination in Employment Act ("ADEA") by terminating approximately 850 employees as part of a corporate restructuring plan. Plaintiffs alleged that Defendant violated the ADEA because the lay-off affected employees aged 40 or over at much higher rates than younger employees and that Defendant replaced terminated employees with younger employees. *Id.* at *3. In support, Plaintiffs cited statistics derived from employee termination data, which purportedly showed that older employees were many times more likely to be laid-off than younger employees during the restructuring. *Id.* Defendant moved to dismiss Plaintiffs' complaint and compel arbitration under the Federal Arbitration Act ("FAA"), alleging that each Plaintiff had signed a binding arbitration agreement and general release agreement as a condition of receipt of a severance package. *Id.* at *9. The Court denied Defendant's motion because the language of the Older Workers Benefit Protection ("OWBPA") mandates that any worker challenging the validity of a waiver of ADEA rights "shall have the burden of proving in a Court of competent jurisdiction that a waiver was knowing and voluntary." *Id.* at *20. Because Plaintiffs disputed that the substantive waivers of their ADEA claims did not meet the requirements of OWBPA, the Court found that OWBPA required Defendant to assert the validity of that waiver in Court, not an arbitral forum. The Court reasoned that the plain language of the statute embodies a congressional command that it was mandatory for Courts, not arbitral tribunals, to hear a dispute over the validity of a waiver of substantive claims under the OWBPA's waiver requirements found in 29 U.S.C. § 626(f)(1). *Id.* at *22. The Court rejected Defendant's argument that "Court of competent jurisdiction" also meant an arbitral forum, since many Courts, and arbitration agreements themselves, have recognized that "Court of competent jurisdiction" refers to a Court. *Id.* at *23. The Court therefore denied Defendant's motion to dismiss and to compel arbitration and allowed the case to proceed for further motion practice and an eventual determination as to whether the release agreements at issue complied with the waiver provisions of the OWBPA.

(vii) Disparate Impact Issues In ADEA Collective Actions

***Villarreal , et al. v. R.J. Reynolds Tobacco Co.,* 2015 U.S. App. LEXIS 20718 (11th Cir. Nov. 30, 2015).** In November 2007 Plaintiff, then age 49, submitted an application for employment to Defendant for the position of Territory Manager. *Id.* at *4. Plaintiff never heard back from Defendant, took no action, and was not aware of a potential claim against Defendant until he spoke with a group of Plaintiffs' lawyers. *Id.* at

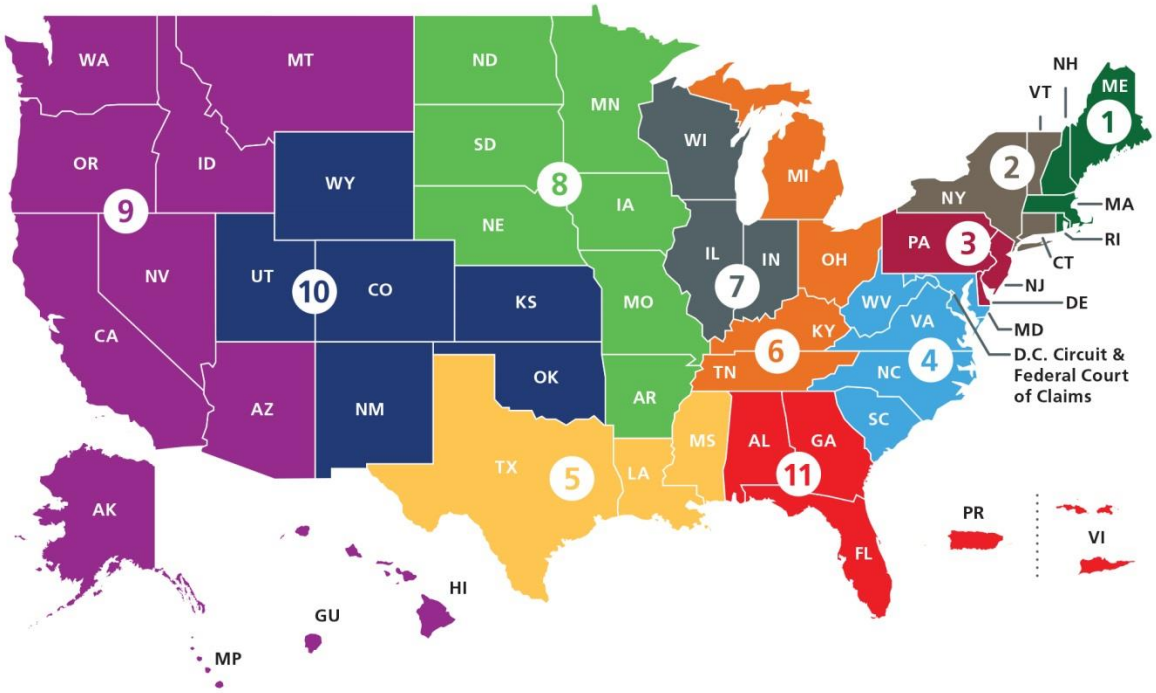
*5. Plaintiff then filed a charge of age discrimination with the EEOC on May 17, 2010, two and a half years after the submission of his unsuccessful job application. While the charge was pending, Plaintiff unsuccessfully applied for the Territory Manager position five more times. *Id.* The EEOC issued Plaintiff a right-to-sue notice in April 2012, and Plaintiff filed a collective action complaint alleging claims including disparate impact discrimination in violation of the ADEA. Plaintiff's disparate impact claim was premised on allegations that Defendant, assisted by recruiting services, used a set of "resume review guidelines" to screen applicants for the position of Territory Manager. These guidelines included targeting candidates "2 to 3 years out of college" and advised hiring managers to "stay away from" candidates with 8 to 10 years of "prior sales experience." *Id.* at *3. Of the 1,024 individuals Defendant hired into the position of Territory Manager from September 2007 to July 2010, 19 were over the age of 40. *Id.* The District Court dismissed the lawsuit, reasoning that the ADEA only authorizes disparate impact claims for current employees. *Id.* at *5. The District Court also dismissed as untimely all claims for hiring decisions made before November 19, 2009, being more than 180 days before Plaintiff filed his EEOC charge. *Id.* In this respect, the District Court specifically found that Plaintiff himself was not entitled to equitable tolling of his ADEA claim because he failed to allege in his complaint what facts he came to know prior to filing his EEOC charge, or how he came to know them. *Id.* The District Court also denied Plaintiff's motion to amend his complaint, explaining that Plaintiff could not state a valid basis for equitable tolling because he did not pursue his rights by contacting Defendant to find out why his job application had been rejected, and further because he failed to allege any misrepresentation or concealment by Defendant. *Id.* at *7. Plaintiff appealed the decision to the Eleventh Circuit. At issue was whether § 4(a) of the ADEA, which was interpreted to give rise to employee claims of disparate impact discrimination in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005), reasonably could be read to authorize claims of disparate impact discrimination brought by job applicants. Section 4(a) provides that it is unlawful for an employer "…to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." *Id.* at *8. While Defendant argued that the phrase "his employees" expressly limits the applicability of § 4(a) to employees, Plaintiff argued that § 4(a) must include applicants because Congress chose to use the broader phrase "any individual" in close proximity with yet in contrast to the preceding phrase "his employees." *Id.* at *10. Finding § 4(a) of the ADEA to be "vague," the Eleventh Circuit determined to defer to the interpretation and policy choices of the EEOC. It reasoned that: "The EEOC enforces the ADEA. We therefore defer to its views on the ADEA's interpretation and application unless those views are unreasonable." *Id.* at *26. In this respect, the Eleventh Circuit cited the EEOC's disparate impact regulations under its rule-making authority as applying to "individuals within the protected age group," without distinguishing between applicants and employees. *Id.* at *27. Although Defendant argued that the EEOC's construction of its regulations was not entitled to deference because its regulations deal with different provisions of the ADEA and did not clearly address the issue at hand, the Eleventh Circuit rejected this argument, stating "we still owe deference to the EEOC's view because the agency has reasonably and consistently insisted in this view for decades." *Id.* Citing the EEOC's own regulations and interpretations by the EEOC and the U.S. Department of Labor, the Eleventh Circuit concluded that § 4(a) of the ADEA can reasonably be read to authorize disparate impact claims by applicants, thereby requiring reversal of the District Court's dismissal of Plaintiff's disparate impact claim. *Id.* at *28. Turning to Plaintiff's claim for equitable tolling, the Eleventh Circuit also rejected the District Court's reasoning that the doctrine of equitable tolling requires misrepresentation by the employer, and opined that it has expressly held that equitable tolling does not require any misconduct on the part of a Defendant. *Id.* at *41. Particularly because "[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual being discriminated against," the Eleventh Circuit explained that it has regularly reaffirmed the "reasonably prudent" person standard in ADEA cases. *Id.* at *39. Although the Eleventh Circuit could "offer no view on whether [Villarreal] will ultimately be able to benefit" from the doctrine of equitable tolling, it reversed the District Court's dismissal of Plaintiff's pre-November 2009 claims and remanded for further proceedings. *Id.* at *47.

V. Significant Collective Action Rulings Under The Fair Labor Standards Act

Fair Labor Standards Act ("FLSA") collective action litigation continued at a rapid pace in 2015. FLSA collective actions were filed more frequently than all other types of workplace class actions.

Statistically, plaintiffs were successful in securing conditional certification almost 75% of the time. In terms of "second stage" decertification motions, plaintiffs also prevailed in a majority of those cases (approximately 64% of the time). A map showing these rulings is as follows:

U.S. Courts Of Appeal – Analysis Of FLSA Certification Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	3	18	7	9	9	3	10	7	35	7	7	0
Conditional Certification Motions Denied	1	10	2	0	3	2	8	2	8	0	2	0
Decertification Motions Granted	0	1	0	0	0	1	1	1	3	0	1	0
Decertification Motions Denied	0	0	0	1	1	1	1	3	4	0	3	0

Total: 115 Conditional Certifications Granted / 38 Conditional Certifications Denied
8 Decertification Motions Granted / 14 Decertification Motions Denied

Whereas in Title VII class actions the courts undertake a "rigorous analysis" required by the U.S. Supreme Court decisional law for determining class-worthiness under Rule 23, courts have continued the trend of utilizing a two-step process for determining certification in FLSA collective action cases under 29 U.S.C. § 216(b). Under the first step of this approach, known as "notice" or "conditional" certification, courts generally impose a much lighter burden on plaintiffs to obtain conditional certification and to authorize a

notice being sent to all putative collective action members. It is only at a second-stage proceeding, usually when considering a motion to decertify after discovery has been taken, that courts apply a more rigorous analysis of the evidence offered by plaintiffs.

A. Cases Certifying Or Refusing To Certify FLSA Collective Action Claims

(i) First Circuit

***Garcia, et al. v. E.J. Amusements Of New Hampshire, Inc.,* 2015 U.S. Dist. LEXIS 48161 (D. Mass. April 13, 2015).** Plaintiffs brought a putative class action alleging that Defendant, a carnival ride provider, failed to pay minimum wages and overtime as required by Massachusetts and New Hampshire law. Plaintiffs moved for certification of a class of current and former hourly employees. The Court granted Plaintiffs' motion. At the outset, the Court found that Rule 23 standards – rather than the allegedly "more lenient" standards provided by Massachusetts and New Hampshire law – applied to Plaintiffs' motion. *Id*. at *5. The Court found that Plaintiffs failed to explain how state substantive law required a different analysis. *Id.* at *6-9. The Court found that Plaintiffs satisfied all of the prerequisites of Rule 23. First, Plaintiffs satisfied the numerosity requirement because they identified more than 160 workers who allegedly suffered wage and overtime violations under Massachusetts and New Hampshire law. *Id.* at *12. Second, Plaintiffs established the commonality requirement because they demonstrated that the action potentially involved a number of important factual and legal questions that could be resolved for the entire class simultaneously. In particular, because Defendant failed to keep records of the specific number of hours worked by each employee and instead kept a "gang time" payroll that tracked the maximum number of hours that any employee could have worked each week, the parties could use common sources of proof to: (i) establish the number of hours worked each week; (ii) show how much Defendant was required to pay each week; and (iii) evaluate Defendant's defenses that it used a pre-payment plan and an end-of-year lump sum payment plan to off-set or compensate for unpaid overtime or minimum wages. *Id.* at *26. Third, Plaintiffs satisfied the typicality requirement because, despite minor differences, Plaintiffs' claims that Defendant failed to maintain an adequate system of paying minimum wage and overtime were sufficiently similar to the rest of the class. *Id.* at *22. Fourth, Plaintiffs established the adequacy requirement because no conflicts of interest existed between Plaintiffs and the proposed class, and their counsel was experienced and more than capable of proceeding with the litigation. *Id.* at *23-24. Finally, Plaintiffs satisfied the predominance requirement because the factual and legal issues that could be addressed on a class-wide basis predominated over any individualized question. Although each individual employee earned a different weekly salary, and establishing liability for the minimum wage claims would require a brief examination of each class member's pay stubs, such a task would not be arduous because the "gang time" payroll showed many hours each employee presumptively worked each week. *Id.* at *26-27. Although calculating the precise damages owed to each class member might require some individualized inquiry, the Court found that the method for calculating each class member's damages likely would be mechanical, based on the individual's salary and common evidence about the typical number of hours worked. Accordingly, the Court determined that questions of individual damage calculations would not inevitably overwhelm the common questions. *Id.* at *28. Finally, the Court ruled that a class action would be the superior method for adjudicating this controversy because the class was comprised of small individual claims, and many of the class members were low-income, uneducated, and lacked resources to litigate on their own. *Id.* at *31. The Court, therefore, granted Plaintiffs' motion for class certification.

***LeVecque, et al. v. Argo Marketing Group, Inc.,* 2015 U.S. Dist. LEXIS 76150 (D. Me. June 12, 2015).** Plaintiffs, a group of customer service representatives and sales personnel, brought an action under the FLSA, the Maine Employment Practices Act, and the Maine Minimum Wage and Overtime Law seeking unpaid wages and overtime. Defendant employed Plaintiffs to sell and service various products offered by third-party vendors such as weight loss, energy, and sexual enhancement products. Plaintiffs alleged that Defendant failed to pay them for the "period between logging-in to Shift Planner and download of information from VACD or Atmosphere software, the two 10-minute rest breaks, and bathroom breaks." *Id.* at *5. Seeking to represent similarly-situated employees, Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b) of the FLSA. The Court granted Plaintiffs' motion, finding that Plaintiffs met their burden of proving that they and other customer service representatives were similarly-

situated and suffered from a common unlawful policy or plan. *Id.* at *23. Plaintiffs submitted a total of four affidavits and one supplemental affidavit in support of their motion, and stated that the job duties of the named Plaintiffs, the opt-in Plaintiffs, and the putative collective action members were essentially the same as one another regardless of the call centers they worked at or the products they sold. Although Defendant also submitted affidavits that contradicted Plaintiffs' affidavits, including Plaintiffs' assertions that they were similarly-situated or that Defendant subjected them to a single decision, policy, or plan, the Court found that it should not in resolved them for purposes of the motion for conditional certification. *Id.* at *42. To the extent Defendant took issue with the number of affidavits submitted by Plaintiffs (in arguing that Plaintiffs' showing was legally insufficient because it was based on a mere four declarations), the Court noted that five named Plaintiffs with three submitting affidavits and six others wishing to opt-in was sufficient to demonstrate a showing of other individuals interested in joining the action. *Id.* at *41. Because Plaintiffs submitted affidavits from employees who worked at the Portland and Pittsfield locations in Maine, Defendant argued that Plaintiffs' experiences were unique and in no way representative of the experience of employees in Lewiston or working from home, and therefore could not establish liability at other Defendant's locations in Maine. *Id.* at *44-46. Although Plaintiffs did not submit any affidavits from customer service representatives who worked in Lewiston, the largest location of Defendant, and significant variations existed in the way each location dealt with lag time, bathroom breaks, and work breaks, the Court found that the differences could be best considered at the second certification stage after discovery provided a more extensive and detailed factual record. *Id.* at *46-47. Because Defendant allegedly subjected both customer service representatives and sales personnel to the same terms and conditions of employment, the Court concluded that Plaintiffs met their burden of a modest factual showing that the proposed collective action members were similarly-situated. *Id.* at *48. Accordingly, the Court granted Plaintiffs' motion for conditional certification of FLSA collective action.

***Rios, et al. v. Current Carrier Corp.*, 2015 U.S. Dist. LEXIS 40362 (D. Mass. Mar. 30, 2015).** Plaintiffs brought an action alleging that Defendants violated the FLSA and Massachusetts wage laws by capping the number of hours they paid to their couriers for each delivery, by failing to pay wages for certain waiting and travel times between deliveries, and by failing to properly reimburse couriers for all transportation expenses. *Id.* at *2. Plaintiffs moved for conditional certification of a collective action under the FLSA, and Rule 23 class certification for their state law claims, which the Court denied without prejudice. First, regarding the motion for conditional certification under § 216(b) of the FLSA, the Court noted that Plaintiffs each had submitted an affidavit that made conclusory statements about the general treatment of couriers. *Id.* at *3. The Court pointed out that none of the Plaintiffs' extensive briefing contained facts about other employees sufficient to compare their situations relative to Plaintiffs' situations, nor did Plaintiffs know the circumstances of the other employees. *Id.* at *3-4. Specifically, Plaintiffs acknowledged that they worked alone as couriers and thus did not have the same opportunity to communicate with other alleged similarly-situated employees as would employees who worked in the same office. The Court maintained that although such a work environment was hardly a bar to FLSA recovery in this case, Plaintiffs appeared to be wholly unaware of the situations of the others they sought to represent. *Id.* at *4. At the very least, the Court determined that Plaintiffs had not put forth a sufficient description of the circumstances of the other employees to permit a reasoned evaluation of whether those other employees were similarly-situated in relevant respects to Plaintiffs. *Id.* The Court thus concluded that because Plaintiffs' affidavits established that Plaintiffs had no personal knowledge of the practices of Defendants' management in other divisions or offices, conditional certification was inappropriate. *Id.* at *5-6. Similarly, the Court found that Plaintiffs' Rule 23 motion for class certification suffered from the same factual deficiencies as in the § 216(b) motion, and denied Plaintiffs' motions without prejudice.

***Saunders, et al. v. Getchell Agency, Inc.,* 2015 U.S. Dist. LEXIS 35978 (D. Me. Mar. 23, 2015).** Plaintiffs, a group of house managers, brought an action alleging that Defendant violated the overtime provisions of the FLSA, the overtime provisions of 26 M.R.S.A. § 664(3), and the minimum wage requirements of 26 M.R.S.A. § 664(1). Defendant provided residential care services to disabled individuals and employed Plaintiffs as house managers to work in the residences. Defendant paid Plaintiffs on an hourly basis and required them to be with consumers 24 hours per day. Plaintiff alleged that they frequently cared for consumers at night and Defendant routinely failed to compensate them for these

hours. *Id.* at *3. Plaintiffs sought to certify a state-wide class on behalf of all hourly paid house managers who worked at any time in the last six years and whom Defendant required to be with the consumers for 24 hours per day. *Id.* at *3-4. Following the Magistrate Judge's recommendation to certify the class, Defendant filed a Rule 72 objection to the findings on commonality, predominance, superiority, and ascertainability. The Court rejected Defendant's arguments and granted class certification. First, the Court found that the class as proposed by Plaintiffs was ascertainable. The Court noted that, because Defendant required Plaintiffs to remain at the residences with the consumers for 24 hour periods as part of their job description, determining class membership would require viewing a putative class member's timecards, and this was both objective and administratively feasible. *Id.* at *21-22. The Court also found that the questions of whether Defendant had a uniform, unlawful policy of withholding pay for overnight hours and whether those overnight hours were compensable under Maine law were capable of class-wide resolution. *Id.* at *11. The Court noted that Plaintiffs had provided sufficient and significant proof to support their allegations that Defendant had a general policy of withholding overnight pay. *Id.* at *7. Specifically, the Court observed that Plaintiffs submitted more than 200 timecards, purporting to represent complete sets of Defendant's timecards from four different weeks, which showed that only three house managers received compensation for any overnight hours. *Id.* The Court also determined that the timecards showed no instance of an employee being compensated for a brief period during overnight hours, which contradicted Defendant's assertions that it encouraged employees to put hours on their timecards if they had to tend to the consumers overnight. *Id.* at *7-8. The evidence further showed that, at least during the shifts where they remained in a residence overnight, Defendant expected Plaintiffs to be on-call to attend to consumers' needs, and this showed that Plaintiffs' overnight hours were hours "actually worked." *Id.* at *11. According to the Court, this was sufficient to establish that Plaintiffs' theory of liability could be proved on a class-wide basis. Finally, the Court found that adjudication of Plaintiffs' state law claim would not require significant consideration of individual issues at the liability stage. *Id.* at *18. Although Defendant placed great emphasis on the fact that some house managers, on occasion, returned to their own homes during overnight hours and argued that the issue of whether Plaintiffs' overnight hours were compensable must be resolved for each employee individually, the Court opined that the issue did not necessitate the resolution of individual issues on the scale Defendant suggested. The Court explained that if Plaintiffs established that hours spent on-call in a residence were hours "actually worked," then hours spent off-site at a house manager's private home were not compensable, and thus not implicated in liability. *Id.* at *13. Defendant further argued that the possible application of an overtime exemption for domestic service employees would raise individual issues. The Court, however, ruled that it was unclear whether any exemption would be actually applicable here, and even if applicable, the scale of any individual issues it could generate was unclear. The Court therefore concluded that individual issues did not overwhelm common ones in this litigation, and a class action would be superior means to resolve the dispute. *Id.* at *18-21. Accordingly, the Court granted Plaintiffs' motion for class certification.

(ii) Second Circuit

***Aldo, et al. v. United Talmudical Academy Of Kiryas Joel, Inc.,* 2015 U.S. Dist. LEXIS 111076 (S.D.N.Y. Aug. 18, 2015).** Plaintiffs, a group kitchen staff employees, brought an action on behalf of themselves and others similarly-situated, alleging that Defendant, a private Jewish educational institution and its administrators, violated the FLSA and the New York Labor Law ("NYLL") by failing to pay them a minimum hourly wage or overtime wage. *Id.* at *4. Plaintiffs also alleged that Defendant failed to provide them with complete and accurate wage statements or keep proper time records. Plaintiffs moved to certify a class on their state law claims pursuant to Rule 23, which the Magistrate Judge recommended be granted. The Magistrate Judge found that Plaintiffs satisfied the numerosity requirement as Defendant produced a list showing that they employed 51 individuals as non-managerial kitchen staff at its facilities. *Id.* at *8. The Magistrate Judge opined that the proposed class could be easily identified from Defendant's own records. *Id.* at *14. The Magistrate Judge also determined that Plaintiffs satisfied the commonality requirement as they identified questions common to the class, including whether Defendant knowingly failed to pay a minimum wage, whether they maintained adequate time records, and whether they furnished employees with adequate wage statements. *Id.* at *9. The Magistrate Judge also noted that Plaintiffs' assertion that Defendant paid each member of the proposed class a flat wage no matter how many hours they worked was uniquely amenable to class-wide resolution. *Id.* In addition, the Magistrate

Judge held that Plaintiffs satisfied the typicality requirement as Plaintiffs and the other class members employed in Defendant's kitchen had the same job responsibilities, and Defendant injured all class members by failing to meet their federal and state law obligations. *Id.* at *11. Further, the Magistrate Judge ruled that Plaintiffs satisfied the adequacy requirement by demonstrating their intention to prosecute the case zealously through actions like retaining qualified counsel, assisting in the preparation of pleadings, and sitting for depositions. *Id.* at *12. The Magistrate Judge also found that Plaintiffs satisfied the predominance requirement as the number of common questions central to Plaintiffs' claims could be resolved through class adjudication, including whether Defendant's school-wide compensation scheme for non-managerial kitchen employees violated federal and state wage & hour laws. *Id.* at *15-16. Finally, the Magistrate Judge concluded that Plaintiffs satisfied the superiority requirement as their individual damages were not significant enough to justify the expense of individual litigation. *Id.* at *16. Accordingly, the Magistrate Judge recommended granting Plaintiffs' motion for class certification.

***Augustyniak, et al. v. Lowes Home Centers, LLC,* 2015 U.S. Dist. LEXIS 110359 (W.D.N.Y. Aug. 20, 2015).** Plaintiff, a Human Resource Manager ("HRM") brought a putative collective action alleging that Defendant misclassified her as exempt and denied her overtime pay in violation of the FLSA. Plaintiff moved for conditional certification of a collective action. The Court denied the motion. The parties previously were involved in another FLSA action in the U.S. District Court for the Middle District of Florida (the "*Lytle* action") which they described as parallel and virtually identical. Plaintiff argued that the main issue was whether the HRMs exercised independent judgment and discretion on matters of significance and agreed that the Court could consider evidence and discovery from the *Lytle* action. *Id*. at *5. In *Lytle*, many of the opt-in Plaintiffs testified that they participated in significant decisions at their stores, especially with respect to hiring; many testified that they led their store's recruiting efforts and were involved in disciplinary decisions; and many testified that they had 50% input into all final hiring decisions at their stores. *Id*. The Court noted that Plaintiff failed to make a "modest showing" that members of the proposed collective action were similarly-situated with respect to alleged violations of the FLSA and failed to make any showing that she was similarly-situated to any of them with respect to such violations. *Id.* at *7. Indeed, Plaintiff made only two submissions that related to her, including the amended complaint and her consent to join, neither of which were in proper evidentiary form. *Id.* The Court, accordingly, concluded that Plaintiff failed to make even the modest showing required for conditional certification under 29 U.S.C. § 216(b) and denied the motion.

***Benitez, et al. v. Demco Of Riverdale, LLC,* 2015 U.S. Dist. LEXIS 79570 (S.D.N.Y. June 15, 2015).** Plaintiffs, a group of former employees, brought an action asserting wage and overtime claims in violation of the FLSA and the New York Labor Law. Plaintiffs moved for certification as a collective action under 29 U.S.C. § 216(b). Plaintiffs asserted that they were non-exempt employees eligible for overtime, and that over the course of several years, they were not paid the minimum wage or overtime while regularly required to work at least 65 hours per week. *Id.* at *3. Plaintiffs also claimed that Defendant paid them a set wage per week, regardless of the fact that they should have been classified as hourly employees, and regardless of the number of hours they worked each week. *Id.* at *3-4. Plaintiffs claimed that their primary duties centered upon the preparation of food and beverages. *Id.* at *4. All the proposed collective action members were employees of Defendant's Planet Wings, Inc. establishments. Plaintiffs also alleged that Defendant did not pay other cooks minimum wage or overtime and that they were personally familiar with the fact that other cooks worked more than 40 hours. Plaintiffs asserted that Defendant subjected them and others employed as cooks to a common discriminatory scheme. Defendant argued that the named Plaintiffs were not similarly-situated to the proposed class members because they were not cooks, but managers who were paid on a salaried basis and eligible for benefits. *Id.* at *11-12. The Court, however, remarked that Plaintiffs had satisfied the modest factual showing required by § 216(b), and that they demonstrated that they were victims of the practice of receiving no pay for overtime and also that this practice was common to the establishments at three locations. *Id.* at *12. The Court opined that by alleging that they were together the victims of a common policy or plan that violated the law, Plaintiffs had met their minimal burden. *Id.* at *13. Defendant argued that collective action certification was improper because the responsibilities of the employees could differ and require additional investigation. The Court determined that the alleged differences among Plaintiffs had little to do with whether Plaintiffs were

similarly-situated with respect to their allegations that the law had been violated. *Id.* Further, although there was a clear dispute of fact as to whether Plaintiffs were misclassified as exempt employees, the Court ruled that to balance the parties' competing affidavits at this stage would require determination of the facts and resolution of legal contentions, all of which the conditional certification and potential later decertification process is structured to avoid. *Id.* at *14. Accordingly, the Court conditionally certified the collective action.

***Bhumithanarrn, et al. v. 22 Noodle Market Corp.,* 2015 U.S. Dist. LEXIS 90616 (S.D.N.Y. July 13, 2015).** Plaintiffs, a group of fast food restaurant employees, brought an action alleging that Defendant required them and at least 25 other workers to work over 40 hours per week for less than minimum wage and without overtime pay. *Id.* at *4. Plaintiffs further alleged that Defendant reduced workers' pay by a "tip credit" and took other improper deductions from employees' wages and tips, including requiring them to purchase and maintain uniforms. *Id.* Alleging violations of the FLSA and the New York Labor Law ("NYLL"), Plaintiffs moved for an order conditionally certifying this action as an FLSA collective action pursuant to 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion. It found that Plaintiffs met the minimal burden of demonstrating that Defendant subjected them to a common policy or practice, and thus they were similarly-situated to one another and to potential opt-in Plaintiffs. *Id.* at *9. The Court noted that Plaintiff's affidavit stating that she and at least 25 other workers employed by Defendant regularly worked for less than minimum wage, without overtime pay and that Defendant forced them to share tips was sufficient to meet the low standard for conditional certification. *Id.* The Court therefore held that Plaintiffs could send § 216(b) notice to other potentially similarly-situated employees informing them of their right to bring FLSA claims and advising them that they might be required to provide information, appear for a deposition, or testify if they opt-in to the conditional class action. *Id.* at *14-15. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Callari, et al. v. Blackman Plumbing Supply, Inc.,* 2015 U.S. Dist. LEXIS 43820 (E.D.N.Y. Mar. 31, 2015).** Plaintiff, an assistant branch manager and a former inside sales representative, brought an action alleging that Defendant violated the FLSA and the New York Labor Law ("NYLL") by improperly classifying him and other assistant branch managers as exempt executives. Plaintiff asserted that the inside sales representatives and assistant managers had the same primary job duties and did not involve any significant managerial responsibilities. *Id*. at *4. Plaintiff moved for Rule 23 class certification of a class of employees who performed work as inside sales representatives and assistant managers for Defendant. The Court denied Plaintiff's motion, finding that Plaintiff failed to establish commonality and typicality. The Court found no basis to believe that the questions proposed by Plaintiff – whether Defendant required both inside sales representatives and assistant managers to work overtime, whether they did in fact work overtime, and whether Defendant refused to pay them for such overtime – were common questions for assistant branch managers and inside sales representatives. *Id.* at *20. While the evidence suggested that Defendant had a policy requiring both salaried inside sales and counter employees to work one four-hour uncompensated Saturday a month in addition to their 40 hour workweek, there was no evidence that this policy also applied to assistant branch managers. *Id.* The Court therefore found that the question of whether the class members worked in excess of 40 hour per week would require it to make individual determinations with respect to each class member. *Id.* at *22. Therefore, the Court found that the only potential common question raised by Plaintiff was the question of whether Defendant properly classified class members as exempt from overtime requirements, but Plaintiff failed to demonstrate that Defendant classified both inside sales representatives and assistant branch managers as "executives" exempt from overtime compensation. *Id.* at *23. Although the evidence demonstrated that Defendant had a policy whereby it classified assistant branch managers as exempt from overtime requirement, Plaintiff failed to provide evidence that Defendant had a similar policy for inside sales representatives. *Id.* at *24. The Court therefore found that the question of whether Defendant misclassified class members as exempt from overtime was not common to all of the proposed class members. The Court also determined that, even if the proposed class satisfied commonality, it would still fail to satisfy the typicality requirement because unlike the inside sales representatives that Defendant did not classify as exempt, the assistant branch managers' NYLL claims would be subject to a unique defense, *i.e.*, whether Defendant properly classified them as executive employees. *Id.* at *30. According to the Court, this question would require it to examine the duties and responsibilities of each individual assistant branch manager because the evidence

suggested that the duties of sales representatives and assistant branch managers varied across Defendant's 20 branches, and Defendant did not define their duties pursuant to any general policy. *Id.* at *31-38. Plaintiff relied on statements made in his own declaration and that of an opt-in Plaintiff to argue that the duties of assistant branch managers and inside sales representatives were similar across all branches. The Court, however, ruled that the declarations were not trustworthy in light of their inconsistent deposition testimony and the lack of their personal knowledge as to the duties of assistant branch managers and inside sales representatives of other Defendant's branches. *Id.* at *37. The Court accordingly denied Plaintiff's motion for class certification.

***Callari, et al. v. Blackman Plumbing Supply, Inc.*, 2015 U.S. Dist. LEXIS 171719 (E.D.N.Y. Dec. 23, 2015)**. Plaintiff brought a class action on behalf of inside salespersons and assistant branch managers ("ABMs") of Defendant's plumbing supply company, alleging violations of the New York Labor Law. After the Court previously denied Plaintiff's motion for class certification, Plaintiff moved the Court to reconsider its previous order pursuant to Local Civil Rule 6.3. The Court denied Plaintiff's motion for reconsideration. *Id.* at *2. In the underlying motion for certification, Plaintiff asserted that the proposed class satisfied the commonality and typicality requirements set forth in Rule 23(a) because both inside salespersons and ABMs shared similar duties and responsibilities and both groups were classified by Defendant as exempt from overtime, and therefore, were all deprived of their rightful overtime compensation. *Id.* at *3-4. In moving for reconsideration, Plaintiff asserted that Defendant did not argue that inside salespersons were not classified as exempt from entitlement to overtime, and thus the Court should have adopted Plaintiff's assertion that both inside salespersons and ABMs were classified as exempt and not paid overtime. *Id.* at *4. The Court rejected this argument, noting it is Plaintiff's burden to establish that the requirements of Rule 23 are satisfied by a preponderance of evidence. *Id.* Plaintiff also contended that the Court erroneously relied on testimony by Susan Cook, Defendant's human resources administrator. *Id.* at *5. The Court found that at the very least, her testimony supported a finding that for part of the proposed class period, which ran from March 31, 2009 to March 31, 2015, inside salespersons, unlike ABMs, did receive overtime. *Id.* at *6-7. Accordingly, the Court held that its factual finding on this issue was not clearly erroneous, contrary to what Plaintiff suggested. *Id.* at *7. Plaintiff further contended that the Court erred in finding that Plaintiff had sufficient opportunities to engage in discovery since Defendant failed to produce relevant discovery regarding the names of inside salespersons and ABMs dating back to 2008 and un-redacted versions of certain documents. *Id.* at *11. The Court rejected this argument on the basis that Plaintiff failed to offer any legal authority for the proposition that he was entitled to renew his motion for certification pursuant to Rule 23 because additional discovery might reveal new documents supporting class certification. *Id.* Accordingly, the Court denied Plaintiff's motion for reconsideration of the Court's previous order denying class certification. *Id.* at *19.

***Chime, et al. v. Peak Security Plus, Inc.,* 2015 U.S. Dist. LEXIS 131727 (E.D.N.Y. Sept. 9, 2015).** Plaintiff, a security guard, brought an action alleging that Defendant failed to compensate him and similarly-situated employees despite knowing that they worked over 40 hours per week in violation of the FLSA and the New York Labor Law ("NYLL"). *Id.* at *2. Plaintiff alleged that he and other similarly-situated employees often worked in excess of 40 hours per week primarily because: (i) Defendant asked security guards to cover a co-worker's shift, resulting in that guard working six to eight hours beyond his regular weekly schedule; (ii) Defendant required guards to arrive at their posts at least fifteen minutes before their shifts began; and (iii) Defendant did not permit guards to leave their post until relieved by their co-workers. *Id.* at *3. Defendant moved to dismiss, arguing that Plaintiff's FLSA claims were time-barred and failed to state a claim. At the same time, Plaintiff moved for conditional certification of a collective action with respect to the FLSA claims, and for class certification with respect to the NYLL claims. *Id.* The Magistrate Judge recommended granting Plaintiff's motion for conditional certification and class certification, finding that although Plaintiff did not allege a formal policy in violation of the FLSA, he showed that Defendant's policies required security guards to work beyond their scheduled shifts without compensation, and thus showed the existence of a common policy or plan that violated the FLSA. *Id.* at *38-41. Further, Plaintiff's affidavit provided specific allegations that Defendant did not pay appropriate overtime compensation to other employees who performed the same or similar work, and thus he met the lenient evidentiary standard that the proposed opt-in Plaintiffs were similarly-situated. *Id.* at *43. In granting Rule 23 class certification,

the Magistrate Judge found that Plaintiff met the numerosity requirement as he showed that more than 40 guards worked for Defendant over the course of six years. *Id.* at *52. Plaintiff also met the commonality and typicality requirements, as Plaintiff alleged that Defendant subjected him and the proposed class members to the same practice of underpayment, raising the common questions of whether Defendant violated the NYLL by failing to pay overtime payment, pay for all overtime hours worked, or furnish wage statements. *Id.* at *54. Defendant did not make any substantial opposition to the showing on the predominance requirement, and therefore the Magistrate Judge concluded that Plaintiff met all aspects of certification required under Rule 23. Accordingly, the Magistrate Judge recommended granting Plaintiff's motion for conditional certification and class certification.

***Escobar, et al. v. Motorino East Village, Inc.,* 2015 U.S. Dist. LEXIS 104348 (S.D.N.Y. Aug. 10, 2015).** Plaintiffs, a group of former employees, brought an action alleging that Defendant failed to pay them appropriate minimum wage and overtime compensation in violation of the FLSA and the New York Labor Law. Plaintiffs moved to conditionally certify a collective action, which the Court granted. The Court observed that Defendant produced voluminous documentation in the form of Defendant's affidavits and payroll logs in opposition to Plaintiffs' motion, attempting to demonstrate that no violation occurred and no collective action should be conditionally certified. *Id*. at *6. The Court, however, found that Plaintiffs submitted sufficient evidence in support of their motion under 29 U.S.C. § 216(b), including three factual declarations making similar allegations of off-the-clock work, failure to pay the appropriate rate of overtime, improper retention of the tip credit, failure to pay for tools of the trade, and unwarranted deductions from tips paid by credit card. *Id*. The Court observed that this was enough for Plaintiffs to meet the modest burden placed on them at the conditional certification stage under § 216(b). *Id*. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Flood, et al. v. Carlson Restaurants, Inc.,* 2015 U.S. Dist. LEXIS 6608 (S.D.N.Y. Jan. 20, 2015).** Plaintiffs, a group of current and former tipped employees at TGI Friday's restaurants, brought a nationwide class and collective action alleging that Defendant violated the FLSA because they paid tipped employees less than the minimum hourly wage by availing themselves of the federal tip credit. They also asserted state law class claims under Massachusetts, New Jersey, and New York law. Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b), which the Court granted. Plaintiffs submitted declarations stating that Defendant paid them less than the full minimum wage, yet failed to properly notify them of the FLSA regulations regarding the tip credit and minimum wages. *Id*. at *8. The declarants also stated that Defendant allegedly subjected the tipped workers to mandatory tip pooling arrangements, and that tipped workers spent a substantial amount of time performing non-tip producing side work. *Id*. at *9. Plaintiffs contended that although Defendant had a time-keeping system that tracked multiple job codes, they were not asked to punch in under a separate job code or keep track of the time spent performing side work. *Id*. The Court noted that Plaintiffs' declarations and depositions contained common allegations of FLSA violations, including Defendant's denial of full minimum wage and overtime compensation for tipped workers, which together with the evidence of Defendant's centralized control over TGI Friday's restaurants nationwide, sufficed to meet the minimal burden for conditional certification. *Id.* at *14. Although Defendant claimed that they had policies that prohibited the alleged FLSA violations, the Court reasoned that the existence of a formal policy in compliance with the FLSA should not immunize a Defendant where, as here, Plaintiffs presented evidence sufficient that this policy was commonly violated in practice. *Id.* at *15. Because Plaintiffs made the requisite factual showing, the Court granted their motion for conditional certification of a collective action under 29 U.S.C. § 216(b).

***Fonseca, et al. v. Dircksen & Talleyranc, Inc.*, 2015 U.S. Dist. LEXIS 136427 (S.D.N.Y. Sept. 28, 2015).** Plaintiffs, a group of restaurant employees, brought an action alleging that Defendants failed to properly distribute tips, pay them for all hours worked, and comply with legally mandated tip credit requirements in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs, on behalf of all captains, front-waiters, back-waiters, bussers, and bartenders, alleged that Defendants required all tipped employees to participate in a tip pool, where gratuities were pooled together and then distributed based on a points system. *Id*. at *3. The tip pool included polishers, and expeditors/back-waiters, positions that, according to Plaintiffs, required no direct customer service. *Id*. at *4. Plaintiffs claimed that Defendants calculated

Plaintiffs' hours based on a fixed number of hours for each shift worked instead of by actual hours worked. *Id*. After the Court granted Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b), Plaintiffs moved for class certification on their NYLL claims, which the Court granted. Plaintiffs identified eight questions common to the class, including whether Defendants employed class members under New York law, and the policies, practices and procedures regarding the handing and distribution of gratuities class members received. *Id*. at *7. Defendants argued that Plaintiffs' testimony established that the answers to the common questions varied significantly from position to position and person to person, and therefore Plaintiffs could not satisfy the commonality requirement of Rule 23(a)(2). *Id*. at *8. The Court remarked that commonality did not mean that all issues must be identical as to each class member, and that the need for an individualized determination of damages suffered by each class member generally did not defeat commonality. *Id*. Accordingly, the Court concluded that commonality was satisfied. The Court also found that typicality was satisfied because Defendants employed all class members as tipped, front-of-house employees, and were denied tips that they were entitled to receive. *Id*. at *10-11. The Court further ruled that predominance was satisfied because Plaintiffs challenged Defendants' commonly applied employment policies and practices. *Id*. at *13. The Court reasoned that the issues of whether Defendants' tip pool was lawful and whether Plaintiffs were paid for all hours worked predominated over all individualized inquiries. The Court thereby held that a class action was the superior mode of adjudication, and certified the NYLL claims under Rule 23.

***Gauman, et al. v. DI Restaurant Development, LLC*, 2015 U.S. Dist. LEXIS 146254 (S.D.N.Y. Oct. 28, 2015).** Plaintiff, a restaurant employee, brought an action alleging that Defendant paid him less than the minimum wage and failed to pay overtime in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiff moved for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). The Court granted Plaintiff's motion. Plaintiff submitted an affidavit in support of the motion for conditional certification. *Id*. at *3. Plaintiff alleged that he worked as a dishwasher and prep cook between 75 to 81 hours per week over the course of three years, for which he was compensated approximately $400 per week. *Id*. Plaintiff further alleged that Defendant employed approximately 17 others, many of whom were paid in the same manner. Plaintiff also named seven individuals that he specifically alleged were paid similarly, and provided hour and salary information for four of them. *Id*. at *4. Plaintiff's knowledge of schedules was based on his observations from working in the same business environment, and his knowledge of wages were based on conversations where each of the four individuals shared their compensation arrangements with him. *Id*. at *6. The Court found that these facts were sufficient to support a conclusion that the four individuals in addition to Plaintiff, and thus at least 29% of Defendant's workforce, may be similarly-situated to Plaintiff, and that they were subject to a common policy or plan of payment that violated the FLSA and NYLL. *Id*. The Court remarked that Plaintiff's affidavit supporting the evidence was more than sufficient to establish he and the other individuals were similarly-situated. *Id*. at *6-7. Accordingly, the Court granted Plaintiff's motion for conditional certification per 29 U.S.C. § 216(b).

***Glatt et al. v. Fox Searchlight Pictures, Inc.,* 2015 U.S. App. LEXIS 11435 (2d Cir. July 2, 2015).** Plaintiffs, a group of unpaid interns, brought an action alleging that Defendant failed to pay them as employees during internships as required by the FLSA's and NYLL's minimum wage and overtime provisions. Plaintiffs contended that they worked as unpaid interns on Defendant's distributed film Black Swan at their corporate offices in New York City. Plaintiffs Eric Glatt, Alexander Footman, and Eden Antalik contended that their job duties resembled those done by employees and that they were therefore employees. *Id*. at *4-6. The District Court had concluded that Plaintiffs Glatt and Footman were improperly classified as unpaid interns and granted their motion for partial summary judgment, and also granted Plaintiff Antalik's motions to certify the class of New York interns and to conditionally certify a nationwide FLSA collective action. *Id*. at *7. On appeal, the Second Circuit vacated both the orders and remanded the action. At the outset, the Second Circuit noted that the U.S. Supreme Court was yet to address the difference between unpaid interns and paid employees under the FLSA. At the same time, the Second Circuit also noted that in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Supreme Court recognized that unpaid railroad brakemen trainees should not be treated as employees, and thus they were beyond the reach of the FLSA's minimum wage provisions. The Second Circuit further noted that in 1967, the U.S. Department of Labor ("DOL") issued informal guidance that enumerated six criteria and stated that

a trainee is not an employee if all of the criteria were met. *Id*. at *10. The six criteria were: (i) the internship, even if it included actual operation of the employer, was similar to training given in an educational environment; (ii) it benefited the intern; (iii) it did not displace regular employees; (iv) the employer received no immediate advantage from the activities of the intern; (v) the intern was not entitled to a job at the end of the internship; and (v) both parties understand that the interns are not entitled to wages for the internship. *Id*. at *11. The Second Circuit noted that the District Court evaluated Glatt's and Footman's employment using the DOL's six-factor test, and found that the first four factors weighed in finding that the two were employees, and concluded that they were misclassified as unpaid interns. *Id*. at *12. The Second Circuit observed that the proper question here was whether the intern or the employee is the primary beneficiary of the internship. *Id*. at *15. The primary beneficiary test focuses on what the intern receives in exchange for his work, and examines the economic reality, as it exists between the intern and the employer. *Id*. In addition, the Second Circuit reasoned that the following considerations must be looked into in the context of unpaid interns: (i) the extent to which the intern and the employer understand that there is no expectation of compensation; (ii) the internship provides training as it would be given in an educational environment; (iii) the internship is tied to formal education program; (iv) it accommodates academic commitments; (v) the duration is limited to the period internship provides intern with beneficial learning; (vi) the extent to which intern's work complements rather than displaces paid employees; and (vii) the understanding that the internship does not entitle a job at the conclusion of the intern ship. *Id*. at *16-17. Accordingly, the Second Circuit vacated the summary judgment order as to Plaintiffs Glatt and Footman and remanded the action, directing the District Court to apply these considerations in making its determinations as to employee status. *Id*. at *19. Further, on Defendant's appeal, Plaintiff Antalik argued that the evidence suggested that Defendant sometimes used interns as opposed to employees, which was sufficient to establish commonality under Rule 23. *Id*. at *22. The Second Circuit, however, found that this evidence would not necessarily mean that every intern was likely to prevail on her claim that she was an employee. Accordingly, the Second Circuit vacated the order conditionally certifying the FLSA collective action, as well as the class certification order as to the state law claims.

***Griffith, et al. v. Fordham Financial Management*, 2015 U.S. Dist. LEXIS 30869 (S.D.N.Y. Mar. 12, 2015).** Plaintiffs, a group of former employees, brought an action alleging that Defendant failed to pay their stockbrokers and cold-callers minimum and overtime wages and made improper wage deductions, in violation of the FLSA and New York Labor Law ("NYLL"). Defendant Fordham, a brokerage firm that provides financial services, including investment banking, employed individuals who sell stocks and other financial products to clients as stockbrokers and trainee brokers, and referred to them as "cold-callers." *Id.* at *2. After the Court granted FLSA conditional certification, Plaintiffs moved for Rule 23 class certification of their NYLL claims. The Court denied the motion, finding that Plaintiffs had failed to establish either the commonality or the preponderance requirements. First, the Court found that Plaintiffs had failed to demonstrate that potential class members' employment status was capable of class-wide proof. *Id.* at *7. Plaintiffs claimed that all potential class members were employees, because Defendant required them to work from 8:00 a.m. to 6:00 p.m. from Monday through Thursday and from 8:00 a.m. to 4:00 p.m. on Fridays. *Id.* at *7-8. The Court noted that although Plaintiffs were generally in the office during those times, there was no particular fixed schedule applicable to all stockbrokers, and some Plaintiffs did not attend work at all on certain days. *Id.* at *8. In addition, the Court found that the method of compensation varied among potential class members. *Id.* at *9. The Court remarked that although Defendant compensated stockbrokers based solely on commissions, thereby weighing in favor of an independent contractor relationship, and paid cold callers $60 per day, which suggested an employee relationship, cold-calling was essentially broker training. Further, the Court noted that some cold-callers earned both a percentage of commissions and a daily salary. Moreover, the Court determined that during the putative class period, some potential class members worked as both cold-callers and brokers, others worked only as cold-callers, and still others worked only as brokers. *Id.* at *9-10. Plaintiffs also asserted that Defendant entered into "employee contracts" and not "independent contractor agreements" with stockbrokers. *Id.* at *10. The Court pointed out, however, that not all potential class members signed such contracts. Some Plaintiffs signed documents titled "employment agreements," while others signed entirely different agreements, and at least one Plaintiff did not have any written agreement. *Id.* at *10-11. Plaintiffs claimed that Defendant made unauthorized deductions from their wages. The Court noted, however, that because

some of the signed employment agreements affirmatively agreed to specified deductions, this would require an individual assessment of which potential class members agreed to deductions, and what those deductions were. Moreover, the Court found that Defendant enforced the terms of the employment agreements inconsistently among potential class members who signed them. *Id.* at *11-12. Finally, the Court opined that Plaintiffs' testimony indicated substantial disagreement regarding the level of control Defendant exercised over potential class members' day-to-day responsibilities. *Id.* at *12-13. Further, the Court remarked that in addition to individual issues regarding potential class members' employment status, Plaintiffs had not established that their damages theory could accurately calculate damages on a class-wide basis. Plaintiffs intended to prove damages through representative testimony that Defendant required class members to work at least 48 hours per week and via Defendant's payroll records. The Court noted, however, that some Plaintiffs testified they did not work 48 hours every week, whereas others testified that they regularly worked more than 48 hours per week. *Id.* at *14-15. The Court reasoned that calculating damages based on a 48-hour per week workweek would therefore over-compensate some class members and under-compensate others, without a basis for the number of hours class members actually worked. *Id.* at *15. Accordingly, the Court concluded that Plaintiffs had failed to establish predominance and commonality, and denied class certification. *Id.*

***Guzman, et al. v. Three Amigos SJL Inc.,* 2015 U.S. Dist. LEXIS 99716 (S.D.N.Y July 30, 2015).** Plaintiffs, a group of entertainers, brought an action alleging that Defendant failed to pay them overtime wages in violation of the FLSA and the New York Labor Law. Plaintiffs worked at one of Defendant's businesses, the Cheetahs Gentlemen's Club & Restaurant ("Cheetahs"). Plaintiffs alleged that during their employment, they were required to pay Cheetahs a "house fee" of approximately $40 or $60 to $100 or $120 per shift worked, and they were also required to pay for arriving late to work or for not working a scheduled shift. *Id.* at *7-9. They were further required to tip-out other individuals who worked at Cheetahs. Plaintiffs contended that throughout their employment, Cheetahs enforced a uniform policy that required all the entertainers to wear club-approved outfits, hairstyles, and make-up, and to purchase, launder, and maintain their uniforms at their own expense. *Id*. at *9-10. Plaintiffs also contended that Cheetahs supervised and controlled many aspects of the entertainers' working conditions. Plaintiffs moved for conditional certification of a collective action, which the Court granted. At the outset, Plaintiffs contended that they were similarly-situated to the other entertainers because Cheetahs subjected all entertainers to the same compensation policies. The Court noted that to demonstrate that the proposed group of employees were similarly-situated, Plaintiffs need only make a modest factual showing. *Id*. at *17. Defendant contended that Plaintiffs' declarations were insufficient because they merely set forth broad conclusory assertions, and lacked personal knowledge that other entertainers were similarly-situated. *Id*. at *18. The Court, however, remarked that existence of some conclusory assertions did not negate the more specific factual statements contained in the declarations that stated: (i) the declarant was not paid hourly wages, (ii) she was not required to share her tips with workers who did not provide service; and (iii) Defendant retained a portion of Plaintiffs' tips. *Id*. On this record, the Court found that none of Defendant's arguments were sufficient to defeat Plaintiffs' motion for conditional certification. *Id*. at *23. Defendant also asserted that there were four categories of dancers with different agreements with Defendant. However, the Court reasoned that even though the type of agreement varied from entertainer to entertainer, Defendant failed to explain how this had any bearing on whether the entertainers might be similarly-situated with respect to Plaintiffs' allegations that the FLSA had been violated. *Id.* at *23. Moreover, regarding Defendant's contention that several of the named Plaintiffs were bound by arbitration agreements, the Court remarked that applicable case law had consistently held that the existence of arbitration agreements was irrelevant to conditional certification of a collective action because it raised a merit-based determination. The Court also found that not all entertainers had arbitration agreements and Defendant had not moved to compel arbitration of any of the named Plaintiffs for whom they assert arbitration agreement existed. Furthermore, the Court also denied Defendant's request to direct further discovery to identify if the Plaintiffs were similarly-situated, inasmuch as extensive discovery was not appropriate at the notice stage. *Id.* at *24-25. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b).

***Iriarte, et al. v. Café 71, Inc.,* 2015 U.S. Dist. LEXIS 166945 (S.D.N.Y. Dec. 11, 2015).** Plaintiff brought an action alleging that Defendant failed to pay Plaintiff overtime wages and minimum wages in violation of the FLSA and the New York Labor Law ("NYLL"). Defendant controlled and operated two food service establishments and employed Plaintiff on an "as needed" basis as a delivery person, pizza maker, and sandwich preparer at Café 71 and 94 Corner Café. *Id.* at *3. Plaintiff alleged that Defendant paid him an hourly rate of $8.50, which is below the New York State minimum wage rate of $8.75, and that Defendant never gave him proper meal breaks when he worked six hours or more in a workday. *Id.* at *4. Plaintiff also alleged that he never received a wage & hour notice as required under the NYLL, and because Defendant paid solely on cash, he never received any form of wage statements. *Id.* Providing his own declaration and a list of the first names of eleven other employees who were subjected to the same wage & hour policies of Defendant, Plaintiff moved for conditional certification of collective action under the FLSA. *Id.* at *5. The Court granted Plaintiff's motion, finding that Plaintiff met the similarly-situated requirement for conditional certification under 29 U.S.C. § 216(b). The Court noted that Plaintiff satisfied the low burden that he was similarly-situated with the proposed collective action members by declaring that Plaintiff had personal knowledge from his observations and his conversation with his co-workers that he and "all other employees at the Cafés" were victims of Defendant's practices of not compensating its staff overtime wages. *Id.* at *10. Although Defendant tried to defeat Plaintiff's motion by arguing that Plaintiff's declaration contained false statements, the Court declined to resolve such factual disputes at this stage of litigation. Accordingly, the Court granted Plaintiff's motion for conditional certification and authorized that notice be sent to potential collective action members in the form authorized pursuant to § 216(b) of the FLSA. *Id.* at *18. The Court further ordered Defendant to provide Plaintiff with the names and last known address of all potential collective action members who worked in the positions of cooks, dishwashers, grill workers, deli workers, sandwich preparers, salad preparers, cashiers, pizza makers and delivery persons at the Cafés for three years from the date of the filing of the action. *Id.*

***Jacob, et al. v. Duane Reade Holdings, Inc.*, 2015 U.S. App. LEXIS 2040 (2d. Cir. Feb. 10, 2015).** Plaintiffs brought an action alleging that Defendant failed to pay its assistant store managers ("ASMs") overtime in violation of the FLSA and the New York Labor Law ("NYLL"). The District Court conditionally certified the collective action pursuant to 29 U.S.C. § 216(b) and also certified Plaintiffs' NYLL class claims under Rule 23. Subsequently, the District Court decertified the class action with respect to damages only. On appeal, the Second Circuit affirmed. Defendant argued that the District Court failed to rigorously examine all the evidence relevant to class certification. The Second Circuit observed that when certifying a class, a District Court must conduct a rigorous analysis that may overlap with the merits of Plaintiff's underlying claim and found that here, the District Court had applied the appropriate standard. The District Court did not rely on the pleadings alone to decide Plaintiffs' motion, and instead went beyond the pleadings to consider the parties' evidentiary submissions and make factual findings where those submissions conflicted. *Id.* at *4. Defendant also argued that the District Court's commonality analysis failed to identify evidence sufficient to generate common answers to class-wide questions. The Second Circuit opined that the relevant inquiry was whether a class-wide proceeding is capable of generating common answers apt to drive the resolution of the litigation, and that the common contention to be proved was whether Defendant misclassified its employees as exempt from New York's overtime requirements. *Id.* at *5. The District Court had found that this contention was subject to class-wide resolution, and had relied on evidence showing that Defendant uniformly classified all ASMs as exempt without an individualized determination of each ASM's job responsibilities, and that the ASMs carried out their duties pursuant to a uniform policy, uniform training, and uniform procedures across all stores. Further, the District Court had concluded that the deposition testimony of Defendant's former director of training and development established that the ASMs had similar baseline responsibilities from store to store, and that all ASMs shared similar primary job responsibilities. *Id.* at *6. Accordingly, the Second Circuit ruled that the District Court did not abuse its discretion in concluding that a class-wide proceeding could generate a common answer to the question of whether Defendant misclassified ASMs. Defendant also argued that under *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the District Court should have analyzed whether common questions predominated over individual questions in the case as a whole before certifying the class with respect to any particular issue. *Id.* at *7. The Second Circuit, however, observed that *Comcast* held simply that a model for measuring class-wide damages relied upon to certify a class under Rule

23(b)(3) must actually measure damages that result from the class' asserted theory of injury, which had little application in this case. *Id.* at *8. In decertifying the class with respect to damages, the District Court concluded that although the individualized nature of the damages inquiry would defeat Rule 23(b)(3) predominance in the case as a whole, predominance was satisfied with respect to issue of liability alone. *Id.* The Second Circuit concluded that the District Court's ruling was not an abuse of discretion. Accordingly, the Second Circuit affirmed the District Court's order certifying the class with respect to the issue of liability.

***Klein, et al. v. Octagon, Inc.,* 2015 U.S. Dist. LEXIS 136410 (S.D.N.Y. Sept. 30, 2015).** Plaintiff, an unpaid intern, brought a putative class action alleging that Defendant misclassified interns as exempt and failed to pay them the minimum wage and earned wages in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs moved for conditional certification of a collective action, and the Court denied the motion. Plaintiff submitted his own declaration and four other interns' declarations in support of his motion, which stated that they did not receive compensation for the work they performed. *Id.* at *3. Plaintiff also submitted a copy of Defendant's summer internship program brochure, which outlined uniform policies for intern conduct, electronic communication, and social media use. *Id.* at *5. The Court cited the case of *Glatt v. Fox Searchlight Pictures,* where the Second Circuit adopted the "primary beneficiary test" as the standard to be applied at the conditional certification stage. *Id*. at *7. The Second Circuit described the primary beneficiary test as a highly individualized inquiry that requires consideration of individual aspects of the intern's experience. *Id*. Applying this new standard, the Second Circuit vacated the conditional certification in *Glatt*. *Id*. at *8. The Court noted that Plaintiff's evidence was indistinguishable from the generalized proof described in *Glatt*. *Id*. at *9. The Court determined that Plaintiff's primary evidence that the collective action members were similarly-situated consisted of the assertion that the declarants worked or knew of other interns who were not being compensated for performing similar duties. *Id*. The Court observed that this did not answer the questions posed by the primary beneficiary test, such as whether a given internship was tied to an education program, whether training occurred, and if so, what type of training the intern received. *Id*. The Court therefore found that Plaintiff failed to provide evidence relevant to the primary beneficiary test. The Court opined that since the internships differed substantially, the differences would necessitate individualized inquiries, and therefore denied Plaintiffs' motion for conditional certification. *Id*.

***Li, et al. v. Lychee House, Inc.*, Case No. 15-CV-1646 (S.D.N.Y. July 13, 2015).** Plaintiff, a former delivery employee, brought a collective action on behalf of himself and other current and former delivery employees alleging that Defendants failed to pay workers minimum wages and overtime compensation in violation of the FLSA. Plaintiff sought unpaid wages, liquidated damages, attorneys' fees, and costs. Plaintiff brought an unopposed motion for conditional certification of a collective action consisting of all current and former delivery employees employed by Lychee House Chinese Restaurant, located at 141 East 55th Street, New York, from July 13, 2012, to the present. *Id.* at 1. The Court granted Plaintiff's motion. In addition, the Court approved publication of Plaintiff's proposed notice and consent to sue forms to members of the collective action. *Id.* As a result, the Court directed Defendants to furnish to Plaintiff's counsel a list containing the names and contact information (excluding social security information) of collective action members in an electronic format. *Id.* at 1-2. The Court held that on or before 20 days after Defendants furnish the list of names and contact information to Plaintiff's counsel, the notice and the consent to sue form – in both English and Mandarin or Cantonese (whichever is more likely to be spoken by the majority of the members of the collective action) – should be mailed to collective action members by first class mail. *Id.* at 2. Finally, the Court directed Defendants to post the notice and consent to sue form in a conspicuous location in their place of business.

Editor's Note: An order to translate a § 216(b) notice into Mandarin or Cantonese is novel. It underscores the substantial discretion courts have to fashion notice in FLSA collective actions.

***Marcus, et al. v. AXA Advisors, LLC,* 2015 U.S. Dist. LEXIS 43016 (E.D.N.Y. Mar. 31, 2015).** Plaintiffs brought an action alleging that Defendant, a licensed broker-dealer of financial products, violated the FLSA by failing to pay its pre-contract associates and employee-agents the minimum wage and overtime, and the

New York Labor Law ("NYLL") by misclassifying them as independent contractors and outside sales agents. According to the complaint, individuals seeking to join Defendant as sales agents first affiliated with Defendant as "pre-contract associates," and after signing pre-employment agreements and obtaining the necessary licenses, Defendant required them to sell a certain number of production credits before the end of their six-month pre-contract period, and paid them on commission. *Id.* at *5-7. Plaintiffs contended that Defendant required pre-contract associates to prospect for business during the licensing phase of their pre-employment, forcing them to work for Defendant's benefit without compensation. *Id.* at *9. Plaintiffs also contended that Defendant required them to be in the office during the pre-contract period for training, district meetings, call times, and regulatory compliance meetings, although some of these meant for full-time employees. *Id.* at *10. As to employee-agents, Plaintiffs contended that the agents spent 5 to 6 days a week in Defendant's offices, only occasionally going on sales calls outside of the office, and that they regularly worked over 40 hours a week, but received less than the basic minimum wage during weeks when they made few or no sales. *Id*. at *14-15. Proposing a class consisting of individuals engaged by Defendant in the state of New York as pre-contract associates and employee-agents during a defined period, Plaintiffs moved for class certification. In support, Plaintiffs submitted deposition testimony and a selection of e-mails from seven proposed class members and 14 managers, questionnaires submitted by opt-in Plaintiffs, and a declaration by an executive. *Id.* at *17. The Court denied class certification, finding that Plaintiffs failed to satisfy Rule 23 commonality requirement. *Id.* at *46. Although Plaintiffs contended that they satisfied the commonality requirement as to pre-contract associates because they suffered a common wrong (*i.e.*, classification as independent contractors), the Court noted that the category of pre-contract associates consisted of two sub-categories, unlicensed and licensed associates, and Plaintiffs failed to offer a common way of establishing the proper classification of either category. *Id.* at *34-35. The record showed that as Defendant treated unlicensed and licensed pre-contract associates differently, that could potentially affect the Court's determination on the merits of the question of Defendant's control over pre-contract associates. The Court found that the record did not credibly establish that Defendant had any state-wide policies requiring unlicensed pre-contract associates to study in the office, solicit business, or perform work for Defendant's benefits, and the differing practices among the offices with respect to supervision and control of pre-contract associates during the study phase of their pre-employment rendered common answers to the question of Defendant's control unlikely. *Id.* at *38-39. The evidence provided by both parties also demonstrated that there was substantial variation with respect to employee-agents' sales work such that determining a putative class member's eligibility for inclusion in the class would be based on a myriad of individual determinations about the agent's sales activity. *Id.* at *42. Although the record showed a greater degree of uniform treatment with respect to Defendant's treatment of licensed pre-contract associates, the Court found that Plaintiffs' sole proposed class representative for the pre-contract associate class was not typical of the class because he never obtained his licenses and therefore never proceeded to the second stage of the pre-contract process. *Id.* at *47. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Mok, et al. v. 21 Mott St. Restaurant Corp.,* 2015 U.S. Dist. LEXIS 83420 (S.D.N.Y. June 26, 2015).** Plaintiff, a waiter at Defendant's restaurant, brought a collective action alleging that Defendant willfully failed to pay him minimum wages, overtime, and spread-of-hours compensation in violation of the FLSA. *Id.* at *4. Plaintiff further alleged that Defendant failed to provide pay statements or post notices explaining wage rights or maintain records of employees' pay and hours. *Id.* Plaintiff moved for conditional certification of a collective action, and submitted an affidavit stating that Defendant employed twelve or thirteen waiters and cooks who worked approximately 10 to 13 hours per day. *Id.* at *5. The Court granted Plaintiff's motion, and found that Plaintiff made the necessary modest factual showing that he and other potential opt-in Plaintiffs together were victims of a common policy or plan that violated the law. *Id.* at *6. The Court further approved Plaintiff's proposed notice form to be disseminated to prospective collective action members limited to Defendant's wait staff and cooks and directed Plaintiff's counsel to remove a clause that allowed the consent forms to be received by the Clerk of Court (as opposed to counsel directly). *Id.*

***Moreira, et al. v. Sherwood Landscaping, Inc.,* 2015 U.S. Dist. LEXIS 43919 (E.D.N.Y. Mar. 31, 2015).** Plaintiffs, a group of laborers, brought an action alleging that Defendant, an exterior landscaping service

provider, violated the FLSA and the New York Labor Law ("NYLL") by failing to pay them overtime wages. Specifically, Plaintiffs alleged that they and similarly-situated employees regularly worked 66 hours per week and their paychecks never showed any hours worked in excess of 40 hours per week, notwithstanding the number of hours they actually worked. *Id.* at *5-6. Plaintiffs further asserted that Defendant regularly paid Plaintiffs "straight time" for the hours worked each week, including hours worked in excess of 40 hours per week, and that Defendant should have paid them at the statutory rate of time and one-half of the regular rate of pay after the 40 hours in a workweek. *Id.* at *5. Following conditional certification of a collective action of the FLSA claims, Plaintiffs moved for class certification of their NYLL claims. The Court granted class certification, finding that Plaintiffs met all of the Rule 23 requirements. First, the Court found that Plaintiffs met the numerosity requirement as they identified a potential class of over 70 members. Although the parties disputed whether Plaintiffs improperly included 13 exempt employees in their proposed class, the Court noted that, even if it resolved the dispute in Defendant's favor, Plaintiffs' proposed class would still exceed 40 potential members and therefore satisfy the numerosity baseline requirement. *Id.* at *22. The Court rejected Defendant's argument that class certification would not lead to judicial economy, since the FLSA collective action had already provided for easy participation in the action. *Id.* at *24-25. Second, the Court found that Plaintiffs met the commonality and typicality requirements, for the named Plaintiffs' claims and the proposed class members' claims arose from the same course of conduct, *i.e.*, Defendant's alleged practice and policy of failing to pay overtime at the statutory rate, and raised the common issue of law and fact as to whether Defendant failed to pay overtime compensation at the statutory rate for all hours worked over 40 hours each week and to maintain complete records of the hours worked by members of the proposed class. *Id.* at *29-30. Although Defendant argued that the proposed class included employees who received different rates of pay and different job functions in different departments under different managers, the Court found that the differences concerned the amount of damages to which any individual class member might be entitled, and not the amenability of Plaintiffs' claims to class certification. *Id.* at *30-31. Third, the Court determined that Plaintiffs met the adequacy requirement as Defendant failed to show that the ability of any of Plaintiffs to represent the interests of the NYLL class fairly and adequately had been impaired by their prior termination by Defendant. *Id.* at *34. The Court also found that Plaintiffs satisfied the predominance requirement as the determination on the legality or illegality of Defendant's practices was susceptible to common proof. Specifically, the Court reasoned that the documentary evidence, such as the employee punch cards and payroll records, could be used to help resolve issues of Defendant's liability on Plaintiffs' overtime claims, and individualized inquiries as to damages did not bar certification. *Id.* at *37. Finally, the Court held that Plaintiffs satisfied the superiority requirement as Plaintiffs' proposed class was significantly numerous and possessed relatively small individual claims, and a class action appeared to be the only device by which many of the proposed a class members could obtain relief. *Id.* at *39-40. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Murphy, et al. v. Philippe LaJuanie,* 2015 U.S. Dist. LEXIS 97531 (S.D.N.Y. July 24, 2015).** Plaintiffs, a group of former servers, bussers, and bartenders, brought an action seeking minimum and overtime wages. Defendant maintained separate tip pool policies, and participants in the tip pool included maître d's, servers, bussers, runners, and bartenders (collectively the "tip pool employees"). The tip pool employees were allocated a certain number of points in or percentage of the tip pool based on their positions. *Id.* at *5. Plaintiffs alleged that the maître d's had authority to hire and fire employees, and that the maître d's assigned tasks, controlled employee schedules, and calculated the tip distribution. Plaintiffs moved for certification of a class comprised of all non-exempt employees at the restaurants in any tipped positions. The Court granted the motion. The Court noted that Plaintiffs met the numerosity requirement because they identified 257 class members who worked for Defendant for a portion of the class period. Regarding commonality, the Court observed that common questions included whether: (i) the maître d's were eligible to receive tips; (ii) Defendant's policy of distributing a portion of the tips to maître d's and bar managers was unlawful; and (iii) Defendant's policy, practice, and procedure of not paying a spread of hours premium when class members' spread of hours exceeded ten hours was unlawful. *Id.* at *12. Because class members were affected by the same policies, the Court opined that their claims shared a unifying thread that warranted class treatment. *Id.* at *13. Further, the Court determined that the harm that the named Plaintiffs allegedly suffered was the same harm suffered by each class member because it

resulted from policies that applied to all tip pool employees at the restaurants. The Court also noted that Plaintiffs satisfied the typicality requirement because Plaintiffs' injuries and the class members' injuries derived from a unitary course of conduct. *Id.* at *14. Both the named Plaintiffs and the proposed class members were tip-eligible employees who were affected by the same restaurant-wide tip pooling, overtime, and minimum wage policies. Although the restaurants had slightly different policies for how tip pool employees received their tips, the policies applied to all of the tip pool employees at each location. Plaintiffs also met the adequacy requirement because the six class representatives did not have any interests that were antagonistic to the other class members, and Plaintiffs were prepared to fully prosecute the action and had no conflicts with any class members. Further, the Court observed that the class was easily ascertainable because Defendant had records of all of the tip pool employees who worked at the restaurants. Regarding predominance, the Court found that common questions predominate in wage & hour actions brought on behalf of a class of employees of the same employer challenging allegedly illegal policies and practices. *Id.* at *18. Here, the issues of whether the tip pool, spread of hours, and minimum wage policies were lawful predominated over all individualized inquiries, and the Court held that the fact that each class member's damages could vary was not relevant to the predominance inquiry, because damages calculations merely entail the application of simple mathematical computations that were consistent with the theories of liability. *Id.* at *19. Finally, the tip pool employees were affected by the same tip pooling, minimum wage, and overtime policies, and the Court opined that a class action was superior manner of adjudication because potential class members were aggrieved by the same policy, the damages suffered were small in relation to the expense and burden of individual litigation, and many potential class members were currently employed by Defendant. *Id.* at *19-20. Accordingly, the Court certified the proposed class.

***Roach, et al. v. T.L. Cannon Corp.,* 2015 U.S. App. LEXIS 2054 (2d Cir. Feb. 10, 2015).** Plaintiffs brought an action alleging that Defendants did not pay hourly employees an extra hour of pay when working a ten-hour workday as required by New York state law, and that managerial staff subtracted pay for statutorily-mandated rest breaks that the employees did not actually take. The District Court denied class certification, finding that Plaintiffs did not offer a model of damages susceptible of measurement across the putative class. While holding so, the District Court construed *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), as holding that the failure to offer a damages model that is susceptible of measurement across the entire class for purposes of Rule 23(b)(3) is fatal to certification. *Id.* at *6. On appeal, the Second Circuit vacated the District Court's order. The Second Circuit noted that before *Comcast*, it was well established under its case law precedents that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification, and that it was only one factor that had to be considered in deciding whether issues susceptible to generalized proof outweighed individual issues when certifying the case as a whole. *Id.* at *9-10. Further, the Second Circuit observed that *Comcast* did not hold that a class could not be certified under Rule 23(b)(3) simply because damages cannot be measured on a class-wide basis, as the holding in *Comcast* was narrower. *Id.* at *14. Although *Comcast* held that a model for determining class-wide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class' asserted theory of injury, the Second Circuit reasoned that it did not require that proponents of class certification must rely upon a class-wide damages model to demonstrate predominance. *Id.* Further, although *Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues, the Second Circuit determined that this requirement was entirely consistent with its prior holding that the fact that damages may have to be ascertained on an individual basis is a factor that required consideration in deciding whether issues susceptible to generalized proof outweighed individual issues. *Id.* *15-16. In addition, the Second Circuit noted that *Comcast* did not foreclose the possibility of class certification under Rule 23(b)(3) in cases involving individualized damages calculations. *Id.* at *16. Accordingly, the Second Circuit vacated the District Court's order denying class certification.

***Romero, et al. v. ABCZ Corp.,* 2015 U.S. Dist. LEXIS 58765 (S.D.N.Y. April 28, 2015).** Plaintiff, a former disc jockey at Defendants' strip club, VIP Club, brought an action alleging that pursuant to a corporate policy, Defendants improperly classified him and all other disc jockeys and dancers who worked at VIP Club at any time from May, 2011 as independent contractors and did not pay them wages in violation of the

FLSA and the New York Labor Law. *Id*. at *2. Plaintiff asserted that tips from customers were the only compensation that they received. *Id*. Plaintiff moved for conditional certification of a collective action and to provide notice to members of the proposed collective action. The Court granted Plaintiff's motion, finding that Plaintiff had made a modest factual showing that he and potential opt-in Plaintiffs together were victims of a common policy or plan that violated the FLSA. *Id*. at *4. Further, the Court found that Plaintiff identified three other disc jockeys and 113 dancers to whom Defendants subjected to the same policy. *Id*. at *5. The Court stated that those assertions were sufficient at the conditional certification stage to demonstrate that potential opt-in Plaintiffs were similarly-situated to Plaintiff. Defendants contended that dancers at VIP Club were not similarly-situated to Plaintiff because: (i) dancers' arrangement for providing services was different from that of disc jockeys; (ii) the very nature of Plaintiff's work differed from that of dancers; and (iii) the manner in which Defendant compensated Plaintiff differed from that of dancers. The Court, however, found that Defendants' arguments were unavailing because the relevant issue was not whether the Plaintiff and potential opt-in Plaintiffs were identical in all respects, but rather whether they all allegedly were subject to a common employment policy that violated the FLSA. *Id*. at *6. Further, to Defendants' argument that Plaintiff did not offer declarations or affidavits from dancers, the Court remarked that an affidavit detailing the personal observations of a single Plaintiff may be sufficient. *Id*. at *7. As to § 216(b) notice, the Court tentatively approved Plaintiff's proposed notice subject to certain modifications, and directed Defendants to post copies of the revised notice and opt-in consent form in conspicuous locations at the VIP Club. Finally, the Court directed Defendants to produce a list of all names, addresses, telephone numbers, and e-mail addresses for all potential opt-in Plaintiffs that Plaintiff requested. *Id*. at *14. Accordingly, the Court granted Plaintiff's motion for conditional certification of the collective action.

***Ruiz, et al. v. Citibank, N.A.*, 2015 U.S. Dist. LEXIS 34489 (S.D.N.Y. Mar. 19, 2015).** Plaintiffs, a group of personal bankers, brought an action alleging that Defendant failed to compensate them for overtime hours worked in violation of the FLSA and the New York Labor Law. After the class notice was sent, 447 current and former personal bankers opted-in to the FLSA collective action. *Id*. at *5. The Court granted Plaintiffs' request and ordered discovery inquiries limiting to a sample of opt-in Plaintiffs. *Id*. at *6. The parties settled upon 30 representative opt-ins, with 15 chosen by each parties, and 23 of them were deposed. *Id*. Upon conclusion of this discovery, Plaintiffs moved for class certification of their state law claims under Rule 23, and Defendant moved to decertify the FLSA collective action. The Court denied Plaintiffs' motion for class certification, and granted Defendant's motion to decertify the FLSA collective action. At the outset, the Court found that the state law classes lacked questions of law or fact common to the class under Rule 23(a)(2). The Court observed that Defendant's policies were comparable to those *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the Supreme Court denied class certification. *Id*. at *26. The Court found that in *Wal-Mart*, the Supreme Court disclaimed the notion that anecdotal evidence must follow a strictly proportionate relationship to the size of the class. *Id*. at *29. Here, the record showed that Defendant's formal, company-wide policies were entirely legal and appropriate, and that there was no evidence of a common plan or scheme to subvert those policies. *Id*. at *41. A class-wide determination of liability thus depended upon demonstrating that appropriate policies were reliably translated into inappropriate managerial behavior across the width and breadth of the class. *Id*. The Court found the evidence insufficient to demonstrate either common direction or a common mode of exercising discretion. Therefore, it ruled that the commonality requirement was not satisfied. *Id*. at *42. In their motion to decertify the FLSA collective action, Defendant argued that the opt-in Plaintiffs were not similarly-situated. The Court observed that when the collective action was conditionally certified, the Court had found that Plaintiffs had met the minimal burden of showing that they were similarly-situated to one another and to potential opt-in Plaintiffs at that stage. The Court remarked that after discovery, Plaintiffs now were tasked with establishing that they were indeed similarly-situated with appropriate evidentiary support. The Court reasoned that Plaintiffs largely relied on anecdotal allegations of violations, second-hand statements regarding a company-wide policy to force unpaid overtime attributed to branch managers, and upon a few entirely appropriate workplace policies across Defendant's many branches. *Id*. at *53-54. The Court remarked that such evidence may suffice for conditional certification, but it was insufficient to show that the collective action members were similarly-situated under 29 U.S.C. § 216(b). The Court observed that even the evidence of the sample opt-in Plaintiffs showed massive disparities that were apparent in the policies of their branch managers; the difficulty in meeting their sales targets; and the

frequency with which they received overtime, etc. *Id*. at *55. Because Plaintiffs failed to show a common policy that operated to a common effect, or some other mode of evidencing shared experiences, the Court concluded that they could not proceed as a collective action. Accordingly, the Court granted Defendant's motion to decertify the FLSA collective action.

***Ruiz, et al. v. Citibank, N.A.,* 2015 U.S. Dist. LEXIS 101777 (S.D.N.Y. Aug. 4, 2015).** Plaintiffs brought a nationwide action alleging that Defendant failed to compensate its personal bankers for overtime hours in violation of the FLSA and the New York Labor Law. The Court denied Plaintiffs' motion to certify three state-wide classes under state overtime wage laws and granted Defendant's motion to decertify a conditionally certified nationwide collective action under the FLSA. *Id.* at *2. Plaintiffs moved for reconsideration, and the Court denied the motion. First, Plaintiffs argued that the Court improperly required them to show a common nationwide pattern or practice, rather than state-wide patterns or practices within New York or Illinois. *Id*. at *6. The Court rejected this argument explaining that, based exclusively on Plaintiffs' briefing in support of their motion for class certification, rather than proving a common policy or practice within each relevant state, Plaintiffs sought to demonstrate a nationwide policy that could be imputed to each state. Throughout their briefing in support of their motion for class certification, Plaintiffs indiscriminately intermingled the testimony of New York and Illinois personal bankers and managers with the testimony of Defendant's employees in other states. *Id*. at *7. In fact, in arguing commonality, Plaintiffs specifically highlighted the geographical disparity of the sample opt-ins from which they drew their evidence, arguing that the strikingly consistent nature of the sample opt-ins' testimony helped demonstrate the existence of centralized, nationwide policies. *Id*. at *8. Second, Plaintiffs contended that, because the Court looked at nationwide evidence, it overlooked the evidence demonstrating a pattern or practice in New York and Illinois. The Court noted that Plaintiffs now sought to do what they never did in arguing for certification, *i.e.*, amass the evidence within New York and Illinois to demonstrate commonality within the bounds of the proposed Rule 23 classes. The Court explained that it already had found the testimony of eleven New York personal bankers and three Illinois bankers insufficient to demonstrate commonality across a class of over 2,000 New York personal bankers and 330 Illinois bankers. *Id*. at *11. Third, Plaintiffs argued that the Court improperly applied the stringent standard of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), to their wage & hour claims. The Court found that Plaintiffs misunderstood the nature of their burden at the class certification stage. The Court never required Plaintiffs conclusively to prove a pattern of wage violations; rather, it merely held them to their burden to establish commonality by a preponderance of the evidence, as required by precedent predating *Wal-Mart*. *Id*. at *15. Plaintiffs next argued that the Court overlooked the importance of the U.S. Supreme Court's burden-shifting test set out in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that, where an employer has kept inaccurate or unclear records, the employee need only prove that he in fact has performed work for which he was improperly compensated and produce evidence sufficient to show the amount an extent of that work as a matter of just and reasonable inference. *Id*. at *17. The Court noted that, in discussing both commonality and predominance, it determined that Plaintiffs could not demonstrate liability on a class-wide basis, and the *Mt. Clemens* doctrine did nothing to alter that decision. *Id.* at *19. Finally, Plaintiffs asserted that the Court could have modified the class definition and created sub-classes instead of denying certification altogether. *Id.* at *20. The Court noted that it already had considered and rejected this possibility in connection with Plaintiffs' opposition to decertification because there was no apparent sub-division that would correct the fatal flaws in Plaintiffs' attempt to maintain a collective action. *Id.* at *22. Plaintiffs offered the Court no reason to reconsider this reasoning or doubt its equal application to the creation of sub-classes within New York and Illinois. Accordingly, the Court denied Plaintiffs' motion for reconsideration.

***Wang, et al. v. The Hearst Corp.,* 2015 U.S. App. LEXIS 11516 (2d Cir. July 2, 2015).** Plaintiffs, a group of unpaid former interns, brought an action alleging that Defendant violated the minimum wage requirements, overtime provisions, and record-keeping requirements of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs asserted that they were Defendant's employees, sought class certification, and filed a motion for partial summary judgment, which the District Court had denied. On appeal, the Second Circuit vacated in part and remanded. Plaintiffs argued that the District Court erred in denying them summary judgment because the interns were employees who provided an immediate advantage to the

employer. Alternatively, they argued that the District Court erred because Defendant could not establish the six criteria as a matter of law under the relevant Department of Labor ("DOL") test. The Second Circuit found that both arguments lacked merit because as established in *Glatt v. Fox Searchlight Pictures, Inc.*, 2015 U.S. App. LEXIS 11435 (2d Cir. July 2, 2015), an unpaid intern was an employee under the FLSA, when the employer, rather than the intern, was the primary beneficiary of the parties' relationship. *Id*. at *3. *Glatt* also set out a non-exhaustive set of factors to answer that question. *Id*. The Second Circuit observed that here, the District Court applied a totality of the circumstances test. Therefore, it remanded, directing the District Court to consider the *Glatt* factors. *Id*. at *4. Further, the Second Circuit noted that in denying the class certification, the District Court found that there was no uniform policy with respect to the contents of the internships, including interns' duties, training, and supervision, such that the analysis would have to be individualized. *Id*. On appeal, Plaintiffs contended that Defendant's common practices would be decisive of the merits and that representative testimony could be used to establish those common practices. The Second Circuit noted that *Glatt* framed the relevant inquiry to analyze how the internship was tied to the intern's formal education, the extent of the intern's training, and whether the intern continued to work beyond the period beneficial learning. *Id*. at *5. The Second Circuit found that irrespective of the type of evidence used to answer them, these questions required individual determinations. The Second Circuit observed that the District Court correctly recognized that interns' experiences varied across the numerous departments at each of the 19 magazines that Defendant operated in New York, which was the requirement under *Glatt*. *Id*. at *5. Accordingly, the Second Circuit concluded that the District Court did not err in denying Plaintiffs' motion for class certification.

***Watson, et al. v. Visionpro,* 2015 U.S. Dist. LEXIS 117168 (E.D.N.Y. Sept. 2, 2015).** Plaintiffs, a group of cable installers/technicians, brought an action alleging that Defendants failed to pay them overtime wages and that their compensation was subject to additional unlawful deductions in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs moved for class certification of their New York state law claims and Defendants moved for summary judgment. The Court denied both motions. Plaintiffs contended that Defendants employed them to provide installation and services for Cablevision Systems Corp.'s customers, and they were compensated on a "piece-rate" basis and paid according to the task or service performed, regardless of the amount of time required. *Id.* at *2. Furthermore, Plaintiffs alleged that their credits for compensation were reduced if they received a parking ticket or other moving violation, or lost any tools or equipment, and their compensation was also subject to additional unlawful deductions since they were required to fuel the vehicles with their own money and were never properly reimbursed. *Id.* at *2-3. Plaintiffs asserted that Defendants' unlawful practice of making deductions for parking tickets or other moving violations, for lost equipment, or for fueling the vehicles Plaintiffs used for work, created claims that were common and typical to the proposed class. Defendants asserted that Plaintiffs were paid a commission based on the service performed and the skill level of the technician providing the service. Defendants also stated that the technicians received a minimum of $8.10 per hour for all hours worked up to 40, and $12.15 per hour for all hours worked over 40 hours in a week. The Court, upon review of the parties' submissions, found that questions of fact existed regarding whether the putative class members had suffered the same deductions allegedly in violation of NYLL and also whether such claims predominated over questions affecting only individual members. *Id.* at *4-5. As a result, the Court found the need to hold an evidentiary hearing on whether Rule 23's requirements were met, and therefore, denied Plaintiffs' motion for class certification without prejudice. *Id.* at 5. In addition, Defendants asserted they were entitled to summary judgment on Plaintiffs' overtime claims since Plaintiffs were exempted from overtime requirements under federal law and New York law. *Id*. at *6. Defendants also argued that even if Plaintiffs were not exempt, they were paid properly for any hours worked over 40 a week. *Id.* After reviewing the parties' submissions, the Court found that various questions of fact existed that precluded summary judgment. Accordingly, the Court denied both the parties' motions.

***Zhou, et al. v. Jia Xing 39th, Inc.*, 2015 U.S. Dist. LEXIS 43062 (S.D.N.Y. April 1, 2015).** Plaintiff brought a collective action on behalf of current and former tipped employees alleging various wage & hour violations of the FLSA. Plaintiff, a former delivery person, alleged that during his employment he worked 11 hours per day, six or seven days per week, for a fixed daily salary of $40 per day, or roughly $3.64 per hour, and that he never received overtime. *Id*. at *2. Plaintiff moved to conditionally certify a collective

action under 29 U.S.C. § 216(b), and the Court granted the motion. At the outset, the Court noted that Plaintiff asserted a colorable claim that Defendant failed to pay him proper minimum wage and overtime compensation while serving as a tipped employee. *Id*. at *7. Based on Plaintiff's conversations with co-workers transferred from other locations, Plaintiff alleged that Defendant implemented the same wage & hour policies for all tipped employees at all of Defendant's restaurants. *Id*. at *8. The Court observed that for each of the FLSA violations, Plaintiff affirmed that his statements were based on his personal observations and conversations with co-workers, *i.e.*, other tipped employees at all the four restaurants that Defendant operated. *Id*. The Court found that these declarations were sufficient to satisfy the modest factual showing that Plaintiff was similarly-situated to tipped employees from all four restaurant locations that Defendant operated. *Id*. Defendant relied on *Morales v. Plantworks, Inc.*, 2015 U.S. Dist. LEXIS 4267 (S.D.N.Y. Feb 2, 2006), in opposition to conditional certification. The Court, however, noted that in *Morales*, conditional certification was denied because the affidavit and exhibits that Plaintiffs submitted made no reference to any employee other than the named Plaintiff, and they made no allegations of a common policy or plan to deny Plaintiffs overtime. *Id*. at *11. The Court found that Plaintiff's showing was different, as Plaintiff had made a modest showing that he was similarly-situated to other employees at all of Defendant's locations, and accordingly, granted his motion for conditional certification.

(iii) Third Circuit

***Bland, et al. v. PNC Bank, N.A.,* 2015 U.S. Dist. LEXIS 159579 (W.D. Pa. Nov. 25, 2015).** Plaintiffs, a group of mortgage loan officers ("MLOs"), brought a class and collective action alleging that Defendant classified MLOs as non-exempt employees with regard to the overtime provisions of the FLSA. Plaintiffs also asserted claims under the Pennsylvania Minimum Wage Act and the Pennsylvania Wage Payment and Collection Law. Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b). The Court granted the motion. At the outset, the Court noted that Plaintiffs set forth sufficient facts to conditionally certify the collective action. *Id*. at *5. Defendant primarily argued that notice at this juncture was premature and would not result in efficient litigation of Plaintiffs' claims. The Court found that argument unavailing since judicial economy and efficiency is the precise purpose for early notification in FLSA collective actions. *Id*. at *6. Defendant also argued that Plaintiffs' affidavits were unreliable and could not support Plaintiff's modest burden to show that potential opt-ins were similarly-situated. *Id*. The Court reasoned that the factual support was slight for one of Plaintiffs' claims, but determined that the balance of Plaintiffs' claims were based upon policies that Defendant uniformly applied to all MLOs. *Id*. Accordingly, the Court found that Plaintiffs satisfied their modest burden at this stage of the litigation, and granted Plaintiffs' motion for conditional certification. *Id*. at *7.

***Bouder, et al. v. Prudential Financial, Inc.,* 2015 U.S. Dist. LEXIS 23736 (D.N.J. Feb. 26, 2015).** Plaintiffs, a group of Prudential representatives, brought a putative collective action and class action alleging that Defendant made improper deductions from their pay toward business expenses as well as failed to pay them overtime wages. Plaintiffs alleged that despite their primary duty to render financial advice, Defendant misclassified them as "exempt salespersons." *Id.* at *143. Plaintiffs moved for class certification, proposing state law sub-classes, including deduction sub-classes and overtime sub-classes for Illinois, Pennsylvania, New York, and California. The Court granted certification to the deduction sub-classes, but denied it as to the overtime sub-classes. In granting certification to the deduction sub-classes, the Court found that each class had more than 40 members. Regarding the commonality requirement, Plaintiffs alleged that Defendant violated respective state laws that prohibit an employer from making certain deductions from an employee's earnings, and in California, a law requires reimbursement of an employee's necessary work expenditures. *Id.* at *153. The Court thus found that Plaintiffs raised the common question of whether Defendant's policies violated such state laws and whether Defendant failed to reimburse necessary work expenditures in California. *Id.* The Court also found that Plaintiffs met typicality and adequacy requirements, as the class representatives asserted the same legal theories against Defendant that they asserted on behalf of the classes, and that no unique defenses applied to any class members. *Id.* at *155. Because Plaintiffs brought their claims based on Defendant's company-wide written policies, the Court rejected Defendant's contention that evidence of each individual Plaintiff's subjective understanding would be required. *Id.* at *157-158. The Court further rejected Defendant's argument that different treatment was required for representatives within the same class during different periods as

Defendant allegedly subjected them to practices and agreements that changed over time. Because Plaintiffs separated their classes into sub-classes in order to specify which polices and practices each was challenging, the Court found Defendant's argument unavailing. *Id.* at *158. Defendant also failed to point to any specific variations in its policy that could disrupt the structure of Plaintiffs' sub-classes. Finally, because the cost of litigation resources and sophistication of Defendant would likely deter individual Plaintiffs to pursue separate actions, the Court concluded that a class action would be the superior means to resolve Plaintiffs' claims of the deductions sub-classes. *Id.* at *162. The Court, however, found that Plaintiffs' overtime sub-classes were not amenable to class treatment. The Court rejected Plaintiffs' argument that an expert's report was enough to overturn an earlier denial of class certification based on the finding that Plaintiffs' primary duty was sales. While Plaintiffs argued that they had eliminated the issues that resulted in their first motion for certification being denied, the Court found that Plaintiffs' expert neither spoke with Plaintiffs nor read their depositions, and thus, did not offer a reliable opinion as to Plaintiffs' primary duty. *Id.* at *164. Although Plaintiffs asserted that Defendant uniformly required them to treat proper financial advices as their primary duty, the Court found that individual inquires would be required to determine how Plaintiffs actually spent their day, and whether they were exempt salespersons. *Id.* at *168. Accordingly, the Court denied class certification to the overtime sub-classes and granted certification to Plaintiffs' deduction sub-classes.

***Diabate, et al. v. MV Transportation*, 2015 U.S. Dist. LEXIS 93762 (E.D. Pa. July 20, 2015).** Plaintiff, a driver, brought a collective action under the FLSA and a class action under the Pennsylvania Minimum Wage Act and Wage Payment Collection Law, alleging that that her former employer failed to pay required wages and overtime for certain pre-shift and post-shift activities and for work performed during periods of time designated as uncompensated meal breaks. Plaintiff moved for conditional certification under 29 U.S.C. § 216(b) and class certification under Rule 23. The Court granted Plaintiff's motion for conditional certification in part, and denied her motion for class certification. At the outset, the Court noted that 90 consent notices were filed by Plaintiff's counsel, and a substantial amount of discovery was completed. *Id*. at *17. Plaintiff argued that she had made the modest factual showing that she and the putative collective action members all worked for Defendant's Philadelphia operation as hourly, non-supervisory paratransit workers during the class period, were subject to common policies and practices, and were not paid overtime wages. *Id*. at *19. With regards to drivers, the Court held that Plaintiff had satisfied her burden to show that the potential collective action members were similarly-situated to Plaintiff. However, the Court ruled that Plaintiff did not satisfy her burden to show that drivers' aides were similarly-situated. *Id*. The Court found that aides did not drive vehicles, but rather were assigned to ride along with drivers on certain tours, and were not subject to any pre-tour and post-tour policies that applied to drivers. *Id*. at *20. Accordingly, the Court granted Plaintiff's motion for conditional certification as to the drivers, but denied the motion as to the aides. In its analysis of the Rule 23 class certification motion, the Court relied on *Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009), a case similar to this action, which affirmed the denial of class certification because individual issues predominated over common issues. *Id*. at *27. The Court remarked that just as in *Babineau*, there was no common proof of Plaintiff's pre-shift claims, as there was no simple way to determine, without resorting to individualized inquiries, whether a driver arrived early on any given day, the reasons for doing so, and whether the driver engaged in work without compensation during that time. *Id*. at *28. The Court observed that as was the case in *Babineau*, permitting Plaintiff's claims to proceed as a class action would deprive Defendant of the ability to explore whether an individual employee was engaged in non-work activities during the gap period and would thus limit Defendant's ability to properly defend the claims. *Id*. at *33. Similarly, the Court found that Plaintiff failed to establish her burden of commonality and predominance of her meal breaks, post-shifts, and overtime claims theories. Accordingly, the Court denied Plaintiff's motion for class certification.

***Henry, et al. v. Express Scripts Holding Co.*, 2015 U.S. Dist. LEXIS 22287 (D.N.J. Feb. 24, 2015).** Plaintiff brought an FLSA action alleging that in early December 2013, Defendant decided to re-classify 170 employees as non-exempt, but failed to pay back overtime wages to any of the 170 re-classified employees. Plaintiff filed a motion for conditional certification of a FLSA collective action pursuant to 29 U.S.C. § 216(b). The Court denied the motion, finding that the facts Plaintiff asserted did not satisfy the requirement for a modest factual showing of FLSA violations. *Id*. at *3. The Court determined that Plaintiff

failed to show facts to suggest that any of the re-classified employees were victims of a common policy or plan that evaded the law. Specifically, the Court opined that there were no facts suggesting that: (i) the previous classifications as exempt were incorrect at the time; (ii) the previous classifications as exempt originated in a common policy, such that the misclassified employees were similarly-situated; or (iii) that the previous classifications as exempt resulted in FLSA violations. *Id*. The Court reasoned that re-classification alone does not evidence any FLSA violations. *Id*. at *3-4. Accordingly, the Court denied Plaintiff's motion for conditional certification.

***Jones, et al. v. SCO, Silver Care Operations LLC,* 2015 U.S. Dist. LEXIS 126425 (D.N.J. Sept. 22, 2015).** Plaintiffs, a group of certified nursing assistants, brought a collective action alleging that Defendant failed to pay them overtime wages in violation of the FLSA, New Jersey's Wage & Hour, and the New Jersey Wage Payment Law. Defendant moved to dismiss or stay Plaintiffs' complaint pursuant to the parties' collective bargaining agreement ("CBA"). Defendant argued that Plaintiffs' claims for overtime and meal break violations required interpretation of the CBA and therefore must be arbitrated pursuant to the CBA's arbitration provision. *Id.* at *5. The Court denied Defendant's motion to dismiss or stay, and found that Plaintiffs' allegations that they experienced deductions of 30 minutes of pay without receiving breaks in violation of the FLSA, which was a dispute distinct from any right included in the CBA. *Id*. at *6. The Court held that Plaintiffs demonstrated through the pleadings and their pay stubs that they each worked at least one week over 40-hours without receiving overtime compensation. The Court accordingly denied Defendant's motion. Plaintiffs filed a motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). Plaintiffs sought conditional certification of overtime pay claims, and meal break policy claims. *Id*. at *12. In support of their proposed collective action, Plaintiffs relied on the pleadings and sworn affidavits, which contained assertions substantiated by the pay stubs, time records, letters written by Defendant, and the parties' CBA. *Id*. at *13. The Court found that these submissions were adequate to establish the prerequisites for conditional certification. *Id*. Further, the Court determined that Defendant's various arguments against conditional certification related to the substantive heart of the disputed issues, and could not defeat Plaintiffs' showing that other employees' pay was calculated the same as the Plaintiffs. *Id*. Accordingly, the Court certified the collective action and issued notice per § 216(b).

***Myers, et al. v. Jani-King Of Philadelphia, Inc.*, 2015 U.S. Dist. LEXIS 29566 (E.D. Pa. Mar. 11, 2015).** Plaintiffs, a group of franchisees, brought a putative class action alleging that Defendant misclassified them as independent contractors in violation of Pennsylvania's Wage Payment and Collection Law ("WPCL"). Plaintiffs claimed that Defendant sold them the rights to cleaning services franchise, and that the franchise agreements that secured those rights were illegal employment agreements. *Id*. at *2. Plaintiffs moved to certify a class, which the Court granted. The Court noted that the central issue in this case was that Defendant misclassified franchisees as independent contractors. Plaintiffs contended that under WPCL, the class members should have been treated as employees and not as independent contractors. The Court observed that if Plaintiffs were in fact misclassified, then the class members, who were bound by the universal policies and procedures, would be entitled to relief. *Id*. at *18. On the other hand, if they were not misclassified, the same policies would have negated an employment relationship. Accordingly, the Court concluded that determination of this issue was common across the class, and that the commonality requirement was satisfied. *Id*. Defendant challenged the adequacy of representation requirement, and contended that named Plaintiff Brooks was not qualified to represent the class since he operated his franchise as a corporate entity. *Id*. at *23. The Court agreed that a corporate entity could not bring claims under WPCL, but remarked that it did not preclude Plaintiff Brooks and similarly-situated individuals from bringing WPCL claims. *Id*. at *24. Defendant further claimed that there was a conflict between the class members because some franchisees might prefer to remain independent contractors rather than be regarded as employees. The Court, however, rejected this argument, finding that in any substantial class action, there was the possibility that some members of the class would take a position different from that of the class representatives. *Id*. at *27. The Court ruled that this was insufficient to deny the class certification motion, and concluded that Plaintiffs satisfied the adequacy requirement. *Id*. at *29. As to predominance requirement, Plaintiffs contended that Defendant's right to control workers could be proved by common evidence, including the franchise agreement, the procedures manual, and the representative testimony from Defendant's managers and cleaning workers. Defendant, on the other hand, claimed that

Plaintiffs' WPCL claims would require separate discovery and rulings for each franchise. Defendant contended that Plaintiffs' evidence was only sufficient to guarantee the quality of its franchised product, but insufficient to establish an employment relationship. The Court agreed with Defendant that to satisfy the predominance requirement, Plaintiffs must show that Defendant had the right of control where franchisees performed their day-to-day activities through common evidence. *Id*. at *39. The Court, however, found that Pennsylvania law was solely concerned with whether the franchisor had the ability to control the manner of the franchisee's work, and in analyzing that law, the franchise agreement should be looked at specifically to see how the nature and extent of the franchisor's right to control is defined. *Id*. at *40. The Court concluded that it was satisfied that Plaintiffs met the predominance requirement, and could establish through policies manual, the franchise agreement, and the training manual that they were employees. *Id*. at *41. Accordingly, the Court certified the class.

***Reed, et al. v. Empire Auto Parts, Inc.,* 2015 U.S. Dist. LEXIS 21112 (D.N.J. Feb. 23, 2015).** Plaintiff, a full-time delivery driver, brought an action alleging that Defendant violated the FLSA and New Jersey Wage & Hour Law ("NJWHL") by failing to pay overtime to him and other drivers. Specifically, Plaintiff alleged that he and other drivers regularly worked more than 40 hours per week and rarely took an uninterrupted, 30-minute meal break. *Id.* at *3. Plaintiff moved for conditional certification of a collective action pursuant to the FLSA, and certification of a Rule 23 class action for violations of the NJWHL. The Court denied Plaintiff's motion. The Court found that Plaintiff failed to demonstrate that he was similarly-situated to the other employees, or to present evidence of the alleged unstated policy for purposes of 29 U.S.C. § 216(b). Although Defendant had a policy of automatic meal break deductions, Plaintiff argued that it was a sham and resulted in Defendant knowingly failing to pay overtime wages. Plaintiff supported his argument with his own and other drivers' declarations, stating that they occasionally skipped meal breaks to finish their routes faster and did not notify management when they skipped the break. *Id.* at *14. Plaintiff thus asserted that skipped meal breaks suggested that Defendant maintained an unwritten policy of discouraging drivers from taking meal breaks. *Id.* Plaintiff also contended that the presence of GPS in drivers' vehicles to track their routes constituted sufficient evidence of the requisite "factual nexus" between Defendant's policies and the effect of those policies on the drivers. *Id.* The Court, however, found that an automatic meal deduction was not *per se* unlawful, and the fact the Plaintiff chose not to tell his supervisors that he skipped meal breaks shed no light on the experience of other drivers. *Id.* at *15. Further, the evidence did not show that Defendant knew or should have known that drivers were skipping breaks, or that Defendant used GPS data for payroll purposes. *Id.* Moreover, Plaintiff's own testimony suggested that his situation was different from other drivers, as his routes were unique, and he did not know whether other drivers took their lunch break or not. *Id*. at *17. Although some drivers testified that they occasionally skipped a break to finish faster and did not report this to managers, the evidence did not show that it was due to the alleged unwritten policy or because of the GPS tracking. The Court therefore denied Plaintiff's motion for conditional certification. For similar reasons, the Court also denied Plaintiff's motion for class certification. The Court found that the difference between Plaintiff's experience and that of the other drivers underscored the fact that Plaintiff could not demonstrate commonality, and the necessarily individualized nature of the inquires needed into each driver's individual circumstances with respect to breaks defeated predominance. *Id*. at *26. Accordingly, the Court denied Plaintiff's motion in its entirety.

***Robles, et al. v. Vornado Realty Trust,* 2015 U.S. Dist. LEXIS 111038 (D.N.J. Aug. 21, 2015).** Plaintiff brought putative collective action against Defendant relating to overtime violations of the FLSA. Plaintiffs worked as lease accountants and Defendant allegedly did not pay them overtime compensation despite Plaintiffs working more than 40 hours per week. Plaintiff moved to conditionally certify a collective action consisting of all employees who were denied overtime wages. In opposition, Defendant argued that Plaintiff lacked personal knowledge as to whether putative collective action members and other lease accountants were receiving overtime compensation. Defendant also argued that they had affirmatively shown that the proposed collective action members were not similarly-situated. *Id.* at *4. The Court noted that the declarations that Plaintiff submitted were substantially similar, *i.e.*, all of the opt-in Plaintiffs stated that they worked as lease accountants for Defendant and mentioned their department and sub-group in the Financial Operations Department. *Id*. at *7. Plaintiff and the other declarants also indicated that they were not aware of an employees in the Financial Operations Department who were paid overtime. *Id*. Despite

these declarations, Defendant contended that the opt-in Plaintiffs were not similarly-situated to the named Plaintiff. The Court found that Plaintiff had submitted sufficient evidence that she was similarly-situated to the potential collective action members, as she showed that she and the opt-ins shared the same job responsibilities and were all subject to policies requiring them to work more than 40 hours per week without overtime compensation. Accordingly, the Court granted Plaintiff's motion, and conditionally certified the collective action and issued notice.

***Vasil, et al. v. Dunham's Athleisure Corp.*, 2015 U.S. Dist. LEXIS 162872 (W.D. Pa. Dec. 4, 2015).** Plaintiff, a former assistant store manager ("ASM"), brought an action alleging that Defendant denied him and other similarly-situated current and former employees' overtime wages in violation of the FLSA, the Pennsylvania Minimum Wage Act, and the Wage Payment and Collection Law. Plaintiff filed a motion for conditional certification of a collective action under 29 U.S.C. § 216(b), and the Court granted the motion. During his employment with Defendant, Plaintiff performed managerial duties less than 20% of the time, and in addition to the managerial duties he worked at registers, assisted customers, stocked merchandise, and performed janitorial duties and other non-managerial tasks. *Id*. at *2-3. According to Plaintiff, Defendant frequently asked ASMs to perform intense manual labor, and the work was substantially similar to that performed by non-exempt hourly employees. *Id*. at *3. Plaintiff alleged that Defendant's intentional misclassification of ASMs as exempt was part of Defendant's pattern or practice of misclassifying all ASMs to exempt them from being paid overtime compensation as required by law. *Id*. at *4. Plaintiff argued that his declaration and the declarations of two other former ASMs provided adequate grounds to meet the conditional certification standard. Defendant contended that conditional certification was inappropriate because: (i) the only policy that Plaintiff identified as the universal job description for ASMs was not illegal or improper under the FLSA; and (ii) Defendant obtained declarations from 150 of its 215 ASMs showing that ASMs' work responsibilities varied greatly by location. *Id*. at *5. The Court found that Plaintiffs had met their modest burden for the conditional certification. The Court reasoned that Plaintiffs merely needed to show a factual nexus between the manner in which the alleged policy affected them and the manner in which it affected other employees such that they ultimately may be found to be similarly-situated. *Id*. at *8. The Court concluded that Plaintiffs had satisfied this burden, and further determinations and assessments that Defendant sought were beyond the scope of this inquiry. *Id*. at *9. The Court explained that there was a discrete and readily identifiable group of employees who worked under similar circumstances, and that Plaintiffs showed that at least some of the employees within the group were subjected to a working environment that violated the FLSA in a manner that would support a finding that they were similarly-situated. *Id*. at *13. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

(iv) Fourth Circuit

***Banks, et al. v. Wet Dog, Inc.*, 2015 U.S. Dist. LEXIS 11623 (D. Md. Feb. 2, 2015).** Plaintiffs, a group of car washers and detailers, brought an action alleging that Defendant's employment policies required them to remain on Defendant's premises for idle periods without pay as required by the FLSA. Under the policy, employees could clock-in only when customers arrived for car washes, and after each car wash was completed, employees were required to clock-out and to remain on Defendant's premises until new customers arrived. *Id.* at *3. Plaintiffs alleged that because of this policy, Defendant's compensated them below the minimum wage and without overtime. Plaintiffs moved for conditional certification of a collective action, which the Court granted. The Court found that Plaintiffs made the requisite factual showing that they were similarly-situated to other employees who worked for the Defendant during the period in question. The 11 declarations Plaintiffs submitted consistently spoke of underpayments and unpaid overtime, and attested that Defendant had the authority to control, manage, and direct Plaintiffs' work and that of other similarly-situated employees. *Id.* at *6. Plaintiffs' declarations all contended that Defendant refused to fully compensate employees by mandating a punch-in, punch-out policy before and after cleaning cars on-site, and that Defendant required employees to clean the work area and attend bi-weekly meetings while they were off-the-clock. *Id.* at *6-7. Although the Court noted some differences among Plaintiffs, such as rates of pay, duration of tenure, and the location at which they worked, it reasoned that these minor inconsistencies did not mean that Plaintiffs were necessarily dissimilar. *Id.* at *7. The Court therefore granted conditional certification of a collective action comprised of all individuals who had not received proper overtime pay or had not received the minimum wage for all hours worked.

***Degidio, et al. v. Crazy Horse Saloon And Restaurant, Inc.,* 2015 U.S. Dist. LEXIS 132558 (D.S.C. Sept. 30, 2015).** Plaintiff, an adult entertainer at Defendant's club, brought an action alleging that Defendant violated the FLSA and South Carolina Payments of Wages Act ("SCPWA") by failing to pay the appropriate minimum wages for all hours worked and by improperly denying overtime wages. Defendant classified its entertainers as lessees or independent contractors, and paid them no wages. *Id.* at *3. The entertainers received tips from customers for their performances, and Defendant often required them to pay a nightly "house fee." *Id.* at *4. Defendant further offered guests artificial currency referred to as "Golden Dollars" for tipping or buying private dances, and required entertainers to pay Defendant a 10% fee in order to have the Golden Dollars redeemed for U.S. currency. *Id.* at *4-5. Defendant also fixed the minimum payment amounts for the various types of individualized services offered by its entertainers, and did not allow the entertainers to charge less than Defendant's stated minimum fee for semi-private performances. *Id.* at *6. Defendant additionally used entertainers in its promotions, and it did not have any written rules for entertainers. *Id.* at *7. Plaintiff alleged that Defendant misclassified entertainers as independent contractors as it controlled the behavior and work of its entertainers, and that Defendant's practice resulted in improper deductions from compensation. Specifically, Plaintiff alleged that Defendant enforced a wide range of rules beyond those required by law, including but not limited to dress code requirements, sign-in requirements, sequence of performances, house fees, minimum prices for dances, tip-sharing requirements, and various policies intended to maintain "a sense of class" in the establishment. *Id.* at *23. In moving for conditional certification under 29 U.S.C. § 216(b), Plaintiff alleged that the putative collective action members were similarly-situated. The Court agreed with Plaintiff and granted conditional certification. The Court found sufficient evidence in the record that established similarity, as Defendant treated entertainers in a common or similar manner, and subjected them to the same requirements regarding house fees and fees for couches, Jacuzzis, and VIP rooms. *Id.* at *61. The Court further found that Defendant subjected them to guidance regarding their attire, discouraged certain behaviors and tip-outs, and adopted a common approach toward its entertainers. *Id.* at *62. The Court refused to find that the potential need for individualized damage calculations precluded collective action treatment, finding that such potential issues could exist in any FLSA collective action. *Id.* at *65. Defendant also referred to the arbitration agreement signed by the entertainers and argued that it precluded their participation in this action. *Id.* at *67. The arbitration agreement waived the signatory's right to participate in a class action against Defendant, including any class that might be certified in this case. The Court noted that Defendant began having its entertainers sign the arbitration agreement more than a year after this action was filed, but one month before Plaintiff moved for certification. *Id*. The Court therefore questioned the enforceability of the arbitration agreement as it pertained to this action, and raised concerns about the statements in the affidavits of employees who signed the agreements that suggested that they might have received inaccurate or incomplete information about the implications of participating in the proposed class. *Id.* at *68-69. The Court held that entertainers who signed the agreements should be permitted to preserve their rights until the issue was resolved. *Id.* at *71. The Court therefore granted Plaintiff's motion for conditional certification of the FLSA claim.

***Desmond, et al. v. Alliance, Inc.*, 2015 U.S. Dist. LEXIS 59708 (D. Md. May 7, 2015).** Plaintiffs, a group of residential rehabilitation coordinators ("Coordinators") and lead residential rehabilitation coordinators ("Leads"), brought a collective action seeking minimum and overtime wages under the FLSA. Plaintiffs worked for a non-profit organization that provides community-based services to people with mental illnesses and developmental disabilities. *Id*. at *1. Plaintiffs contended that they often worked through lunch and late into the evening, and their evening hours usually totaled more than 40 hours. *Id*. at *4. According to Plaintiffs, their supervisors instructed them not to fill out their timesheets to reflect more than 40 hours, and in lieu of overtime pay, the supervisors told them a "flex time" plan would allow them to take off a day they were scheduled to work. *Id*. Plaintiffs contended that they were rarely able to take off this extra day because of the demands of their employment. *Id*. Plaintiffs moved for conditional certification of a collective action. The Court granted Plaintiffs' motion, and ruled that through their declarations, Plaintiffs made the necessary modest showing that they were similarly-situated to other Coordinators and Leads. *Id*. at *7. The Court observed that Plaintiffs' detailed declarations suggested they performed the same job duties, and explained how under-staffing caused them to work more than 40 hours per week. *Id*. at *8. Named Plaintiff King attested that at company-wide meetings she discussed these issues with other

Coordinators, and those Coordinators indicated that they were subjected to the same unlawful practices. *Id*. The Court observed that this was sufficient to make a modest showing that they were similarly-situated to other putative collective action members. Defendants argued that the Coordinators and the Leads could not be similarly-situated to each other because Leads had certain responsibilities that Coordinators did not. *Id*. at *9. Defendants contended that Coordinators worked at some locations where Leads did not, and the two positions had different pay scales. The Court rejected this argument, finding that Plaintiffs need not show that the potential collective action members had identical positions for conditional certification, and remarked that Plaintiffs could be similarly-situated even though there were distinctions in their job titles, functions, or pay. *Id*. Accordingly, the Court conditionally certified the collective action.

***Gardner, et al. v. Country Club, Inc.,* 2015 U.S. Dist. LEXIS 162009 (D.S.C. Dec. 3, 2015).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendants failed to pay them minimum and overtime wage in violation of the FLSA and the South Carolina Payment of Wages Act ("SCPWA"). Defendants engaged Plaintiffs to work on stage and on the floor of the club, and Plaintiff relied on the money received from the customers, including tips and payments for private performances. *Id.* at *5-6. Defendants did not pay Plaintiffs any wages or include them in their payroll, and required Plaintiffs to pay a nightly "house fee" to the club in order to dance. *Id.* at *7. Defendants also took a portion of the fees charged for individualized services of Plaintiffs, and did not allow them to charge more or less than the club's recommended amounts. *Id.* at *8-9. Alleging that Defendants misclassified them as independent contractors, and thereby denied them minimum and overtime wages, Plaintiffs moved for conditional certification of a collective action under the FLSA and for class certification of their state law claims under Rule 23. The Court granted conditional certification under 29 U.S.C. § 216(b), but denied Plaintiffs' motion for Rule 23 class certification. *Id.* at *4. The Court noted that this action was similar to *Degidio v. Crazy Horse Saloon, Inc.,* 2015 U.S. Dist. LEXIS 132558 (D.S.C. Sept. 30, 2015), and thus its analysis in *Degidio* controlled here as well. On September 30, 2015, the Court had issued an exhaustive order granting the motion for conditional certification under 29 U.S.C. § 216(b) and denying class certification under Rule 23 in *Degidio,* and had indicated a desire for this case and *Degidio* to proceed in parallel considering the similarity of issues in both the actions. *Id.* at *2-4. The Court had also instructed Defendants to comply with its September 2015 order. Before the Court could issue its statement of reasons, Defendant filed a motion seeking relief from that order and permission to appeal. Defendants argued that the Court failed to analyze the facts of this case and simply assumed that the outcome in *Degidio* would control the outcome here as well. *Id.* at *30. After careful review of the records in this action, the Court determined that the analysis set forth in detail in *Degidio* controlled. *Id.* at *31. The Court applied the six-factor test for determination of employee status and ruled that Plaintiffs were employees under the FLSA. Similar to *Degidio,* the Court found that Defendants exercised sufficient control over Plaintiffs, including that Defendants retained the authority and responsibility to hire and fire Plaintiffs, and exercised control over Plaintiffs' appearance. The Court noted that the fact that Defendants issued written rules, required Plaintiffs to work a minimum number of shifts each week, and required them to submit to a breathalyzer and obtain a "see-ya" pass before leaving the club at the end of the shift, easily made up for the few practices employed by the club in *Degidio* that Defendants claimed were distinct. *Id.* at *45-46. The Court therefore concluded that all the factors weighed in favor of finding an employer-employee relationship between Plaintiffs and Defendants. *Id.* at *53. Defendants argued that it should be allowed to off-set its wage obligations to Plaintiffs for the fees that customers paid for table-side dances, couch dances, and other VIP-area dances. *Id.* at *55. Defendants asserted that its practices were in line with guidance previously received from the U.S. Department of Labor ("DOL") *Id.* at *59. The Court, however, found that the DOL letter was 20 years old and very outdated and that Defendants were not entitled to rely on it because it had not complied with the record-keeping requirements prescribed by the letter. *Id.* at *60-62. The Court therefore held that Defendants failed to submit any evidence to show that this action was distinguishable from *Degidio* in any manner that warranted the Court to alter its ruling regarding certification. Accordingly, the Court granted Plaintiffs' motion for conditional certification under the FLSA and denied the motion for class certification under Rule 23 for the reasons set forth in *Degidio.*

***McCoy, et al. v. RP, Inc.,* 2015 U.S. Dist. LEXIS 142521 (D.S.C. Oct. 19, 2015).** Plaintiff, a former employee, brought a collective action on behalf of himself and others similarly-situated seeking unpaid

minimum wages and overtime wages pursuant to the FLSA. Specifically, Plaintiff asserted that Defendant paid some employees an hourly wage lower than the statutory minimum wage using the FLSA's tip credit provision and that Defendant required certain employees to contribute a portion of their net sales to tip pools to compensate other employees. *Id.* at *2. Plaintiff further alleged that some back-of-the-house employees who did not qualify to share in the tip pools and who did not customarily receive tips received money from the tip pools. *Id.* at *2-3. Seeking to represent individuals employed at Kickin' Chicken to whom Defendant paid an hourly rate less than the statutory minimum wage and the employees who either contributed money to a tip pool or received money from a tip pool, Plaintiff moved for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). *Id.* at *8. The Court conditionally certified the proposed collective action, but modified the collective action as "all Kickin' Chicken servers at each location who were paid an hourly rate less than the statutory minimum wage of Seven and 25/100 dollars per hour at any time since October 19, 2012." *Id.* at *12. The Court found that Plaintiff produced sufficient factual evidence to support his allegation that the proposed collective action members were similarly-situated. Plaintiff submitted an affidavit stating that he worked at the downtown Kickin' Chicken location and that servers from other Kickin' Chicken locations had told him that all had a mandatory tip-out policy. *Id.* at *11. Plaintiff also produced evidence that Kickin' Chicken employed a common scheme or policy of requiring servers to participate in tip pools with allegedly ineligible employees. *Id.* Defendant pointed out that Plaintiff did not produce any evidence from employees of the other Kickin' Chicken locations or identify the declarants who told him about the policies at those locations. *Id.* at *12. While agreeing with Defendant, the Court held that such arguments were better suited for second stage, decertification proceedings. *Id*. Although Plaintiff's affidavit did not identify the declarants who told him about tip pools at other Kickin' Chicken locations, the Court found that the information was nonetheless within his personal knowledge as it was a result of his conversations with other servers and with a member of management, whether accurate or not, of the tip pooling practices at other Kickin' Chicken locations, and such knowledge might be considered by the Court at the notice stage under § 216(b). *Id*. at *28. The Court therefore held that Plaintiff's evidence was sufficient to demonstrate that the proposed members of the collective action were similarly-situated to Plaintiff, and thus he met his lenient burden for conditional certification. The Court also granted Plaintiff's request for an order requiring Defendant to produce the names, addresses, telephone numbers, e-mail addresses, and dates of employment of all potential Plaintiffs, and held that Plaintiff might request additional address information for any potential collective action members whose U.S. Mail Notice was returned and whose e-mail notice was undeliverable. *Id.* at *16-20. The Court, however, declined to authorize any third-party administrator to send text messages via cell phone to any potential collective action member, or to post any laminated notice in any of Kickin' Chicken locations. *Id.* at *21-25. Accordingly, the Court granted Plaintiff's motion for conditional certification, subject to certain modifications and limitations.

***Meeker, et al. v. Medical Transport, LLC*, 2015 U.S. Dist. LEXIS 43143 (E.D. Va. April 1, 2015).** Plaintiffs, a group of current and former ambulance crew personnel, brought a FLSA collective action alleging that Defendant failed to pay for automatic deductions of the 30-minute meal breaks without reimbursement ("meal break deduction claim") and off-the-clock activities such as returning calls and e-mails ("off-the-clock claim"). Plaintiffs filed a motion for conditional certification, which the Court granted. At the outset, the Court noted that Plaintiffs had demonstrated that they and other potential collective action members were victims of a uniform policy or practice that violated the law. Regarding the meal deduction claim, Plaintiffs relied exclusively on a written policy that applied to every employee. *Id*. at *7. Plaintiffs alleged that the policy was unlawful because it suggested that the reimbursement of overtime payment was optional and dependent on the employee seeking reimbursement. *Id*. Defendant argued that Plaintiffs failed to sufficiently prove the existence of an unlawful policy or practice because automatic break deduction policies were generally lawful. *Id*. at *8. The Court remarked that Plaintiffs had met their burden because they did not argue that the policy itself was unlawful; rather, they challenged the process for reimbursement after the automatic deduction as unlawful. *Id*. Regarding the off-the-clock claim, Plaintiffs asserted that the uniform policy or practice was the absence of a method of tracking and reporting off-duty work, and that employees were obligated to obtain required training on their own time without compensation. *Id*. The Court found that this practice was sufficient to carry Plaintiffs' burden at the first stage of conditional certification under 29 U.S.C. § 216(b). *Id*. at *9. Second, the Court found that Plaintiffs

had established that they were similarly-situated to members of the putative collective action. The Court explained that for the meal deduction claim, all members of the ambulance crew were subjected to the automatic deduction policy, regardless of the crew member's position or location of operation. *Id*. Similarly, for off-the-clock claim, the Court noted that all crew members were subjected to the same lack of a method for tracking and recording off-duty work. *Id*. The Court found that Plaintiffs had satisfied their burden to show that they were similarly-situated, and conditionally certified the collective action.

***Rehberg, et al. v. Flowers Banking Co. Of Jamestown, LLC*, 2015 U.S. Dist. LEXIS 36939 (W.D.N.C. Mar. 24, 2015).** Plaintiffs, a group of bakery product distributors, brought an action alleging that Defendant misclassified them as independent contractors and denied them benefits under the FLSA and the North Carolina Wage & Hour Act ("NCWHA"). The Court granted Plaintiffs' motion for conditional certification of a collective action. Subsequently, Plaintiffs sought Rule 23 class certification for their NCWHA claims, and Defendant moved to decertify the FLSA collective action. The Court certified the Rule 23 class, and denied Defendant's motion. At the outset, the Court found that Plaintiffs had met their burden of showing that all the requirements of Rule 23(a) were met and that class certification was appropriate pursuant to both Rue 23(b)(2), and Rule 23(b)(3). Defendant argued that the record showed material differences existed between Plaintiffs as to: (i) the level of control they were subjected to by Defendant; (ii) the exercise of entrepreneurial business opportunities; (iii) the level of investment and practice of hiring helpers; (iv) degree of skill; and (v) duration of their relationship with Defendant. The Court remarked that there was sufficient common evidence as it had found in its Rule 23 analysis to every factor that it must assess. As to the degree of control, the Court noted that while each distributor may have carried out the essential functions of his job slightly differently, such differences did not destroy commonality. *Id*. at *22. The Court explained that all distributors were instructed to carry out their jobs subject to the distributor agreement, had substantially similar job duties, and were subject to common policy of being misclassified as independent contractors. As such, the Court found that there was a question common to all putative class members that could be resolved in a single stroke. Accordingly, the Court concluded that common evidence of Plaintiffs' factual and employment settings leaned in favor of a finding that all distributors were similarly-situated for the purposes of the FLSA. Defendant argued that several individualized issues warranted decertification of the FLSA collective action. First, Defendant contended that determining whether the distributors were subjected to either the motor carrier exemption or the outside sales exemption under the FLSA would require the fact-finder to hear and weigh significant individualized evidence. *Id*. at *47. The Court, however, found that those exemptions, if applicable to any distributors, did not overwhelm the similarly-situated analysis under 29 U.S.C. § 216(b). The Court further explained that the primary inquiry at this point was to determine whether or not all distributors were misclassified as independent contractors and whether they were truly employees within the meaning of the FLSA. *Id*. at *48. Accordingly, the Court concluded that the members of the collective action were similarly-situated for the purposes of collectively adjudicating their FLSA claims, and denied Defendant's motion for decertification.

***Siquic, et al. v. Star Forestry, LLC,* 2015 U.S. Dist. LEXIS 135674 (W.D. Va. Oct. 5, 2015).** Plaintiffs, a group of migrant workers employed on a seasonal or temporary basis, brought an action seeking unpaid minimum wages. Plaintiffs alleged that besides delaying payments, Defendant did not provide pay stubs or any records regarding hours, wages paid, or deductions taken from their paychecks. *Id.* at *4. Plaintiffs also alleged that Defendant deducted money from Plaintiffs' wages for business expenses, and that Plaintiffs were not compensated for traveling long distances as part of their employment. *Id.* Plaintiffs moved for class certification of their Rule 23 claims and conditional certification of their FLSA claims, and the Court granted the motions. First, the Court found that the proposed class was readily identifiable because they were required to obtain H-2B visas to work in the United States, and their passports would specify their employer and the periods of employment. Regarding numerosity, Star Forestry, LLC generally applied for at least 75 visas per season, and the retention rate for workers from season to season was between 50% and 75%. *Id.* at *9. Plaintiffs, thus, estimated that there were about 19 to 38 new temporary migrant workers per season, and the Court opined that Plaintiffs' estimate of 200 proposed class members constituted a good faith estimate that established numerosity. Regarding commonality, Plaintiffs filed several declarations confirming Defendant's alleged failures. Defendant also admitted that they did not

save handwritten calculations that were used to ensure that employees received the prevailing wages, paid workers in cash, and did not give them pay stubs until the most recent season. The Court opined that these facts demonstrated that the putative class members suffered a common injury. The Court also noted that there were common questions of law, such as whether Defendant's employment practices violated the AWPA and the FLSA. The Court observed that Defendant's failures affected all the class members, and that differences in the amount of damages suffered by the class members did not make their legal claims atypical. *Id.* at *13. The Court also opined that Defendant's liability with respect to its employment practices would be subject to resolution in a single adjudication; although there would be differences in the putative class members' individual damages, the Court ruled that such differences were of minimal consequence, given the common questions of law and fact among the proposed class members. *Id.* at *18. Thus, the Court held that the common questions of law and fact predominated over questions affecting individual members. Further, the Court observed that individual putative class members had little interest, if any, in bringing their own individual actions because they resided in Guatemala, did not speak English, were indigent, were unfamiliar with U.S. law, and due relatively small sums of money. The Court concluded that all these factors made a class action a superior mode of adjudication. For these reasons, the Court granted class certification. The Court also certified the proposed collective action because Plaintiffs showed they were similarly-situated to the proposed collective action members, and bolstered their allegations with declarations from several potential collective action members.

***Walter, et al. v. Buffets, Inc.,* 2015 U.S. Dist. LEXIS 82507 (D.S.C. June 25, 2015).** Plaintiffs, a group of restaurant servers, brought an action alleging that Defendant had a corporate policy to limit labor costs across each of its 300 restaurants in 35 states, which resulted in servers being assigned significant amounts of non-tip producing work for which they should have been paid the standard minimum wage, but were paid at tip credit rates in violation of the FLSA and the Ohio Minimum Fair Wage Standards Act. Plaintiffs moved to conditionally certify a FLSA collective action, but after the completion of discovery they also moved to narrow the scope of the FLSA class, citing Defendant's tenuous financial situation and limited the class to servers who worked at restaurants overseen by 11 named area directors. The Court conditionally certified the collective action, but denied the motion to narrow the scope of the FLSA claim. Plaintiffs provided affidavits that supported the allegations in the complaint from eight servers in six different states, referring to conversations with managers about corporate-level policies that resulted in the alleged violations. *Id*. at *14. In addition, Plaintiffs also provided copies of the "Server Opening Duties Checklist" and the "Line Server Opening Beverage Bar Duties" checklist, which listed a number of non-tip-producing duties that servers were required to perform. *Id*. at *14-15. The Court found that these affidavits provided ample evidence for Plaintiffs to meet the modest showing required to conditionally certify a collective action under 29 U.S.C. § 216(b). *Id*. at *15. Plaintiffs proposed to limit the scope of the collective action, arguing that Defendant's financial condition required narrowing the collective action, and that the proposed narrowed collective action would be more efficient. *Id*. at *16. The Court, however, observed that when the number of parties who would opt-in remained speculative, its concern was not with narrowing the scope of the collective action due to concerns such as Plaintiffs had with Defendant's financial status; the concern was to ensure that the scope of the collective action properly defined those with a cognizable injury. *Id*. at *17. The Court, however, determined that the proposed definition of the collective action required some alteration. *Id*. at *16. The Court thus conditionally certified a collective action of all individuals from July 11, 2010 to July 18, 2012, who worked as tipped employees earning a sub-minimum, tip credit wage. *Id*. at *18. Accordingly, the Court granted Plaintiffs' motion to conditionally certify a FLSA collective action and denied Plaintiffs' motion to narrow the scope of the FLSA class.

***Zelaya, et al. v. A+ Tires, Brakes, Lubes, And Mufflers, Inc.*, 2015 U.S. Dist. LEXIS 130225 (E.D.N.C. Sept. 28, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendants failed to pay overtime wages in violation of the FLSA and the North Carolina Wage & Hour Act ("NCWHA"). Plaintiffs worked for one of two separate Defendants using the same employee handbook. *Id*. at *2. Plaintiffs contended that despite having overtime policies, Defendants frequently denied overtime wages. *Id*. at *3. Specifically, Plaintiffs asserted that Defendants did not pay workers if they arrived early or worked late, which included time spent loading and unloading vehicles and traveling to jobsites. *Id*. Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b), and class certification of their

NCWHA claim per Rule 23. At the outset, the Court noted that Plaintiffs met the requirements for conditional certification. The Court observed that Plaintiffs made a factual showing that they were subject to several common policies that violated the FLSA. *Id*. at *8. Plaintiffs and putative collective action members, through their declarations, showed that Defendants systematically reduced employees' hours to reflect less hours than employees actually worked, which resulted in employees not being paid overtime wages. *Id*. at *9. The Court found that this was sufficient to meet the modest burden under 29 U.S.C. § 216(b), and certified the collective action. Similarly, the Court found that Plaintiffs satisfied the Rule 23(a) requirements on their NCWHA claims. The Court observed that Plaintiffs met the commonality requirement as they showed that they were affected by several common policies and practices, since employees had their hours reduced when those hours were not approved, and employees were not reimbursed for meals while traveling. *Id*. at *12. The Court also determined that Plaintiffs satisfied the predominance requirement as the common issues predominated over individual issues. *Id*. at *13. The parties disputed when and how the statute of limitations would apply, under both the FLSA and the NCWHA. The Court observed that under Rule 15(c), amendments will relate back to an original complaint when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading. *Id*. at *16. The Court reasoned that here, the original complaint centered on Defendants' failure to pay overtime wages, and that failure provided the factual nexus between the original complaint and the amendments. *Id*. Accordingly, the Court concluded that Plaintiffs' NCWHA amendments related back to the original complaint. *Id*. The Court, however, found that FLSA claims did not relate back to the original complaint. *Id*. at *17. Accordingly, the Court granted Plaintiffs' motions in part.

(v) Fifth Circuit

***Bryant, et al. v. United Furniture Industries, Inc.*, 2015 U.S. Dist. LEXIS 40308 (N.D. Miss. Mar. 30, 2015).** Plaintiffs, a group of employees at a furniture manufacturer, brought an action alleging violations of the minimum wage and overtime provisions of the FLSA. Plaintiffs alleged that Defendant forced its employees to begin work before clocking-in and forced them to clock-out before completing work. *Id.* at *3. Plaintiffs moved for conditional certification of a collective action, and Defendant argued that a previously settled lawsuit precluded certification. First, the Court found that the doctrine of *res judicata* did not apply. Defendant argued that the case involved claims that already had been certified for collective action treatment and subsequently settled in *Carothers v. United Furniture Industries, Inc.*, Case No. 13-CV-00203 ("*Carothers*"), another lawsuit within the same Court. *Id.* at *4. The Court noted that *Carothers* involved similar claims of FLSA violations by persons employed by Defendant as non-exempt factory workers in Mississippi, North Carolina, and California during a similar time period. *Id.* The Court observed, however, that none of the Plaintiffs named in the present action were among the nearly 500 employees who opted-in to the *Carothers* action. *Id.* at *7. The Court explained that, without affirmatively opting-in to *Carothers*, the employees pursuing relief in this case could not have been parties to *Carothers* and therefore they could not benefit from or be bound by the *Carothers* judgment. *Id.* at *7-8. Second, the Court granted in part Plaintiffs' motion for conditional certification. Plaintiffs sought conditional certification of a collective action of non-exempt employees at Mississippi locations who Defendant required to work off-the-clock without overtime compensation. In addition to the Plaintiffs, eleven other potential Plaintiffs had filed written consents with the Court seeking to join the action. *Id*. at *15. In support of their motion, Plaintiffs and opt-ins submitted affidavits alleging FLSA violations that pervaded different positions, occurred at various facilities in Mississippi, and involved a wide range of Defendant's supervisors. Specifically, Plaintiffs identified employees holding ten different positions, at four facilities, who allegedly worked off-the-clock at the direction of 12 different individuals with supervisory authority. *Id*. at *16. The Court concluded that such widespread and pervasive allegations constituted evidence of an illegal decision, policy, or plan such that the employees were sufficiently similarly-situated for purposes of 29 U.S.C. § 216(b), and therefore conditional certification was proper. *Id.* at *16-17. Finally, the Court narrowed Plaintiffs' proposed collective action. The Court determined that Plaintiffs' proposed definition was overly broad because Plaintiffs identified no discernable time period, and because it included Plaintiffs and opt-ins in *Carothers* who already had settled their claims. *Id.* at *17-18. Accordingly, the Court conditionally certified a smaller action consisting of persons employed by Defendant from January 1, 2010 until December 30, 2013, in the state of Mississippi who worked off-the-clock without overtime wages under the FLSA, excluding those who previously opted-in to the *Carothers* settlement. *Id.* at *18.

***Caballero, et al. v. Kelly Services, Inc.,* 2015 U.S. Dist. LEXIS 137475 (S.D. Tex. Oct. 5, 2015).** Plaintiffs, a group of recruiters on the Weatherford International account of Defendant, a temporary staffing services firm, brought a collective action under the FLSA alleging that Defendant required them to work substantially more than 40 hours per workweek without receiving overtime compensation. *Id.* at *3-4. Plaintiffs worked on-site at Weatherford locations and/or remotely from their own homes, and Defendant originally classified them as exempt from overtime. *Id.* Defendant later sent an e-mail informing Plaintiffs that it had improperly classified Plaintiffs as exempt and that their position would be re-classified as non-exempt, and that Plaintiffs would be eligible for overtime compensation. *Id*. Alleging that Defendant never compensated them for overtime, Plaintiffs moved for conditional certification of a collective action of recruiters that received the e-mail dated March 27, 2012, that indicated that they were not exempt from overtime. *Id.* at *10. Defendant opposed the motion, arguing that Plaintiffs were not similarly-situated, and that collective action treatment would be inappropriate because the claims would require individualized inquiries. *Id.* The Court denied Plaintiffs' motion, finding that Plaintiffs failed to carry their burden of presenting meaningful admissible evidence that they were similarly-situated to other potential collective action members. *Id.* at *11. The Court noted that Plaintiffs did not identify a single decision, policy, or plan that unified the allegation, but relied on factors that were not probative of whether there was an unlawful practice imposed by Defendant. *Id.* at *12. Although Plaintiffs contended that they were similarly-situated because they all shared the same primary job duties and received the same e-mail regarding their FLSA classification as non-exempt employees, the Court found that Plaintiffs did not meet their burden of presenting evidence that the alleged FLSA violations grounded on an alleged unwritten practice stemming from a single decision, policy, or plan. *Id.* at *13-14. Plaintiffs relied heavily on a declaration from Defendant's former supervisor, who supervised two recruiters on the Weatherford account, to argue that the supervisory employees directed recruiters not to record overtime they worked. *Id.* at *15-16. The Court, however, determined that the declaration did not provide evidence of relevant acts by Defendant or its supervisory employees taken at the direction of Defendant as it only amounted to one supervisor's impressions of Defendant's practices without specifying any acts or statements that provided a basis for those impressions. *Id.* Further, the declaration did not provide sufficient facts to extrapolate a company-mandated national management practice that affected the many other potential Plaintiffs. *Id.* at *18. The Court held that Plaintiffs did not provide sufficient information regarding the structure and practices of the management who oversaw the proposed collective action to infer a national unwritten practice from Plaintiffs' admissible evidence, and thus, resolution of the proposed collective action members' claims would require individualized inquiries on essential factual issues. *Id.* at *20. Accordingly, the Court denied Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b).

***Dyson, et al. v. Stuart Petroleum Testers, Inc.*, 2015 U.S. Dist. LEXIS 113509 (W.D. Tex. Aug. 27, 2015).** Plaintiff, a flow tester responsible for monitoring oil and gas wells, brought a collective action alleging that Defendant improperly classified him as an independent contractor and denied him overtime pay in violation of the FLSA. Plaintiff alleged that Defendant set up a paper profile designed to create the impression that flow testers were independent contractors, although in reality they were employees of Defendant. *Id.* Plaintiff sought to conditionally certify a collective action consisting of all current and former hourly-paid workers classified as independent contractors who performed work for Defendant associated with monitoring and maintaining oil and gas wells throughout the United States within the last three years. *Id.* at *5. The Court granted Plaintiff's motion. Plaintiff supported his motion with declarations from himself and another tester, Alvin Garvey ("Garvey"). *Id.* at *5-6. Defendant argued that Plaintiff failed to show sufficient evidence of potential opt-in Plaintiffs because he provided only two declarations and the mere existence of other similarly-situated individuals did not guarantee that those individuals actually would seek to join the lawsuit. *Id.* at *6. The Court rejected Defendant's argument in opposition to the motion because the case was in its very early stages, no discovery had been conducted, and Plaintiff did not need to submit evidence identifying other interested persons. *Id.* at *7. Moreover, the Court found that Plaintiff had presented at least some evidence of other opt-in Plaintiffs. In their declarations both Plaintiff and Garvey averred that other flow testers were subject to the same working and pay conditions and may be interested in joining the lawsuit. *Id.* The Court found this showing sufficient to carry Plaintiff's burden at the conditional certification stage. *Id.* Defendant also contended that Plaintiff failed to provide evidence of a widespread illegal practice or plan because he relied solely on identical, conclusory statements in two

declarations that fell short of the evidence necessary for conditional certification. *Id.* at *8-9. The Court again rejected Defendant's argument. Although Plaintiff couched the declarations in general terms, the declarants stated that they worked with other flow testers who performed work for Defendant and that the other flow testers performed similar work, were paid hourly, and were not paid overtime. *Id.* at *9. Moreover, Garvey stated that, because he worked for Defendant for over a year, he became familiar with company-wide practices due to the fact that he worked closely with other flow testers and "visited with them" about their jobs, pay, and hours. *Id.* at *9-10. The Court found Garvey's testimony sufficient to show a widespread illegal plan. The Court, therefore, concluded that Plaintiff presented sufficient evidence to meet the slight burden imposed at that initial conditional certification stage under 29 U.S.C. § 216(b). *Id.* at *10-11.

***Jones, et al. v. Cretic Energy Services, LLC*, 2015 U.S. Dist. LEXIS 164786 (S.D. Tex. Dec. 9, 2015).** Plaintiff, an employee, brought a collective action alleging that Defendant misclassified equipment operators and supervisors as exempt employees and denied them overtime wages under the FLSA. Plaintiff alleged that he worked for Defendant as a member of a coil tubing crew, and his job duties primarily involved operating and tending to power-driven, stationary, or portable pumps and manifold systems used to transfer gases and oil to and from various vessels. *Id*. at *2-3. Plaintiff filed a motion to conditionally certify the collective action, and the Court granted the motion. Defendant argued that the proposed collective action was overly broad, because Plaintiff worked as an equipment operator, and the proposed collective action included service supervisors who were not similarly-situated to Plaintiff. *Id*. at *13. The Court observed that to satisfy the modest burden for conditional certification, Plaintiff only needed to show that there was a reasonable basis to believe that other individuals also existed in the putative collective action. *Id*. at *14. Plaintiff attached declarations of two other coil tubing crew members, both of whom stated that despite working for over 40 hours, Defendant did not pay them overtime wages. *Id*. at *14-15. Plaintiff also submitted another employee's declaration who stated that he worked for Defendant on coil tubing crews in multiple positions, including both as an operator and supervisor, and was not paid overtime wages. *Id*. at *15-16. In all the three declarations, the employees stated that they knew of others similarly-situated who would be interested in joining the litigation. *Id*. at *16. Defendant argued that supervisors were not similarly-situated to operators because the operators had no staff management duties, while the supervisors supervised the equipment managers, assisted in recruitment, and were responsible for performance evaluations, etc. *Id*. at *20. Defendant also contended that the supervisors were not similarly-situated to operators because it classified supervisors as exempt under the executive exemption to the FLSA, and it classified operators as exempt under the motor carrier exemption. *Id*. at *20. Plaintiff argued that the supervisors were similarly-situated to operators because both worked the exact same hours from start-to-finish, performed the same type of manual labor in the oil field, were paid a salary plus a bonus, and were uniformly misclassified as exempt. *Id*. at *21. The Court noted that the evidence showed that the members of the coil tubing field crews worked the same hours side-by-side as a team, traveled together from jobsite to jobsite, and spent most of their time physically operating and maintaining coil tubing equipment in oil fields. *Id*. at *23-24. The Court determined that employees with different job titles were similarly-situated for the purposes of an opt-in FLSA collective action when their day-to-day job duties did not vary substantially. *Id*. The Court reasoned that the job duties of the supervisors and the operators were substantially similar despite the additional responsibilities given to the supervisors. *Id*. Accordingly, the Court concluded that the supervisors were similarly-situated to the operators, and conditionally certified the collective action.

***Jones, et al. v. Yale Enforcement Services, Inc.*, 2015 U.S. Dist. LEXIS 83221 (E.D. La. June 26, 2015).** Plaintiff brought a collective action seeking unpaid wages and overtime pay under FLSA alleging that Defendant ordered him and eight other individuals to report to Lakeview Regional Medical Center ("LRMC") and remain there 24 hours a day for four days, during the landfall and aftermath of Hurricane Isaac. *Id.* at *2. Plaintiff moved for partial conditional certification, which the Court granted. Defendant argued that Plaintiff failed to show that his entire stay at LRMC was compensable time. In support of its contention, Defendant included: (i) the affidavit of Defendant's senior payroll administrator stating that Plaintiff received pay for 77.75 hours of work during the week of Hurricane Isaac; (ii) the affidavit of Defendant's CEO stating that Defendant was only complying with the emergency procedures initiated by

LRMC; and (iii) the employee handbook decreeing sleeping on the job as a punishable offense, which, according to Defendant, made clear that Plaintiff could not have thought such activity was part of being "on duty," and thus compensable. *Id.* at *4-5. Plaintiff argued that the Code of Federal Regulations, 29 C.F.R. § 785.22, extended compensable time to sleeping and other activities when an employer requires an employee to be on-duty for more than 24 hours, and there was no employment contract to the contrary. *Id.* at *5-6. Although the Court found that Defendant's argument that "Plaintiff had not alleged that he was on-duty after his set shift ended" had some merit, it opined that it was appropriate to weigh such arguments at the second step of the certification process. *Id.* at *6. The Court pointed out that the exact scope of Plaintiff's duties would be further clarified by discovery. The Court maintained that it was sufficient at that point that Plaintiff had alleged that, contrary to normal procedures, Defendant required Plaintiff and others to report to and remain at LRMC for several days without leaving. Because the allegations pertained only to a very small group of individuals during a very short period of time within a very specific geographical territory, the Court concluded that collective action would better address the parties' claims. *Id.* at *8. Accordingly, the Court granted Plaintiff's motion for partial conditional certification of a collective action pursuant to 29 U.S.C. § 216 (b).

***Kelly, et al. v. Healthcare Services Group*, 2015 U.S. Dist. LEXIS 64258 (E.D. Tex. May 18, 2015).** Plaintiffs, a group of account managers, brought a collective action alleging that Defendant misclassified them as exempt employees and therefore denied them overtime wages in violation of the FLSA. Defendant provided housekeeping management in nursing homes and similar facilities. *Id*. at *5. In facilities where Defendant supplied the labor, account managers also provided labor to help keep the facilities clean. *Id*. Account managers were characterized as salaried exempt employees and hourly non-exempt employees. *Id*. Defendant determined the exempt or non-exempt status of an account manager was based on the manual labor performed by the individual as opposed to the account manager's actual day-to-day duties. *Id*. at *5. After the Court conditionally certified the collective action, Defendant moved for decertification under 29 U.S.C. § 216(b). The Court denied Defendant's motion to decertify. Defendant claimed that opt-in Plaintiffs were not similarly-situated because disparate factual and employment settings were present. The Court observed that the opt-in Plaintiffs relied on a company-wide job description and uniform standardized job routines for Defendant's account managers. *Id*. at *14. The job description included certain managerial duties and non-managerial, labor intensive duties, including heavy housekeeping. *Id*. The Court reasoned that the uniform job description, together with the precise job routines, were pieces of evidence that suggested uniformity and defined the potential scope of the opt-in Plaintiffs' job duties. *Id*. at *16. In addition, Plaintiffs also pointed to deposition testimony showing that the account managers spent the vast majority of their workday performing manual labor. *Id*. at *18. The Court found that the reason this occurred was because the account managers worked the routines of a hourly employees, covered for staff, and were required to compete a number of special projects that kept the facilities clean. *Id*. As a matter of fact, the account managers were expected to perform some managerial functions, but the overwhelming weight of the testimony showed that they spent their time in cleaning, and not managing. *Id*. The Court also observed that the opt-in Plaintiffs' depositions consistently told the same story, establishing that they were all similarly-situated. Defendant contended that the "person-specific factors" and "facility-specific factors" showed that opt-in Plaintiffs were not similarly-situated. *Id*. at *32. Defendant asserted that person-specific factors – such as each regional manager had independent discretion to set policies and priorities within the regions and districts – showed that how an account manager worked depended on the regional manager. The Court observed that Defendant relied on testimony taken out of context, and re-characterized them to fit its arguments. *Id*. at *40. The Court therefore concluded that the person-specific factors were non-existent. The Court ruled that Defendant's reliance on facility-specific factors to show that the opt-in Plaintiffs were not subject to a uniform policy failed because there was overwhelming evidence to show that the opt-in Plaintiffs across all facilities performed similar job duties, and that they were denied overtime wages. *Id*. at *50-51. Accordingly, the Court denied Defendant's motion for decertification of the collective action.

***Lindsey, et al. v. Harris County,* 2015 U.S. Dist. LEXIS 158027 (S.D. Tex. Nov. 6, 2015).** Plaintiffs, a group of former officers employed by Harris County Constable's Office Precinct 3 ("Precinct 3"), brought an action against Defendants for violations under the FLSA and Title VII. Plaintiffs sought conditional

certification of the FLSA claims. The Court denied Plaintiffs' motion. Plaintiffs alleged that officers were instructed not to record all the hours they actually worked, and as a result were denied overtime pay. *Id*. at *4. Plaintiffs stated that they feared being retaliated against if they reported all of the time they worked. *Id.* Defendants argued that: (i) Plaintiffs failed to offer substantial evidence of common policy or plan; and (ii) Plaintiffs did not show personal knowledge of the existence of similarly-situated collective action members. Plaintiffs claimed that they were similarly-situated to all non-exempt law enforcement officers within Precinct 3, and alleged that all officers were subjected to the same common policy, *i.e.*, all officers were required to close out investigation scenes, draft incident reports, work community events, attend community meetings, and be on call outside of their regularly scheduled shifts without appropriate compensation. *Id*. at *11-12. In support of a common policy, Plaintiffs stated in their affidavits that the management team did not look favorably upon deputies reporting time worked outside of their scheduled shift. *Id*. at *12. The affidavits stated that Plaintiffs knew that most of the other precinct officers also worked over 40 hours in a week. *Id.* The Court remarked that Plaintiffs did not offer sufficient evidence of a common plan or a policy to deny all officers' overtime compensation. *Id*. at *13. Officers self-reported their timesheets, and Plaintiffs failed to explain that Defendants knew or should have known that any officers were actually working overtime hours without compensation. *Id*. at *14. The Court reasoned that an employee has a duty to notify his employer when he works more than 40 hours per week. *Id.* Defendants provided evidence that they paid overtime for reported hours for hours worked beyond 40 per week, and had a grievance policy in place for officers who disagreed with pay decisions. The Court determined that Plaintiffs failed to meet their initial burden of showing a common policy or plan or that a potential collective action contained similarly-situated individuals. The Court therefore concluded that Plaintiffs failed to meet even the lenient standard of conditional certification under 29 U.S.C. § 216(b), and denied Plaintiffs' motion.

***Lopez, et al. v. Hal Collums Construction, LLC,* 2015 U.S. Dist. LEXIS 155910 (E.D. La. Nov. 18, 2015).** Plaintiffs, a group of laborers, brought a collective action alleging that Defendants denied them overtime wages in violation of the FLSA. Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion. Plaintiffs submitted declarations of two named Plaintiffs and an opt-in Plaintiff that provided details regarding the allegations in the complaint. *Id*. The Court found that the complaint and the attached declarations set forth substantial allegations that the putative collective action members were together victims of a single decision, policy, or a plan. *Id*. at *15. The Court observed that Defendant's alleged policy of failing to pay employees overtime for work performed over 40 hours was common throughout the proposed "class." *Id*. at *15-16. Accordingly, the Court concluded that Plaintiffs satisfied their lenient burden of showing that they were similarly-situated to members of the purported collective action. Defendants contended that conditional certification should be limited to employees who worked as laborers for Defendants at hourly rates between $9 and $11, the wages that Plaintiffs earned. *Id*. at *17. The Court remarked that similarly-situated does not have to mean identically situated. Further, Plaintiffs did not allege that they were singled out for underpayment, but that all hourly employees working alongside them performing manual labor were not paid the proper overtime rate. *Id*. at *18. Although Plaintiffs asserted that they were paid between $9 and $11 per hour, they claimed that their co-workers, who performed the same duties, were paid between $10 and $14 per hour. *Id*. Given these facts and the lenity with which conditional certification decisions must be made, the Court found that the collective action should be conditionally certified. The Court, however, rejected Plaintiffs' request for six months for opt-in Plaintiffs to file their consent form, and found that an opt-in period of 90 days was appropriate in this action.

***Mason, et al. v. Amarillo Plastic Fabricators,* 2015 U.S. Dist. LEXIS 95624 (N.D. Tex. July 22, 2015).** Plaintiff, an employee, brought a collective action seeking back pay, unpaid overtime, and other compensatory damages. Plaintiff alleged that Defendant conspired to violate the FLSA by altering employee timesheets and timecards, falsifying paychecks, failing to withhold taxes from employee paychecks, and improperly classifying workers as independent contractors. *Id.* at *2. Plaintiff moved for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). Plaintiff submitted a single declaration in support of her motion, wherein she stated that she worked from 8:00 a.m. to 5:00 p.m. five days a week as an hourly employee, and that Defendant permitted her to work overtime, whereby she

began arriving to work by 7:15 a.m. to 7:30 a.m. *Id.* at *8-9. Plaintiff also stated that she performed work duties during her lunch hour and was not paid for all of the time she spent working, including overtime hours, and that the human resources manager altered her timecards to avoid paying her regular time hours and overtime hours. *Id.* at *10. The Court indicated that Plaintiff's declaration provided no factual support for the allegations that other hourly employees were denied regular and overtime pay in violation of the FLSA. Plaintiff's declaration did not identify any other potential Plaintiffs who might be interested in opting-in to her lawsuit and focused solely on her own work schedule and the alleged FLSA violations that she personally suffered. *Id*. The Court reasoned that the declaration did not suggest that Plaintiff had personal knowledge of other employees who were subjected to similar FLSA violations. Further, not one potential Plaintiff submitted an affidavit or declaration in support of Plaintiff's motion, and that the only potential Plaintiffs who submitted affidavits were two employees who submitted affidavits on behalf of Defendant, explicitly stating that they had no interest in joining the action. *Id*. Because Plaintiff did not identify potential Plaintiffs, no potential Plaintiffs submitted affidavits, and no evidence of an alleged widespread illegal plan was submitted by Plaintiff's counsel, the Court concluded that the potential collective action members were not the victims of a single decision, policy, or plan that violated the FLSA. *Id*. at *13. Thus, the Court was unable to determine whether the potential collective action members were similarly-situated, and accordingly denied Plaintiff's motion for conditional certification.

***Pacheco, et al. v. Wessam Aldeeb,* 2015 U.S. Dist. LEXIS 40944 (W.D. Tex. Mar. 31, 2015).** Plaintiffs, a group of food service workers, brought a collective action alleging that Defendant failed to pay them overtime wages in violation of the FLSA. Plaintiffs alleged that Defendant required them to perform unrecorded and unpaid work before and after shifts, to clock-out during compensable break time, and routinely made unlawful deductions from the paychecks of Plaintiffs and similarly-situated employees. Plaintiffs moved for conditional certification of a collective action per 29 U.S.C. § 216 (b) and for notice to potential collective action members, which the Court granted in part. Plaintiffs first showed that they each worked overtime and were paid the same hourly rate for their overtime work, and spoke with other employees who stated they also did not receive overtime pay for time worked over 40 hours per week. *Id*. at *11. Plaintiffs also demonstrated that Defendant deducted pay from their paychecks based on cash register shortages. *Id*. Plaintiffs' pay stubs indicated that each worked more than 80 hours in a two-week pay period and did not receive overtime pay, the Court found that this evidence was sufficient to credit the allegations that Defendant failed to appropriately compensate Plaintiffs and similarly-situated employees. *Id*. at *11-12. While Defendant argued that Plaintiffs had no evidence of a common policy of forcing employees to work off-the-clock, Plaintiffs contended that Defendant consistently deducted a 30-minute lunch break from their paychecks although they generally worked through lunch. *Id*. at *12-13. Plaintiffs further attested that Defendant required them to perform work outside of their shifts, and refused to compensate them for that work. *Id*. at *13. The Court found those statements sufficient to show a reasonable basis for the existence of a policy of forcing employees to work off-the-clock for the purposes of conditional certification. *Id*. Defendant further argued that Plaintiffs were not similarly-situated to the proposed collective action members because Plaintiffs worked in a managerial capacity, and that named Plaintiff Pacheco was not similarly-situated to other Plaintiffs. *Id*. at *14. While the fact that Plaintiffs served in a managerial capacity did not preclude them from representing employees who worked for Defendant in a non-managerial capacity, the Court found that named Plaintiff Pacheco was not similarly-situated to other Plaintiffs. *Id*. at *15-16. Because Pacheco's additional responsibilities and different compensation scheme would require a different analysis than that presented with respect to employees whose only compensation was an hourly wage, the Court found that Pacheco could proceed as an individual Plaintiff, but not on behalf of a similarly-situated collective action members. *Id*. at *19-20.

***Perkins, et al. v. Manson Gulf, LLC*, 2015 U.S. Dist. LEXIS 21427 (E.D. La. Feb. 23, 2015).** Plaintiff, a rigger, brought a FLSA collective action seeking overtime compensation for time spent on attending various meetings and travelling to and from the worksite. Plaintiff moved for conditional certification, which the Court granted. Plaintiff alleged that Defendant did not pay employees who worked offshore for participation in mandatory safety meetings prior to or subsequent to the start of their shifts; travel time spent mobilizing and demobilizing prior to and following each hitch; mandatory fire and abandon drills; mandatory "man overboard" and muster drills; and other work-related activities. *Id.* at *7. Plaintiff worked

aboard the E.P. PAUP, which was owned by Defendant, and there were about 30 other employees consisting of riggers, mechanics, oilers and crane operators. Plaintiff asserted that he and his fellow hourly offshore personnel had not received pay for the safety meetings and travel time, and that this policy was Defendant's payroll practice throughout his period of employment and was applicable to all hourly offshore personnel company-wide. *Id.* at *8. The Court opined that the policy of failing to pay for allegedly compensable meetings and travel time constituted a factual nexus which bound the named Plaintiff and the potential collective action members together, and that there was no indication that this policy related to specific circumstances personal to Plaintiff. *Id.* at *9. Further, because Plaintiff attested that it was within his personal knowledge that all offshore hourly employees company-wide received pay pursuant to this policy, the Court found that he satisfied his lenient burden for conditional certification under 29 U.S.C. 216(b). *Id.* at *10. Although Defendant emphasized that Plaintiff failed to identify any other particular individual who was interested in joining the class, the Court observed that there was no categorical rule that Plaintiff must submit evidence at that stage that other individuals sought to opt-in to the case. *Id.* at *10-11. The Court also noted that Plaintiff had affirmed that he knew other similarly-situated individuals would join the litigation. Defendant, however, argued that Plaintiffs' proposed collective action included a broad spectrum of employees who worked in various positions. The Court remarked that it need not find uniformity in each and every aspect of employment to determine that a group of employees is similarly-situated. *Id.* at *13. Accordingly, the Court conditionally certified a collective action comprised of all hourly offshore personnel who were employed as riggers, mechanics, oilers, and/or crane operators by Defendant within the last three years.

***Rios, et al. v. Classic Southern Home Construction, Inc.,* 2015 U.S. Dist. LEXIS 171391 (E.D. La. Dec. 22, 2015).** Plaintiffs, a group of manual laborers, brought a collective action alleging that Defendant deprived them of overtime wages in violation of the FLSA. *Id.* at *2. Plaintiffs moved to conditionally certify a collective action pursuant to 29 U.S.C. § 216(b), which the Court granted in part. The Court found that the complaint alleged that Plaintiffs and the putative collective action members frequently worked more than 40 hours a week over six or seven days per week, and Defendant paid them at an hourly rate and incorrectly treated them as exempt from the FLSA's overtime requirements. *Id.* at *7. The Court further considered seven declarations of Plaintiffs where they affirmed that they did not receive an overtime rate of pay for hours in excess of 40 per week. *Id.* at *8. Thus, the Court found that the complaint and Plaintiffs' affidavits set forth substantial allegations that the putative collective action members were together the victims of a single decision, policy, or plan of non-payment of overtime. *Id.* at *9. Defendant, however, disputed the merits of the named Plaintiffs' claims for non-payment of overtime and argued that they received full compensation. *Id.* at *10. The Court remarked that questions regarding whether overtime was paid went well beyond the scope of the conditional certification issue and into the merits of Plaintiffs' FLSA claims, and that a full evaluation of the merits was not appropriate at this stage. *Id.* at *11. Defendant also asserted that various Plaintiffs secured employment with falsified documentation and used false names. The Court concluded that Defendant's allegations regarding Plaintiffs' immigration status were not germane to the conditional certification issue under 29 U.S.C. § 216(b). *Id.* at *12. Finally, Defendant referred to an alleged insurance fraud and other purported motivations Plaintiffs had to sue them. The Court opined that these issues were not responsive to the question of conditional certification and would be reserved for the second-step of decertification after notice and discovery. *Id.* As to Plaintiffs' § 216(b) notice, the Court found that Plaintiffs' request for a six-month opt-in period was excessive and unwarranted, and therefore a notice with a 60-day opt-in period was appropriate. *Id.* at *14. Accordingly, the Court granted in part Plaintiffs' motion for conditional certification.

***Wedel, et al. v. Vaughn Energy Services, LLC*, 2015 U.S. Dist. LEXIS 138036 (S.D. Tex. Oct. 9, 2015).** Plaintiff, a survey engineer, brought a collective action alleging that Defendant denied the survey engineers overtime wages in violation of the FLSA. Previously, the Magistrate Judge recommended granting Plaintiff's motion for conditional certification. On Defendant's Rule 72 objections, the Court adopted the Magistrate Judge's recommendation. The Court noted that under *Lusardi v. Xerox, Corp.*, 118 F.R.D. 351 (D.N.J. 1987), a Plaintiff seeking conditional certification must present a minimal showing that: (i) there is a reasonable basis for crediting assertions that aggrieved individuals exist; (ii) that those aggrieved individuals were similarly-situated to Plaintiff in relevant respects given the claims and defenses asserted;

and (iii) that those individuals want to opt-in to the lawsuit. *Id*. at *3. Defendant challenged the third factor, objecting to the Magistrate Judge's accounting of those wishing to join the lawsuit because it included individuals who opted-in between Defendant's response to the pending motion to certify and the recommendation. *Id.* Defendant, however, conceded that at the time of its response, two or three individuals had been named as putative opt-in Plaintiffs. The Court found that the addition of the two individuals satisfied the third *Lusardi* factor, and overruled Defendant's objections. *Id*. at *3-4. The Court similarly found that the evidence before it, including three sworn declarations and the payroll records, was sufficient to show that potential collective action members were together the victims of a single decision, policy, or plan. *Id*. at *4-5. Accordingly, the Court adopted the Magistrate Judge's recommendation and certified the collective action.

(vi) Sixth Circuit

***Garcia, et al. v. Sar Food Of Ohio, Inc.,* 2015 U.S. Dist. LEXIS 111677 (N.D. Ohio. Aug. 24, 2015).** Plaintiffs, a group of hourly restaurant workers, brought an action alleging that Defendant misclassified them as exempt from the overtime requirements of the FLSA and applicable state labor laws. Plaintiffs alleged that Defendant frequently required workers to continue working beyond the scheduled shifts and that the additional hours usually amounted to several hours each week without pay. Following conditional certification under 29 U.S.C. § 216(b) and discovery, Defendant moved for decertification. Defendant argued that the named Plaintiff Garcia never filed the requisite consent forms under § 216(b) and the individual Plaintiffs' circumstances were highly disparate, precluding resolution of the allegations as a collective action. *Id.* at *3. Plaintiffs maintained that the named Plaintiffs and opt-in Plaintiffs were similarly-situated because the company used a "unified" work hour reporting approach that violated the FLSA. *Id.* at *4. The Court granted Defendant's motion, finding that although the named Plaintiff Garcia had viable claims as he filed his § 216(b) consent form within the limitations period, he failed to show that he was similarly-situated to the opt-in Plaintiffs. Plaintiff identified no single FLSA-violating policy that unified the claims of the collective action members. *Id.* at *7. The records indicated that each store presented a separate factual setting with different managers across locations presenting unique legal and factual questions as to whether the store stayed open late. *Id.* Plaintiff argued that a common practice could be found in the lack of alteration to the timesheets when testimony indicated that stores sometimes stayed open 10 to 30 minutes after closing. The Court, however, found that the discrepancy might be the basis for individual FLSA claims, but the lack of alterations alone did not demonstrate a "single-FLSA-violating policy." *Id.* at *8. The Court determined that none of the opt-in Plaintiffs presented any evidence that demonstrated a cohesive or unified theory of the alleged FLSA violation. *Id.* at *10. The Court, therefore, concluded that the alleged violations could not be litigated as a collective action, and granted Defendant's motion for decertification.

***Hughes, et al. v. Gulf Interstate Field Services, Inc.*, 2015 U.S. Dist. LEXIS 88205 (S.D. Ohio. July 7, 2015).** Plaintiffs, a group of field service workers ("FSW"), brought an action under the FLSA and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"), seeking to recover unpaid wages and other damages Defendant allegedly owed to workers under the day rate payment system. Both named Plaintiffs worked on the MarkWest Ohio Project, and under the day rate payment system they received a flat fee for each day worked with no overtime compensation. *Id.* at *3. Plaintiffs moved for conditional certification of a nationwide collective action comprising of all FSW who received pay under the day rate payment system. Plaintiffs also moved for Rule 23 certification of a class comprising all FSWs in Ohio. The Court granted the motions in part. FSWs included the job titles of Chief Inspector, Assistant Chief Inspector, Coating Inspector, Welding Inspector, Sr. Welding Inspector, General/Utility Inspector, Tie-In Inspector, Safety Inspector, Environmental Inspector, Sr. Electrical Inspector, Electrical /Instrument Inspector, Lead Pipe Mill Inspector, Office Manager, Office Clerk, and Office Administration. *Id.* at *4. Plaintiffs provided affidavits and formal letters on Defendant's letterhead, describing the terms and conditions of the affiants' employment ("offer letters"). The Court noted that rather than a nationwide class of FSWs, Plaintiffs made a modest showing that they and other Inspectors or equivalent positions on the MarkWest Ohio Project performed similar job duties and were subject to similar pay practices. The affidavits and offer letters stated that the Inspectors tested and observed the pipeline construction, welding, and coating processes to ensure compliance with MarkWest specifications, and that Defendant subjected them to similar pay

practices. *Id.* at *9-10. Plaintiffs, however, failed to submit any sufficient evidence to support a class outside of the MarkWest Ohio Project, and the Court remarked that generalized statements in the affidavits that Defendant paid all other pipeline inspectors on a day rate basis was not specifically directed at projects outside of the MarkWest Ohio Project. Accordingly, the Court limited the collective action to FSWs on the MarkWest Ohio Project. Further, Defendant argued that four separate exemptions from the OMFWSA overtime compensation provisions applied to the proposed class members, including: (i) administrative; (ii) executive; (iii) combination; and (iv) highly compensated. *Id.* at *15-16. The Court reasoned that the applicability of each of these exemptions involve fact-specific inquiries regarding an employee's specific job duties, the independent judgment exercised in the performance of said duties, the percentage of time devoted to each duty, and the supervisory capacity, if any, of each employee. *Id.* at *18. Although the affidavits Plaintiffs provided answered some of these questions regarding the individual affiants, the Court ruled that Plaintiffs failed to satisfy their burden of demonstrating that all individuals in the proposed class would have common answers, such that a determination of whether these exemptions apply was capable of class-wide resolution. *Id.* Additionally, the Court opined that Plaintiffs failed to affirmatively demonstrate that commonality existed between a nationwide class of FSWs paid on day rate basis. Even with respect to the narrower collective action the Court certified under 29 U.S.C. § 216(b), the Court held that Plaintiffs did not demonstrate commonality. The affidavits only pertained to pipeline and welding inspectors, leaving out all other types of inspectors on the MarkWest Ohio Project, and Plaintiffs failed to demonstrate that the answers to these duties questions applied equally across identical job titles and were not individualized per employee. Accordingly, the Court denied Rule 23 class certification.

***Hurt, et al. v. Commerce Energy, Inc.*, 2015 U.S. Dist. LEXIS 35823 (N.D. Ohio Mar. 23, 2015).**
Plaintiffs, a group of door-to-door workers who solicited residential customers for Defendant's energy services, brought an action alleging that Defendant's commission-based compensation system deprived them of minimum wages and overtime pay in violation of the FLSA and the Ohio Minimum Fair Wage Standards Act. The Court previously had certified a nationwide FLSA collective action for minimum wage and overtime claims, and a state-wide Rule 23 class action for overtime claims under Ohio law. *Id.* at *3. The Court then bifurcated the proceedings into a liability phase and a damages phase. During the liability phase, the jury found that Defendant had not proved Plaintiffs were exempt outside salespeople, and Defendant were therefore liable for unpaid wages and overtime. *Id.* at *4. Defendant subsequently moved to decertify the FLSA collective action and the Rule 23 class for the damages phase of the case, arguing that the individualized evidence necessary to establish what damages were owed to each Plaintiff made continuing class treatment inappropriate. The Court denied the motion without prejudice. First, the Court remarked that damages were difficult to determine because Defendant failed to keep adequate records of the hours that employees had worked. The Court, however, noted that Defendant did have records of how much each Plaintiff was paid. Both parties agreed that, if hours worked could be determined, then a mathematical formula could be used to determine damages based on each employee's hours worked and wages earned. *Id.* at *7. Regarding the Rule 23 class, the Court noted that because Plaintiffs' claims all proceeded under the same damages theory, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), did not require that class to be decertified. *Id.* Furthermore, although the damages would be unique for each class member, the Court found that they would all be determined by applying a consistent methodology. The Court ruled that this was a predominating common issue that allowed for continued class treatment under Rule 23. *Id.* Moreover, the Court remarked that with proper management, class treatment was likely to be less burdensome to the parties than handling a large number of individual cases because of the small dollar values at stake for each Plaintiff. *Id.* at *7-8. Alternatively, the Court suggested that in this case a claims process could be used where each Plaintiff, through submission of a standardized form, could assert how many hours he or she worked and thereby significantly streamline discovery and facilitate settlements. *Id.* at *9. The Court held that because the standard for substantial similarity is less stringent than the Rule 23 predominance standard, the FLSA collective action also should be continued. *Id.* at *10. The Court remarked that the identical theory and formula that would cover all Plaintiffs' damages claims made them similarly-situated, even though they worked different hours. *Id.* The Court observed that if Plaintiffs presented evidence about how many hours they worked, the jury could infer that non-testifying employees worked a similar number of hours and award back pay to the entire membership of the collective action. *Id.* at *10-11. The Court pointed out, however, that if Plaintiffs intended to proceed using

that type of proof, then sub-classes for each office and further sub-classes for workers within each office may be appropriate and Plaintiffs would need to offer representative testimony from each of those sub-classes to establish damages. *Id.* at *11. Finally, the Court determined that if the Rule 23 class was to proceed using proof-of-claim forms, it may be simpler and more efficient for the FLSA collective action to use a similar process that would make full-blown damages trials using representative testimony unnecessary. *Id.* The Court concluded, however, that until the final structure of the damages phase was determined, it would be premature to make a final decision on that issue. *Id.* at *11-12. Accordingly, the Court denied Defendant's motion for decertification without prejudice.

***Kutzback, et al. v. LMS Intellibound, LLC,* 2015 U.S. Dist. LEXIS 37946 (W.D. Tenn. Mar. 25, 2015).** Plaintiff brought a putative FLSA collective action alleging that Defendant failed to pay their uploaders overtime wages and minimum wages. Plaintiff sought to conditionally certify a collective action of all uploaders employed by Defendant during the past three years in 239 or more locations on a nationwide basis. *Id*. at *2. The Magistrate Judge determined that because Defendant had similarly compensated Plaintiff and other potential opt-in employees, and that all had allegedly worked while off-the-clock without compensation, Plaintiff met the lenient standard for conditional certification under 29 U.S.C. § 216(b). *Id.* at *6. Defendant raised three primary objections to the Magistrate Judge's Report and Recommendation, which the Court overruled on Defendant's Rule 72 obligations. First, Defendant objected to the Magistrate Judge's finding that Plaintiff's showing of a common plan or policy that violated the FLSA was sufficient to obtain conditional certification. *Id.* at *7. The Court found that the Magistrate Judge properly adhered to the standard adopted by the Sixth Circuit because she concluded that all unloaders performed the same or similar jobs and received compensation by a production-based method that was possibly in violation of the FLSA. *Id*. Second, Defendant objected to the Magistrate Judge's finding that Plaintiff was similarly-situated to the other unloaders employed by Defendant in its various locations across the nation. *Id.* at *11. In particular, Defendant argued that the Magistrate Judge failed to find the existence of other potential collective action members who similarly worked off-the-clock without pay. *Id.* The Court determined that the objection was unpersuasive because not only did the Magistrate Judge determine that Defendant subjected Plaintiff and the proposed opt-in Plaintiffs to a common policy or plan that violated FLSA, she also stated that any factual differences or particularities regarding their workplace environments were prematurely raised during the discovery phase of the case. *Id.* at *11-12. The Court pointed out that during the notice stage, a Plaintiff merely needs to demonstrate that his position is similar, not identical to positions held by the putative class members. *Id.* at *12. Finally, Defendant objected to the Magistrate Judge's recommendation that the Court facilitate notice to all potential opt-in Plaintiffs employed by Defendant nationwide during the past three years. *Id.* at *12-13. Defendant contended that conditional certification would be overly broad and unmanageable and proposed that should the Court grant conditional certification, the collective action should be limited to the five work locations about which Plaintiff and the opt-ins had personal knowledge. *Id.* at *13. The Court observed that Plaintiff had narrowly tailored their collective action to unloaders within the past three years who had received compensation based on production, and excluded all other warehouse workers. The Court thus concluded that the collective action was not overly broad and unmanageable. Accordingly, the Court overruled Defendant's objections, and adopted the Magistrate Judge's Report and Recommendation to conditionally certify a collective action of other unloaders who had worked for Defendant in any of its 262 nationwide locations anytime during the preceding three year period. *Id.* at *15-16.

***Perry, et al. v. Randstad General Partner (US) LLC*, 2015 U.S. Dist. LEXIS 61822 (E.D. Mich. May 12, 2015).** Plaintiffs brought a collective action alleging that Defendant, a staffing services company, misclassified them as exempt from the overtime requirements of the FLSA. Plaintiffs worked for Defendant at its branch in Troy, Michigan. They worked in various office and administrative positions as account managers, assistant branch managers, and staffing consultants. Their base pay ranged from $32,000 to $48,125, and they were also eligible for commissions and bonuses. Defendant classified all of the Plaintiffs, except one, named Plaintiff Choudhury, as exempt. Choudhury alleged that no one ever informed her that she was non-exempt or permitted her to claim overtime pay. *Id*. at *2. *Id.* Defendant's work planning index ("WPI") measured an employee's productivity, and assigned a certain point value to various tasks. Plaintiffs claimed Defendant required them to complete certain tasks to add up to 100 points

each week, and that was impossible to do so in 40 hours per week. *Id.* at *4-5. While Plaintiffs moved for conditional certification under 29 U.S.C. § 216(b), Defendant moved for summary judgment on the grounds that Plaintiffs were covered by the administrative exemption to the FLSA's overtime requirements. The issue in Defendant's motion was whether Plaintiffs exercised discretion and independent judgment with respect to matters of significance. *Id.* at *6. In classifying Plaintiffs as exempt, Defendant contended that it relied upon an opinion letter of the Department of Labor ("DOL") dated October 25, 2005, in which the DOL determined that staffing managers at a temporary staffing agency qualified for the exemption. Further, various case law precedents have found recruiters for staffing agencies, who performed duties similar to those performed by Plaintiffs, to qualify for the administrative exemption. *Id.* at *6-8. Plaintiffs, in turn, argued that they did not qualify because Defendant's WPI micromanaged and constrained their work. *Id.* at *9. The Court, however, pointed out that WPI was a spreadsheet – a method for tracking the completion of tasks – but it did not determine how the employee completed those tasks. *Id.* The Court observed that Plaintiffs performed inherently discretionary tasks, such as finding the candidates who were the best fit for the client and resolving issues when candidates did not perform as expected. Further, Plaintiffs had the authority to assess candidates and to decide whether to present certain candidates to clients, built relationships with clients, resolved issues between clients and candidates, and coached candidates about meeting the client's expectations. *Id.* at *9-10. In addition, the Court observed that Plaintiffs did not persuasively distinguish either the DOL opinion letter or the relevant case law regarding recruiters/staffing agencies. *Id.* at *10. Thus, the Court held that Plaintiffs who worked as account managers, assistant branch managers, and staffing consultants qualified for the administrative exemption. Alternatively, the Court found that even if those positions did not qualify for the administrative exemption, Defendant was entitled to the application of the good faith defense available under the Portal-to-Portal Act because Plaintiffs' duties were sufficiently similar to those described in the DOL letter, so as to make Defendant's reliance on it reasonable. *Id.* at *10-11. The Court found, however, that Choudhury's claim was different because she did not perform her duties with the same level of discretion and independent judgment as the exempt Plaintiffs; and Defendant itself classified her as non-exempt. *Id.* at *12. Accordingly, the Court concluded that while summary jugement was not appropriate as to Choudhury's claim, it granted summary judgment against all other three Plaintiffs. As to Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b), the Court found that even under the relatively lenient standard, Plaintiffs had not demonstrated that conditional certification was appropriate as to the claim brought by Choudhury because they had not alleged facts suggesting that there were any other employees similarly-situated to her or that Defendant had a policy or practice of denying non-exempt employees overtime. *Id.* at *14-15. Accordingly, the Court denied Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b).

***Russell, et al. v. Citigroup, Inc.*, 2015 U.S. Dist. LEXIS 171205 (E.D. Ky. Dec. 22, 2015).** Plaintiff, a telephone representative, brought a class action alleging that Defendant, a global enterprise furnishing financial services and products, failed to compensate its phone representatives for their off-the-clock work. *Id.* at *2. Defendant initially paid phone representatives based on their timesheets submitted at the end of each week, and later introduced programs called "ePay" and "Time and Attendance Tracker" for time tracking, which operated in conjunction with an internet-based system called the "North American Time and Attendance" ("NATA") program. *Id.* at *4. Defendant gave phone representatives approximately ten minutes at the beginning of their scheduled shifts to become "call-ready," and managers retained discretion to cancel this time, known as "closed-key" time, if there was a particularly high call volume. *Id.* at *6-7. A few months later, Defendant implemented a remediation program and implemented the "Collections Time Tracking System," which tracked when a phone representative hit "control/alt/delete on their computer keyboard and fed that time stamp into NATA." *Id.* at *8. Plaintiff alleged that Defendant unjustly enriched itself by requiring its phone representatives to clock-in at the precise time that their scheduled shifts began, even though they performed several work-related tasks to become "call-ready," including starting their computers, opening applications, and reading bulletins. Alleging that Defendant failed to compensate them for their off-the-clock work, Plaintiff moved for certification of class of phone representatives who worked at its Florence and/or Louisville, Kentucky call centers at any time between July 2007 and April 2010. The Court denied class certification. Plaintiff alleged that Defendant's policy and practice of requiring phone representatives to perform uncompensated work was susceptible to class-wide proof as Defendant imposed similar time-keeping practices, pay scales, and remediation schemes on all phone

representatives. *Id.* at *18. The Court, however, found that a determination that Defendant had such a policy would not resolve issues central to the validity of each putative class member's unjust enrichment claim. The Court noted that Plaintiff's allegation depended upon an unofficial, unwritten policy, and would be subject to varying levels of enforcement depending upon the managers in charge of each group at each location. *Id.* at *18-19. Moreover, even if Plaintiff established that the policy applied on a class-wide basis, the Court noted that it would still have to look at the individual circumstances of each class member and determine whether he or she actually conferred a benefit on Defendant, whether Defendant appreciated that benefit, and whether it would be inequitable to retain such benefit without payment for its value. *Id.* at *19. The Court therefore concluded that Plaintiff failed to satisfy commonality. Because the Court would have to take into account each phone representative's subjective understanding of how he or she would be compensated, and individualized circumstances of each phone representative would delineate the equities in this action, the Court also concluded that Plaintiff's claim was not typical of the putative class. *Id.* at *22-23. In light of the absence of any common interests between Plaintiff and the unnamed members of the class and given the equitable nature of the claim, the Court doubted whether any representative would be able to fully and adequately represent the interests of the putative class. *Id.* at *24. Thus, finding considerable difficulties in managing this case as a class action, the Court concluded that class certification would be inappropriate. Accordingly, the Court denied Plaintiff's motion for class certification.

***Waggoner, et al. v. U.S. Bancorp,* 2015 U.S. Dist. LEXIS 81918 (N.D. Ohio June 24, 2015).** Plaintiffs, a group of former employees, brought a collective action alleging that Defendant denied them wages and overtime compensation in violation of the FLSA. Plaintiffs claimed that they were employed in Defendant's various branches as co-managers, and Defendant misclassified the co-manager position as exempt for purposes of the FLSA and statutory provisions, notwithstanding the fact that the primary duties they performed were limited to non-exempt functions involving customer service, sales, and operations. *Id*. at *3. Plaintiffs moved for conditional certification of the collective action, which the Court granted. In support of their motion, Plaintiffs offered declarations of two named Plaintiffs and three potential opt-in Plaintiffs stating that they regularly worked more than 40 hours a week, performed non-exempt duties, and were never paid overtime compensation. *Id*. at *13. Plaintiffs maintained that this evidence more than satisfied the modest burden required at the preliminary stage of the proceedings. Defendant argued that Plaintiffs' evidence demonstrated that co-managers regularly performed managerial job duties, such that those employed in the co-manager position would qualify as exempt from overtime wages under the executive exemption to the FLSA. *Id*. at *19. The Court remarked that it would be inappropriate to consider the merits of Defendant's defense at this early stage, before the record had been fully developed. *Id*. The Court similarly refused to consider Defendant's evidence of co-managers' varying duties to show that the job duties significantly differed from branch to branch and co-manager to co-manager. *Id*. at *21. Regarding conditional certification, the Court noted that Plaintiffs had met their initial lenient burden under the FLSA. The Court, however, remarked that it had serious concerns that this litigation could be maintained as a collective action. The Court explained that the declarations of the potential opt-in Plaintiffs contained only generalized statements about the job duties of other in-store co-managers, and that Plaintiffs failed to indicate how they knew that all in-store managers were subject to the same compensation system. *Id*. at *22-23. The Court, nevertheless, found that the declarations, along with the job postings, supported a preliminary finding of a company-wide policy, and that Plaintiffs established that they and the potential opt-ins were similarly-situated. *Id*. at *30. Accordingly, the Court granted Plaintiffs' motion for conditional certification, and directed the parties to meet and confer regarding the content of the notice to be issued pursuant to 29 U.S.C. § 216(b).

(vii) Seventh Circuit

***Aguilera, et al. v. Waukesha Memorial Hospital, Inc.,* 2015 U.S. Dist. LEXIS 79143 (E.D. Wis. June 18, 2015).** Plaintiffs, a group of certified nursing assistants and housekeepers, brought an action under the FLSA and Wisconsin's Wage & Hour Law alleging that Defendant failed to pay them for time they spent working during meal periods. Plaintiffs' claim related to their use of communication devices, which they carried all times, including during meal periods. Plaintiffs alleged that Defendant frequently interrupted them by calls on these devices during their meal periods and they often skipped their meal periods to perform work in response to those calls, and thus they were entitled to have their meal periods treated as

compensable time. *Id.* at *4. Plaintiffs moved for class certification, seeking to represent a class of all housekeepers who worked for Defendant at any time since November 2011 and did not receive pay for meal periods during which they carried, monitored, and/or answered a hospital-based communication device. The Court denied certification of the proposed class, finding that Plaintiffs failed to meet the commonality requirement. The Court noted that Defendant did not adopt any hospital-wide policies that resulted in proposed class members using their communication devices in the same manner such that a jury could simply assess whether the policy resulted in all class members performing work during meal periods. *Id.* at *12. Particularly, the Court found that the question of whether Plaintiffs carrying, monitoring, or answering communication devices during unpaid meal periods constituted work could not be answered for the entire class in one stroke because the phrase "carrying, monitoring, or answering communication devices" described a wide spectrum of activities, some of which might be work and some of which might not. *Id.* at *11. The Court explained that on one end of the spectrum, an employee simply carried the device during the meal period but received no calls or ignored any calls he or she received; at the other end of the spectrum, an employee monitored the devices, the calls constantly interrupted his or her meal period, and he or she frequently had to leave meal period to perform a task. *Id.* at *11-12. This also included employees whose experiences included things like receiving a call but forwarding it to another employee who was on-duty, responding by doing no more than informing the caller that the employee was on break, or answering a work-related question. *Id.* Similarly, Defendant did not have a written policy regarding Plaintiffs leaving hospital premises during their meal periods. *Id.* at *18. The evidence showed that supervisors had different practices with respect to contacting a housekeeper during a meal period, the extent and frequency of the interruptions, and their option of leaving their devices at the hospital if they wanted to leave for lunch. *Id.* at *14-20. The Court therefore concluded that there was no single answer to the question of whether Plaintiffs carrying, monitoring, or answering communication devices during unpaid meal periods constituted work and whether Plaintiffs were free to leave the premises during their meal periods. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Bell, et al. v. PNC Bank, National Association,* 2015 U.S. App. LEXIS 15403 (7th Cir. Aug. 31, 2015).** Plaintiff, a banker, brought an action alleging that Defendant failed to pay her overtime wages in violation of the FLSA, the Illinois Minimum Wage Law, and the Illinois Wage Payment and Collection. *Id.* at *1. Although Defendant contended that its written overtime policy explicitly required payment of time and a half for any hours worked over 40 hours in any workweek, and that it had paid overtime at every branch, Plaintiff alleged that Defendant had an unofficial policy or practice that required employees to work off-the-clock without compensation. *Id.* at *19-21. The District Court concluded that whether Defendant had an unofficial policy that required employees to work off-the-clock overtime hours was a common question and certified a class of employees from 26 branches in Illinois as to Plaintiff's state law claims. *Id.* at *23-24. Defendant appealed. Defendant argued that the District Court abused its discretion in certifying the class without requiring Plaintiff to prove the existence of an unwritten policy and by treating individualized liability issues as damages issues. *Id.* at *24. Addressing each of Defendant's arguments, the Seventh Circuit affirmed the District Court. The Seventh Circuit found that the question of whether Defendant had an unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours was indeed a common one capable of class-wide resolution. *Id.* at *31-33. Plaintiff alleged that she was told not to record overtime and offered evidence that the denial of overtime pay came from a broader company policy and not from the discretionary decisions of individual managers. *Id.* at *31. Further, the District Court had chronicled plentiful evidence suggesting that many employees worked overtime without proper compensation, including an affidavit from Plaintiff's branch manager stating that Defendant regularly required off-the-clock work. *Id.* Moreover, Defendant's investigation reports revealed that employees from at least six other branches had complained that their managers told them that Defendant had an unofficial policy against compensative overtime work. *Id.* at *37. The Seventh Circuit, therefore, ruled that Plaintiff sufficiently raised a common question as to whether Defendant had an unwritten practice or policy that required employees class-wide to work off-the-clock overtime hours. Defendant argued that even if it had an alleged unwritten policy, each class member still would be required to prove each element of his or her claim, *i.e.*, that the class member worked unrecorded hours, that his or her manager knew or had reason to know of the work, and that the unrecorded time caused the class members to work more than 40 hours in a week. *Id*. at *38. The Seventh Circuit, however, noted that Plaintiff did not need to prove that every class

member had been harmed before she could obtain class certification and that Rule 23 did not require a Plaintiff seeking class certification to prove each element of her claim through class-wide proof. *Id.* at *43-45. The Seventh Circuit reasoned that whether or not Defendant had an unlawful policy denying required compensation was relevant to whether Defendant willfully denied overtime pay to its employees or whether such denials occurred despite a good faith attempt to comply with the statutes, these questions were, in turn, relevant to the extent of damages under Illinois law and the FLSA. *Id.* at *46. Thus, the Seventh Circuit concluded that the District Court correctly concluded that a class action would be an appropriate and efficient pathway to resolution. Accordingly, the Seventh Circuit affirmed the District Court's order granting Plaintiff's motion for class certification.

***Brunner, et al. v. Jimmy John's, LLC,* 2015 U.S. Dist. LEXIS 46018 (N.D. Ill. April 8, 2015).** Plaintiffs, a group of employees, brought an action under the FLSA and the Illinois Minimum Wage Law ("IMWL") alleging that Defendant misclassified them as exempt and thus denied them overtime compensation. Plaintiffs sought to represent all individuals who were employed nationwide as salaried assistant store managers at any of Defendant's shops and to whom Defendant did not pay all wages pursuant to the IMWL. *Id.* at *19. Defendant moved to strike the class claims, contending that Plaintiffs' class claims sought to impose the IMWL on a nationwide class of Plaintiffs. *Id.* at *18. The Court granted Defendant's motion, finding that Plaintiffs could not maintain their IMWL nationwide class claim against Defendant as it was facially and inherently deficient. *Id.* at *21. The Court noted that "the IMWL is absolutely devoid of any indication that the law can or should be applied to workers outside of Illinois." *Id*. Thus, in the absence of explicit legislative intent indicating the permissibility of the IMWL to apply to out-of-state employees, the Court concluded that Plaintiffs' claim under IMWL for a putative nationwide class could not stand. *Id.* Defendant also moved to dismiss on the basis that Plaintiffs performed work which fell under the executive and administrative exceptions to the FLSA. The Court denied the motion, since it could not make the necessary factual inquiry into Plaintiffs' job responsibilities at this juncture, as the action was merely in the pleading stage of the proceedings. *Id.* at *28. Although Plaintiffs satisfied the initial administrative exemption inquiry involving their weekly compensation exceeding $455 per week, the Court noted that the manual duties which Plaintiffs enumerated to perform over 90% of their workday, including making sandwiches, stocking supplies and shelves, and cleaning, did not amount to the job duties typically performed by administrative or executive employees. *Id.* at *27-28. The Court, therefore, held that Defendant failed to establish that Plaintiffs fell under the executive or administrative employees exemptions to the FLSA. Accordingly, the Court granted Defendant's motion to strike the class allegations, and denied to dismiss Plaintiffs' FLSA claims.

***Brunner, et al. v. Jimmy John's, LLC,* 2015 U.S. Dist. LEXIS 110751 (N.D. Ill. Aug. 19, 2015).** Plaintiffs, a group of assistant store managers ("ASMs"), brought an action alleging that Defendant, a franchisor, violated the FLSA and the Illinois Minimum Wage Act by improperly classifying them as exempt employees to avoid paying them for time worked in excess of 40 hours a week. Plaintiffs brought claims individually and on behalf of a putative nationwide class. Plaintiffs filed a consolidated amended complaint seeking to hold Defendant, as a franchisor, liable for the FLSA violations of thousands of independently operated franchises on the premise that Defendant was a joint employer. Plaintiffs also sought to join the franchisees through a "Rule 23 Defendant Class" mechanism. *Id*. at *5. Defendant moved to strike the class allegations, which the Court granted in part and denied in part. The Court granted Defendant's motion to strike the class allegations regarding Plaintiffs' newly alleged nationwide "FLSA Franchisee Defendant Class," finding that the FLSA does not permit Defendant classes. *Id.* at *8-9. Although none of the named Plaintiffs claimed to have worked for any unnamed putative Defendant and some named Plaintiffs admittedly did not work for Defendant, Plaintiffs based their certification theory on the "juridical link" doctrine outlined in *Payton v. County of Kane,* 308 F.3d 673 (7th Cir. 2002), which provides that "[w]here the particular class representative has not been injured by the entire class of Defendants, the standing to sue all named Defendants is established under the 'juridical link' doctrine." *Id.* at *12. Plaintiffs alleged that Defendant uniformly exercised control over all aspects of all company-owned and franchised locations, created, mandated, and implemented uniform policies at its company-owned and franchised shops, and that franchisees followed the explicit, precise, and detailed instructions and mandates, policies, and practices issued by Defendant. *Id.* at *14-15. Plaintiffs attempted to demonstrate a uniform failure to

abide by the FLSA by misclassifying ASMs as exempt and thereby justify application of the "juridical link" doctrine. *Id.* at *15. The Court, however, noted that the statute expressly provides for a collective action of employee Plaintiffs, but not for Defendant employers. *Id.* at *9. According to the Court, Plaintiffs' allegations showed that the extreme and unwieldy measure of a bilateral class action involving an Illinois or nationwide "Franchisee Defendant Class" under the "juridical link" doctrine was unnecessary because relief might be obtained in a suit against Defendant alone, just as Plaintiffs had sought in their last three complaints. *Id.* The Court thus found that the case lacked justification for the application of the "juridical link" doctrine based on a "state or local statute" requiring "common action" by all Defendants or the need for one "broad action" against all putative Defendants. *Id.* at *16. The Court therefore concluded that Plaintiffs' allegations of a nationwide FLSA Franchisee Defendant Class and an Illinois-only IMWL Franchisee Defendant Class failed for lack of standing and were inherently deficient. *Id*. The Court, however, denied the motion to strike Plaintiffs' newly alleged claims of an Illinois IMWL Plaintiff class, finding that the striking of class allegations at the pleading stage would be premature. *Id.* at *7-8. The Court held that Plaintiffs' new allegations fell into the category of a claim requiring discovery, and that it could not strike the new allegations merely because Plaintiffs' prior allegations fell short. *Id.* Accordingly, the Court granted in part and denied in part Defendant's motion to strike Plaintiffs' class allegations.

Editor's Note: It is believed that the ruling in *Brunner* is the first decision ever to address the propriety of a "Defendant only" FLSA collective action.

***Brunner, et al. v. Jimmy John's, LLC,* Case No. 14-CV-5509 (N.D. Ill. Dec. 11, 2015).** Plaintiffs, a group of Assistant Store Managers ("ASMs") brought an action alleging that Defendants misclassified them as exempt and denied them overtime wages in violation of the FLSA. Plaintiffs advanced a case theory that Defendants, as franchisors, nonetheless were liable for wage & hour violations of their franchisees, since Defendants allegedly were joint employers of Plaintiffs and members of the putative collective action (*i.e.*, all ASMs employed by all franchisees nationwide). Asserting that Defendants subjected them to the same company-wide policies and thus they were similarly-situated, Plaintiffs moved for conditional certification of a collective action under 29 U.S.C. § 216(b). *Id.* at 3. The Court granted Plaintiffs' motion. The Court found that Plaintiffs' declarations contained information supporting their request for conditional certification that was plainly based on the declarants' direct experiences or observations. *Id.* at 4. Contrary to Defendants' characterizations of Plaintiffs' declarations as conclusory and speculative, the Court noted that most of the declarations reflected first-hand experience of being paid on a salary basis and regularly working overtime without compensation. *Id.* at 6-7. The declarations also alleged similar job duties and similar limits on their authority. The Court found that the declarations supported a preliminary finding that Plaintiffs were similarly-situated to each other and to the members of the putative collective action. *Id.* at 8. Defendants argued that Plaintiffs failed to show that any such similarity was the result of a common unlawful policy. According to Defendants, the evidence showed that each franchisee individually made decisions concerning the roles and responsibilities of ASMs, and thus no common unlawful policy could bind all collective action members together. *Id.* The Court, however, reasoned that instructions to ASMs during their corporate training suggested a common plan, and the documents indicated some common design surpassing the mere coincidental. *Id.* at 9. Thus, although Defendants presented contrary evidence regarding the merits of Plaintiffs' FLSA claims, the Court concluded that Plaintiffs nevertheless met the modest factual showing required for conditional certification. *Id.* at 10-11. Accordingly, the Court granted Plaintiffs' motion for conditional certification and directed the parties to meet and confer to finalize the proposed notice to be sent to putative collective action members.

***Cook, et al. v. Applebees Services, Inc.,* 2015 U.S. Dist. LEXIS 130159 (S.D. Ill. Sept. 28, 2015).** Plaintiffs, a group of hourly employees, brought an action alleging that Defendant failed to inform tipped employees of the tip credit provisions in violation of the Illinois Minimum Wage Law ("IMWL") and the FLSA. Plaintiffs further alleged that Defendant maintained a vacation policy that denied hourly employees vacation benefits in violation of the Illinois Wage Payment and Collection Act ("IWPCA"). Plaintiffs moved to certify the class claims under the IMWL and IWPCA, and the Court granted the motion. At the outset, based on Defendant's answers to interrogatories stating that they employed over 5,000 hourly employees, the Court found that the numerosity requirement was satisfied. *Id*. at *3. Plaintiffs contended that the two

common questions were: (i) whether the vacation policy was a "length-of-service" policy under the Illinois law; and (ii) whether separating employees forfeited earned vacation pay as a result of the policy. *Id*. at *3-4. The Court agreed with Defendant that to answer the second question, it would need to determine whether each individual class member earned vacation. *Id*. at *4. The Court, however, concluded that the questions regarding the legality of the application of the policy and whether benefits were earned were common to all proposed class members. *Id*. The Court similarly found that the claims or defenses of the representative parties were typical of the claims or defenses of the class members. *Id*. at *5. Likewise, the Court determined that Plaintiffs were adequate representatives of the putative class members, and concluded the adequacy of representation requirement was satisfied. *Id*. at *6. Finding that the Plaintiffs satisfied the predominance requirement, and that deciding whether Defendant's vacation policy violated the IWPCA was a superior mode of adjudication, the Court granted Plaintiffs' motion for class certification.

***Drake, et al. v. Aerotek, Inc.,* 2015 U.S. Dist. LEXIS 146653 (W.D. Wis. Oct. 29, 2015).** Plaintiff brought an action under Wisconsin Labor Law seeking to recover overtime pay for the work performed as recruiter trainee and subsequently a recruiter for Defendant, an international staffing company. Plaintiff alleged that Defendant violated Wisconsin law by not paying trainees for overtime they worked for the weeks between March 2012 and March 2014, and classifying recruiters as exempt from overtime compensation. *Id.* at *2. Plaintiffs filed a motion for class certification and proposed two sub-classes, including: (i) individuals who worked for Defendant in Wisconsin during a training period who engaged in the tasks and activities of a recruiter trainee without receiving proper compensation; and (ii) individuals who completed the training period and worked for Defendant as recruiters and whom Defendant classified as "exempt" under state law. *Id.* at *21. The Court denied Plaintiff's motion for class certification. The Court found that, given the absence of proof of a company-wide policy or directive and the wide variation in the class members' experiences, the common questions central to Plaintiff's trainee overtime claim could not be resolved on a class-wide basis. Although Plaintiff contended that Defendant had a uniform set of national polices that applied to every office in Wisconsin that prohibited trainees from working overtime, but at the same time required them to work more than 48 hours a week, Plaintiff failed to answer why Plaintiff and other trainees chose to work overtime without reporting it. *Id.* at *25-26. The Court noted that the declarations and other trainee statements submitted by Plaintiff varied significantly with respect to the instructions they received and their understanding of how Defendant compensated for overtime. *Id.* at *26. Defendant paid overtime to some employees, and therefore the Court concluded that it appeared that the decision to pay overtime was left to the discretion of management and varied depending on the circumstances. *Id.* at *27. The Court determined that Plaintiff failed to show that his trainee claim met the commonality, typicality, and predominance requirements of Rule 23. *Id*. at *31. The Court also ruled that Plaintiff failed to show that his recruiter claim was appropriate for class certification. Although Plaintiff argued that common issues predominated for the misclassification claim because Defendant had a uniform, corporate policy of classifying recruiters as exempt from overtime pay under the administrative exemption, the key question was whether the potential class members' experiences were so similar that the Court could apply the exemption criteria on a class-wide basis. *Id.* at *32-33. Defendant contended that the job duties, level of discretion, and need for supervision of its recruiters varied by office, division, and individual, and that these differences would prevent class-wide application of the administrative exemption criteria. *Id.* at *33. Plaintiff asserted that the differences in the amount of discretion and independence exercised by recruiters were irrelevant because regardless of a recruiter's job title, supervisor, or location, every recruiter had the primary duty of securing quality candidates for Defendant's clients. *Id.* Although some of Plaintiff's evidence suggested that some trainees and recruiters had the same primary job function, the Court found that Plaintiffs failed to established that all 13 types of recruiters across Defendant's Wisconsin offices had the same primary duty. *Id.* at *35-36. The Court also noted that none of the evidence cited by either party explained how much time recruiters spent on administrative tasks. *Id.* at *36. The Court, therefore, concluded that Plaintiff has not met his burden of showing that class certification was appropriate. Accordingly, the Court denied Plaintiff's motion for class certification.

***Elder, et al. v. Comcast Corp.*, 2015 U.S. Dist. LEXIS 70231 (N.D. Ill. June 1, 2015).** Plaintiffs, a group of former service technicians, brought an action alleging that Defendants failed to pay them for all the time they were required to work in violation of the FLSA, the Illinois Minimum Wage Law ("IMWL"), and the

Illinois Wage Payment and Collection Act ("IWCPA"). Defendants' service technicians installed and repaired Defendants' products, including cable television and high-speed internet. *Id*. at *3. Defendants launched a home dispatching program, which required the technicians to drive Defendants' vehicles directly from their home to work assignments and back. Technicians were paid for the time of their commute to their first job assignment. *Id*. at *4. Plaintiffs contended that Defendants' policies required them to stay at work to log-in to Defendants' dispatching application, called Technect. *Id*. at *5. Plaintiffs also contended that notwithstanding Defendants' policies regarding start, end, and lunch times, technicians also performed a significant amount of work before they started their shifts, during their lunch breaks, and after their shifts were supposed to be over, but were not compensated for their off-the-clock work. *Id*. at *7. After the Court conditionally certified the FLSA claims as a collective action under 29 U.S.C. § 216(b), Plaintiffs moved for Rule 23 certification of their state law claims, and Defendants moved for decertification. The Court denied Plaintiffs' motion and decertified the action. At the outset, the Court found that Plaintiffs satisfied the numerosity requirement with regard to the meal break class, as they estimated the class to consist of 3,000 technicians, but failed to provide any estimate of the number of technicians with regard to the pre-shift and post-shift classes. *Id*. at *19. The Court remarked that it was difficult to ascertain what Plaintiffs believed were questions of law or fact that were common to the class. The Court explained that Plaintiffs first identified common questions such as: (i) whether Plaintiff began work before the start of the scheduled shift without pay; or (ii) did Defendants have a policy or practice to automatically deduct 30 minutes of pay each day. *Id*. at *20-21. Plaintiffs later identified common legal issues such as documented time spent logging-in to Defendants' routing applications, and time spent working through unpaid and unrecorded meal breaks. *Id*. at *21. Plaintiffs also characterized their common injuries such as whether Defendants failed in their duty to make and maintain true and accurate time records, and whether Plaintiffs and the class worked before the start of their shifts. *Id*. at *22. The Court reasoned that the overarching issue with all of Plaintiffs' common questions was their inability to produce common answers apt to drive the resolution of the litigation. *Id*. at *23. Because the answer for one technician did not necessarily shed light on the answer for the other, the Court concluded that Plaintiffs failed to satisfy the commonality requirement. *Id*. Similarly, the Court found that Plaintiffs failed to establish common policies mandating off-the-clock work, or that there could generate common answers to determine whether Plaintiffs actually performed any pre-shift or post-shift work. *Id*. at *25-26. Accordingly, the Court held that Plaintiffs failed to meet the commonality requirement, denied class certification, and granted Defendants' motion for decertification.

***Garcia, et al. v. J.C. Penny Corp., Inc.*, 2015 U.S. Dist. LEXIS 40898 (N.D. Ill. Mar. 31, 2015).** Plaintiffs, for themselves and on behalf of current and former management associates and former part-time non-management associates based in Illinois, brought a putative class action alleging that Defendant did not pay them vacation benefits earned pursuant to Defendant's "my time off" vacation policy (the "MTO vacation policy") in violation of the Illinois Wage Payment and Collection Act ("IWPCA"). *Id*. at *1-2. Initially, Plaintiffs in *Tschudy v. J.C. Penney*, Case No. 11-CV-1011 (S.D. Cal.) brought an action on behalf of current and former employees of Defendant in California and Illinois. *Id.* at *2-3. The Court in *Tschudy* carved off the Illinois portion of that case and transferred it to the U.S. District Court for the Northern District of Illinois. *Id.* at *3. The MTO vacation policy defines "my time off" as a bank of paid time off hours that an employee earns in a month. *Id.* at *5-6. The amount of vacation benefits accrued by an associate depends on his or her position, length of service, and the average number of hours worked per week. Management associates, who generally work full-time, become eligible to receive MTO vacation benefits on the first day of the third month of employment subject to completion of 60 days of employment. In contrast, part-time non-management associates become eligible to receive MTO vacation benefits on the first day of the month following 12 months of employment if they averaged 25 or more hours per week during the first 48 weeks of employment. *Id.* at *6. Plaintiffs moved for class certification, which the Court denied without prejudice. The Court observed that the issue in this case was whether Defendant's MTO vacation policy, as applied to management associates and former part-time non-management associates, violated the IWPCA. *Id.* at *9. The Court found that because the current operative complaint and Plaintiffs' motion for class certification contained different proposed classes, it was impracticable to analyze all of the class certification factors at that time. *Id*. at *20-21. Nevertheless, the Court held that the named Plaintiffs, both of whom were part-time non-management associates, could not proceed on behalf of the putative

class of approximately 38,096 part-time non-management associates and 345 management employees. *Id.* at *21-22. Plaintiffs alleged that their claims were typical of the claims of all other class members – both management and non-management – because the members of the putative class all challenged Defendant's uniform MTO vacation policy. *Id.* at *23. Plaintiffs also contended generally that the claims of management associates arose out of the same event, practice, or course of conduct that gave rise to the claims of the part-time non-management associates and were based on the same legal theory. *Id.* at *23-24. The Court opined that Plaintiffs' position was very broadly correct insofar as the claims of management and part-time non-management associates were based on Defendant's vacation policy, but that broad commonality was not enough to show that the named Plaintiffs' claims were typical of the claims of management associates. *Id.* at *24. The Court pointed out that the named Plaintiffs had no discernable motivation to litigate issues that applied exclusively to management associates, such as whether Defendant properly barred management associates from receiving vacation benefits during their first 60 days of employment. *Id.* at *25. Thus, the Court concluded that because Plaintiffs' claims were typical of the claims of other part-time non-management associates, but atypical of the claims of management associates, the putative class could not include management associates. *Id.* Accordingly, the Court denied Plaintiffs' motion for class certification without prejudice to renewal of the motion with an amended class definition. *Id.* at *25-26.

***Jacks, et al. v. DirectSat USA, LLC,* 2015 U.S. Dist. LEXIS 28881 (N.D. Ill. Mar. 10, 2015).** Plaintiffs, a group of technicians, brought an action alleging violations of the Illinois Minimum Wage Law ("IMWL") and the FLSA. Defendant moved to decertify the earlier certified class consisting of Defendant's technicians working in the state of Illinois anytime between June 2008 and February 2010. *Id.* at *2. The Court granted Defendant's motion. The Court noted that this action paralleled two other cases brought by Defendant's technicians for alleged violations of the FLSA and state wage laws entitled *Farmer v. DirectSat USA,* No. 08-CV-3962 (N.D. Ill. Dec. 30, 2008), and *Espenscheid v. DirectSat USA, LLC,* Case No. 09-CV-625 (W.D. Wis. Feb. 10, 2011). The Courts decertified both actions, finding unavoidable complications in managing the litigation. Particularly, in both these actions, the Courts found that a class trial was doomed because of variance in class members' damages. *Id.* at *5. Defendant compensated its technicians on a "piece-rate system," and variances resulted from different technicians performing various tasks without records of the amount of time they worked. *Id.* at *6. Because Plaintiffs failed to propose a feasible litigation plan, the Courts in *Farmer* and *Espenscheid* decertified these cases. The Court found that the same touchstones of variance existed in this case and required decertification. Although Plaintiffs characterized the variance in their damages as "inconsequential," they did not dispute that their damages varied in the same ways that Plaintiffs' damages varied in *Espenscheid*. *Id.* at *9. The Court, therefore, concluded that affording class treatment to Plaintiffs' entire IMWL class was "improvident." *Id.* at *10. Plaintiffs, as an alternative, requested for partial certification as to liability issues. Plaintiffs contended that issues related to Defendant's policies and practices were appropriate for class-wide resolution because common policies and practices caused each class member's individual damages. *Id.* at *11. The common issues proposed included whether: (i) Defendant defined technicians' workday as the time between when they arrived at their first job and the time they completed their last job; (ii) whether Plaintiffs were entitled to compensation for the time spent driving from home to their first customer site and driving home from their last job of the day; (iii) whether the Employee Commuter Flexibility Act rendered Plaintiffs' commuting time not compensable; and (iv) whether activities such as maintaining vehicles, receiving assignments, loading/unloading equipment, and calling customers are compensable work when not performed between the start and finish of the workday as defined by Defendant's policies. *Id.* at *21-22. Agreeing with Plaintiffs, the Court granted partial certification for the resolution of liability. The Court found that all the common issues related either to Defendant's policies or practices or to their legality under the IMWL, and were separate and severable from its effect upon individual class members. *Id.* at *23. The Court thus found that partial certification would ensure consistency in result as only one Court would have to determine the central common issues of liability. *Id*. The Court cited various circuit cases, including Seventh Circuit, to determine that a class action limited to determining liability on a class-wide basis, with separate hearings to determine damages of individual class members is permitted by Rule 23(c)(4), and would often be the sensible way to proceed. *Id.* at *12-13. Accordingly, the Court decertified the class for all purposes, and granted partial certification of the class for the resolution of liability.

***Jenkins, et al. v. White Castle Management Co.*, 2015 U.S. Dist. LEXIS 22241 (N.D. Ill. Feb. 25, 2015).** Plaintiffs brought a class action alleging that Defendant required employees to make personal payments to off-set drawer and safe shortages in violation of the Illinois Wage Payment and Collection Act ("IWPCA"). Although Plaintiffs acknowledged that official policy barred employees from paying for drawer and safe shortages, they contended that General Manager Sylvia Anderson held employees at the Dolton location personally accountable and required them to cover drawer and safe shortages. *Id.* at *5. Plaintiffs moved for certification of a class comprising all individuals employed at the Dolton, Illinois location who received less than the agreed-upon wage rate by the practice of compelled payments. The Court denied Plaintiffs' motion because they failed to establish ascertainability and predominance. First, the Court found that Plaintiffs failed to identify any objective criterion to ascertain class membership. Although Plaintiffs alleged that they and other employees made payments to off-set drawer and safe shortages at the conclusion of their shifts, no records of these payments existed because employees allegedly made such payments in cash. *Id.* at *12. Although Plaintiffs pointed to named Plaintiff Jenkins' testimony, in which he claimed that everyone at the Dolton location had to make cash payments for drawer or safe shortfalls, Jenkins recalled only a few specific instances, and the company submitted declarations from other employees affirming that they never made such payments. The Court, accordingly, determined that Jenkins' assertion provided no basis upon which to ascertain class membership. *Id.* at *13. Further, although Plaintiffs contended that they could identify class members by excluding those who opted-out after receiving class notice, they offered no authority to support the idea that the class could self-define itself in this manner. The Court held that using a putative class member's decision to opt-out was no proxy for class membership because the Court still would have to determine whether an individual who chose not to opt-out belonged to the class. Hence, the absence of objective proof would transform the class proceeding into a series of hearings of individuals without objective proof to support their anecdotal testimony. *Id.* at *16. Second, the Court ruled that Plaintiffs failed to show that the common question of law – whether Anderson's alleged practice of compelling employees to pay for drawer and safe shortages violated the IWPCA – predominated over individual questions. *Id.* at *17. The primary evidence Plaintiffs submitted consisted of their own testimony and declarations, which failed to show that their claim was subject to generalized proof. Although Jenkins stated that he likely made 400 payments between 2008 and 2012, at his deposition he recalled making a drawer payment only on two occasions and did not recall the amounts he paid to off-set such shortages. *Id.* at *19. The Court reasoned that in determining whether other employees were injured, and to what extent, every class member would have to testify regarding the date, amount, and circumstances of each alleged shortage payment. Because the Court would need extensive individual testimony to determine who sustained an injury similar to that of the named plaintiffs, Plaintiffs failed to establish predominance. Accordingly, the Court denied class certification.

***Lukas, et al. v. Advocate Health Care Network,* 2015 U.S. Dist. LEXIS 109851 (N.D. Ill. Aug. 19, 2015).** Plaintiffs, a group of clinicians, brought a putative class action and collective action under the FLSA and the Illinois Minimum Wage Law ("IMWL") seeking damages for Defendant's alleged failure to pay them overtime wages for work in excess of 40 hours per week. *Id.* at *2. Defendant classified all full-time clinicians as exempt for FLSA/IMWL purposes and compensated them based on rate sheets that set out: (i) flat fees payable for various types of visits to patients; and (ii) hourly pay for administrative tasks such as attending committee meetings, team meetings, in-service, case conferences, resolving technical problems, covering for supervisors, and working on temporary light duty. *Id.* at *3-4. Plaintiffs alleged that subjecting clinicians to a pay scheme that combined per-visit rates with hourly rates did not satisfy the requirements for designating employees exempt from overtime pay under the FLSA and IMWL. *Id.* at *5-6. The Court initially certified a collective action as to the FLSA claims under 29 U.S.C. § 216(b). Plaintiffs moved for certification of a state-wide class consisting of all individuals employed as clinicians in their home health care division who were paid on a per visit and hourly basis, and Defendant moved to decertify the FLSA collective action involving the same individuals. *Id.* at *6-7. The Court granted Plaintiffs' motion, finding that Plaintiffs' proposed class met the Rule 23 standards for class certification. *Id.* at *22. First, Plaintiffs met the numerosity requirement because Defendant employed at least 286 clinicians during the relevant time, and Defendant's payroll records showed that those clinicians received hourly pay for some tasks and fee-based pay for other tasks. *Id.* at *10-11. Second, Plaintiffs met the typicality requirement because Plaintiffs' legal theory – that Defendant's pay scheme rendered clinicians non-exempt – applied to the

claims of the named Plaintiffs and other class members in an identical fashion. The unique features of the named Plaintiffs' work, such as the large geographic area of their visits and their high patient loads, did not render the named Plaintiffs' claims atypical for purpose of Rule 23. *Id.* at *11-12. Third, Plaintiffs met the adequacy requirement because the named Plaintiffs actively participated in the case, and their attorneys had experience litigating wage & hour class actions. *Id.* at *13. Fourth, Plaintiffs met the commonality requirement because Defendant classified all clinicians as exempt and compensated them using the same mixed per-visit and per-hour pay arrangement. *Id.* at *14-15. The Court found that it did not matter which particular tasks were paid hourly to different clinicians so long as each class member received hourly pay for some work activities and per visit pay for other activities. *Id.* at *16. Further, the Court determined that Plaintiffs met the predominance requirement because the common issue of whether a hybrid pay system rendered an employee ineligible for exemption from the FLSA overtime provisions was dispositive, and resolution of this common question entirely would settle the question of liability, leaving damages as the only remaining issue. *Id.* at *18. While the Court acknowledged that determining damages owed to each individual class member would be complex because many class members testified that they did not accurately record their work time, it opined that such individualized issues went only to damages and, therefore, did not defeat predominance for class certification purposes. *Id.* at *18-19. The Court also ruled that, although damages questions varied, a class action was superior to individual trials for each class member during which the legal issue of the pay scheme's compliance would have to be wastefully re-litigated. *Id.* at *22. The Court concluded that, because Plaintiffs met the Rule 23 standards for class certification, they necessarily met the much lower bar for FLSA collective action certification. The Court, therefore, granted Plaintiffs' motion for class-certification and denied Defendant's motion for decertification of the collective action.

***McCaster, et al. v. Darden Restaurants, Inc.,* 2015 U.S. Dist. LEXIS 40343 (N.D. Ill. Mar. 24, 2015).** Plaintiffs, a group of former restaurant employees, brought a class action alleging that Defendant did not pay them their earned vacation pay as part of their final compensation when their employment ended in violation of the Illinois Wage Payment and Collection Act. Plaintiffs contended that Defendant had a vacation policy under which hourly employees earned vacation days based on length of service. *Id*. at *2. Plaintiffs sought to certify a class of all former Defendant employees in Illinois since December 11, 2003, who were subject to Defendant's vacation policy and who did not receive all earned vacation pay benefits. Defendant moved to strike the declaration of Cristina Calderon, which Plaintiffs submitted in support of their motion. The Court granted Defendant's motion to strike, and denied Plaintiffs' motion for class certification. First, Defendant contended that Calderon, a paralegal for Plaintiffs' counsel, had done more than simply summarize the data Defendant supplied to Plaintiffs during discovery, and instead, in effect, had given an expert opinion concerning the data. *Id*. at *5. The Court found that although the costs incurred for paralegal work are likely to be less than that of an expert witness, Plaintiffs could not submit a paralegal's purported summary and circumvent the procedural and substantive requirements for an expert witness. *Id*. at *6. Regarding the motion for class certification, the Court first found that Plaintiffs failed to establish commonality. The Court noted that although Plaintiffs argued that Defendant employed each member of the proposed class under the same vacation policy, Plaintiffs' own brief and exhibits illustrated that Defendant had a variety of policies at different time periods and in different restaurants with different eligibility criteria. *Id*. at *10-11. The Court observed that Defendant also had provided evidence showing that different managers at different restaurants administered the vacation policies in a different manner. *Id*. at *11. The Court thus found that Plaintiffs had failed to identify one consistent policy underlying the reasons for denying vacation benefits to proposed class members. *Id*. at *12. Although there could be some general similarities in the facts of some of the proposed class, Plaintiffs had not pointed to a single common question of fact or the type of standardized conduct toward members of the class that was required. *Id*. at *13. Second, the Court held that Plaintiffs' claims were not typical of proposed class members because Defendant had shown that each Plaintiff stood in a unique position that was separate from other proposed class members. *Id*. at *14. Third, the Court ruled that Plaintiffs failed to satisfy the adequacy of representation requirement because Defendant had unique defenses against each Plaintiff, which other proposed class members might not face based on the particular policies that such proposed class members were subject to at work. *Id*. at *15-16. Finally, regarding Rule 23(b)(3)'s predominance requirements, the Court opined that although certain common issues might be resolved in a class action,

the parties and the Court would expend significant time and resources analyzing the individual claims of the proposed class members, thereby defeating predominance. *Id*. at *17. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Panwar, et al. v. Access Therapies*, 2015 U.S. Dist. LEXIS 7584 (S.D. Ind. Jan. 22, 2015).** Plaintiffs, a group of immigrants employed on H-1B visas, brought an action alleging that Defendant failed to pay employees their contracted rate of pay, and that if an employee complained about the underpayment or wanted to quit, Defendant would threaten them with promissory note penalties, visa loss, revocation of lawful permanent resident application sponsorship, and deportation. Plaintiffs alleged violations of the Trafficking Victims Protection Act and the Indiana Statutory Wage Law. Plaintiffs were required to sign an employment contract, which set forth the employment term and the wage, as well as a promissory note corresponding with the contract's liquidated damages/recovery of expenses provision. *Id*. at *3-4. Plaintiffs also alleged that although some employees were not assigned to paid positions as promised by the employment agreements, they were unable to leave their employment because of the threat to their immigration status and the amount they would have to pay under the promissory note for breaching the employment agreement. *Id*. at *4. Plaintiffs sought certification of a class comprised of current and former H-1B, lawful permanent residents, and lawful permanent resident applicant employees, who worked for Defendant under potential promissory note penalties or contractual penalties. The Court denied the motion for want of ascertainably and typicality. The Court noted that the class definition was not connected to the claims, and that the proposed definition was very broad and included virtually all former and current employees, whether or not they remained employed with Defendant because of the alleged threat of harm, and whether or not they were paid their contractually agreed wage. *Id.* at *8. The Court opined that although it was not required that all class members be injured for class certification, the inclusion of a large number of non-injured Plaintiffs rendered the class too broad, and thus not ascertainable. *Id.* at *9. As to typicality, the Court found that the class definition included all employees whose contract included a specific wage requirement, whether they were underpaid or not. The Court remarked that this definition included employees who would not have claims common to the named Plaintiffs, namely that they were not paid wages owed to them under the contract. In addition, the class definition included all employees regardless of their immigration status and whether or not such status was threatened by Defendant. *Id*. at *15. The Court observed that the class definition would require an examination of each class member who worked for Defendant to determine: (i) the amount and the terms of the liquidated damages provision of each employment contract; (ii) whether this amount and the associated terms constituted an unenforceable penalty; and (iii) whether the employee ever tried to terminate his or her contract, but was prevented from doing so due to the threat of serious harm of the same nature alleged by named Plaintiffs. *Id.* at *17-18. Since the proposed class members were not all subjected to the same course of conduct, resulting in differing claims and defenses than those applicable to Plaintiffs, the Court opined that typicality was lacking. Accordingly, the Court denied certification to Plaintiffs' proposed class.

***Smith, et al. v. Family Video Movie Club, Inc.,* 2015 U.S. Dist. LEXIS 43335 (N.D. Ill. Mar. 31, 2015).** Plaintiffs, a group of former employees, brought an FLSA collective action alleging that Defendant, a video rental store chain, failed to include commissions in employees' base pay rates when calculating overtime rates. *Id.* at *3. Plaintiffs also alleged that Defendant violated the FLSA through its training guide that required employees to run deposits to the bank off-the-clock, and that Defendant's anti-overtime and payroll policies created a *de facto* work policy requiring employees to perform other off-the-clock tasks, including assisting customers, cleaning and maintaining stores, making phone calls for work-related matters, taking inventory, stocking shelves, balancing the cash register, and running errands. *Id.* The Court granted Plaintiffs' motion to conditionally certify a collective action, and the parties commenced discovery. Following discovery, Defendant moved to decertify the conditionally certified collective action. Defendant argued that individual store manager decisions created material variances in the opt-in members' employment situations and these variances would necessitate individualized adjudications of liability. *Id.* at *5. In response, Plaintiffs sought to narrow their claims to three sub-classes, each addressing distinct claims. Plaintiffs' first proposed sub-class was comprised of those employees who did not have their commissions included in their base rate of pay before calculation of overtime rates, the second proposed sub-class was comprised of those employees who ran bank deposits off-the-clock, and

the third proposed sub-class was comprised of employees who performed sundry off-the-clock tasks for Defendant. *Id.* The Court allowed Plaintiffs to proceed with the first two sub-classes to trial on a collective basis, finding that these two proposed sub-classes constituted similarly-situated employees under the FLSA. First, regarding Plaintiffs' claims of under-calculation of overtime rates, the Court noted that Defendant calculated all hourly employees' commissions and overtime rates based on a same formula used by an outside payroll department and upon computerized transmissions of Defendant's employee payroll data, and Plaintiffs had provided substantial evidence that their claims arose out of a single policy, custom, or practice that lead to FLSA violations. *Id.* at *12-15. Next, regarding running bank deposits off-the-clock, the Court found that Defendant's requirement of employees to run deposits to the bank off-the-clock was common to the proposed sub-class and capable of a fair and efficient collective-wide adjudication. Plaintiffs cited a corporate training policy requiring employees to first clock-out before taking the deposits to the bank as well as interrogatory responses, deposition testimony and declarations from opt-in Plaintiffs demonstrating that Defendant required every opt-in member to run bank deposits off-the-clock. Based on this showing, the Court found that Defendant's company-wide training policy had company-wide force. *Id.* at *15-18. The Court therefore denied Defendant's motion to decertify Plaintiffs' first and second proposed sub-classes. The Court, however, ruled that Plaintiffs had failed to demonstrate through substantive evidence of the similarity of opt-in collective members with respect to uncompensated off-the-clock tasks. Although Plaintiffs identified various management policies as evidence of a company-wide *de facto* policy that permitted off-the-clock work, the Court found nothing facially unlawful about those policies. *Id.* at *21. Despite 80% of the discovery sample performing off-the-clock tasks, the Court determined that individual variance driven by store manager discretion suggested that the policies Plaintiffs identified did not promote a *de facto* company-policy requiring off-the-clock work. *Id.* at *22-23. The Court, therefore, denied Defendant's motion to decertify Plaintiffs' third proposed sub-class. Because none of Defendant's defenses to the FLSA claims raised individualized issues to the point that proceeding as a collective action was improper, the Court also held that Defendant's affirmative defenses either could be resolved collectively or efficiently managed at the damages stage. *Id.* at *23-26. Accordingly, the Court partly granted and partly denied Defendant's motion to decertify.

***Solsol, et al. v. Scrub, Inc.,* 2015 U.S. Dist. LEXIS 56426 (N.D. Ill. April 27, 2015).** Plaintiffs, a group of janitors who worked at the O'Hare International Airport ("O'Hare"), brought a collective action alleging that Defendants' method of determining their compensation based on the Supervisor Payroll Input Sheet ("input sheets") violated the FLSA. Janitors who worked at O'Hare clocked-in and clocked-out at the start of their shifts, and orally reported the amount of time they worked to supervisors. *Id*. at *2-3. Plaintiffs contended that the supervisors filled out the input sheets to record the time each janitor worked. *Id*. at *3. Plaintiffs contended that Defendants used these input sheets and not the timecards or the oral representations to tabulate payroll in violation of the FLSA. Plaintiffs filed a motion for conditional certification pursuant to 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion for conditional certification of a collective action. The Court observed that Plaintiffs had submitted a substantial amount of evidence in support of their allegations, including testimony from Defendants' witnesses, employee timecards, and declarations from opt-in Plaintiffs. *Id.* The Court opined that Plaintiffs also presented evidence from multiple employees of Defendants with different levels of responsibility who all stated that the supervisors were trained to engage in the alleged practice. *Id*. at *10. Accordingly, the Court found that Plaintiffs had presented more than a modest showing of common practices. *Id.* Plaintiffs also alleged that Defendants violated the FLSA by rounding the janitor time to the nearest 15 minutes when janitors arrived late to work. *Id*. at *11. Further, Plaintiffs alleged that Plaintiffs alleged that Defendants deducted 30 minutes from the time janitors worked each day to account for meal breaks. *Id*. The Court observed that Plaintiffs had presented sufficient evidence to make the modest factual showing of a common policy or plan to violate the FLSA in regard to employees who worked at O'Hare. *Id*. at *12. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Watson, et al. v. Jimmy John's, LLC,* 2015 U.S. Dist. LEXIS 154598 (N.D. Ill. Nov. 13, 2015).** Plaintiff, an assistant store manager ("ASM"), brought a putative class action alleging that Defendant misclassified him and others similarly-situated as exempt employees and denied them overtime compensation in violation of the FLSA and state wage & hour laws. Plaintiff was employed directly by a franchisee operator.

He sued Jimmy John's, the franchisor, on the theory that it was a joint employer for purposes of federal and state wage & hour laws, and therefore liable for the alleged misclassification of ASMs as exempt employees. Plaintiff's case theory posited that Defendant was the joint employer of all ASMs nationwide for over 1,450 independently owned and operated franchisees. Plaintiff moved for conditional certification of a collective action under 29 U.S.C. § 216(b), and the Court granted the motion. The Court noted that the declaration of another ASM, Adam Kathat, filed in support of the motion for conditional certification, stated that he worked as an ASM at several Jimmy John's stores (the same job held by putative collective action members), and that he was required to follow all of Defendant's corporate policies. *Id*. at *2. These policies related to such matters as what menu items were sold at the stores; the store's layout and hours; and the store's marketing and promotion strategies. *Id*. Kapusta averred that he learned that these matters were handled by Defendant at his corporate training session, and by reading Defendant's operations manual setting forth Defendant's corporate policies. *Id*. Kapusta also asserted that Defendant classified him as an exempt employee, and that he averaged 60 hours per week but he was not paid overtime. *Id*. at *3. Kapusta also stated that he had no authority to close the store, to establish the payroll budget, or to set or determine employees' pay. *Id*. Kapusta further declared that he observed ASMs at a Jimmy John's store in Charleston, Illinois, where he trained for three weeks, and based on his observations, their responsibilities were similar to his. *Id*. Based on Kapusta's declaration, the Court concluded that Plaintiff made a modest showing that he and the putative collective action members were victims of a common policy or plan that violated the law. The Court rejected Defendant's argument that the issue of joint employer status should be decided as a threshold matter, or that a collective action case theory proposed by Plaintiff was inherently unmanageable. *Id.* at *3. The Court reasoned that these issues go "to the merits," and "will require discovery. . ." *Id.* Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Watson, et al. v. Jimmy John's LLC,* 2015 U.S. Dist. LEXIS 166003 (N.D. Ill. Nov. 30, 2015).** Plaintiff, an Assistant Store Manager ("ASM"), brought an action alleging that Defendants misclassified ASMs as exempt from overtime compensation. Plaintiff advanced a case theory that Defendants, as franchisors, nonetheless were liable for wage & hour violations of their franchisees, since Defendants allegedly were joint employers of Plaintiff and members of the putative collective action (*i.e.*, all ASMs employed by all franchisees nationwide). Following conditional class certification of the action, Defendants moved for reconsideration on the basis that the Court declined to resolve their evidentiary objections to declarations filed in support of Plaintiffs' motion for conditional certification, relying instead on the later filed declaration of Adam Kapusta, which Plaintiffs submitted after briefing was completed. *Id.* at *1-2. Kapusta stated in his declaration that Defendants classified him as an exempt employee and that he worked 60 hours per week without overtime compensation. He also stated that he spent about 95% of his time working the cash register, greeting customers, preparing and serving food, cleaning the store, unloading delivery trucks, stocking supplies, and making deliveries. He also averred that he had no authority to close the store, to establish a payroll budget, to set the rate of pay for employees, or to determine the raises. *Id.* at *2. Based on Plaintiff's allegations and Kapusta's statements, the Court concluded that Plaintiff has made at least a modest factual showing that he and the putative collective action members were victims of a common policy or plan. *Id*. Defendants objected to the declaration, arguing that the declarant lacked personal knowledge about the job duties and responsibilities of other ASMs in the nationwide network of Defendants' stores, and that all of Plaintiff's opt-in declarations were speculative, conclusory, and contained inadmissible hearsay. *Id.* at *3. After review of the objections, the Court granted Defendants' motion in part and denied it in part. Although acknowledging that some of the defense objections had merit, the Court noted that portions of the declarations were admissible, and those portions, taken together and in conjunction with other evidence, were adequate to satisfy the minimal showing that others in the potential collective action were similarly-situated. *Id.* at *2. The Court noted that many of the statements in each declaration related to the declarant's description of his or her own job duties and responsibilities, and they obviously had personal knowledge about such matters. *Id.* at *3-4. Further, although they worked at eleven different stores in seven states, the fact that they nevertheless described nearly identical job duties and activities showed that individual experiences were not the product exclusively of store-level management decisions, but driven by a common policy across the franchise operations. *Id.* at *4. While the Court acknowledged that one declarant relied, in part, on unspecified conversations with an ASM from

Defendants' other location, and some declarations included sweeping generalization that were not reasonably supported, the Court opined those statements had no evidentiary value and thus did not warrant striking the declaration in its entirety. *Id.* at *6. Defendants insisted that the employment policies Plaintiff challenged were the exclusive domain of franchisees. The Court, however, found that the job postings, including the description, summary, duties, and responsibilities of ASMs were materially identical, supporting an inference of commonality, and the evidence Defendants asserted in rebuttal was precisely the kind that Plaintiff was entitled to test through discovery. *Id.* at *10-11. Because Defendants' evidence-based arguments underscored the need for discovery, the Court concluded that if discovery confirmed that Plaintiff and any opt-in class members were injured, if at all, by the policies or management decisions of individual franchisees, rather than policies that were common to the franchise, Defendants could move to decertify the collective action at the appropriate juncture. *Id.* at *13-14. Accordingly, the Court granted in part and denied in part Defendants' motion for reconsideration.

***Wilkins, et al. v. Just Energy Group, Inc.*, 2015 U.S. Dist. LEXIS 31902 (N.D. Ill. Mar. 13, 2015).**
Plaintiff, a door-to-door salesperson, brought a class action alleging that Defendant misclassified her as an independent contractor and an outside salesperson under the Illinois Minimum Wage Law ("IMWL"). Defendant moved for summary judgment, contending that Plaintiff was outside the scope of the IMWL because she was an outside salesperson. At the same time, Plaintiff moved for class certification. The Court denied Defendant's motion, and granted Plaintiff's motion and certified the class. At the outset, the Court remarked that the proposition that door-to-door workers engaged in sales-related activities was unremarkable, so calling them "salespeople" was accurate and descriptive. *Id*. at *28. The Court, however, found that this designation did not transform them into an exempt "outside salesperson" as that term was used in the IMWL and the FLSA because job responsibilities, as opposed to job's name, were dispositive. *Id*. The Court noted that this inquiry would not depend on whether Plaintiff made sales; instead, it would depend on whether, in her sales efforts, Plaintiff was sufficiently independent to qualify for the exemption. *Id*. at *29. Accordingly, the Court denied Defendant's motion for summary judgment. Plaintiff sought certification of a class consisting of all Illinois door-to-door workers who were treated as independent contractors by Defendant. Plaintiff defined the common question as whether Defendant violated Illinois law when they failed to pay the door-to-door workers minimum wage and overtime pay. Defendant argued that the regional distributors and crew coordinators at its various offices in Illinois had substantial discretion in how the offices were managed and did not necessarily comply with Defendant's global policies. Defendant contended that this resulted in differing levels of supervision and control for door-to-door workers, so that no common questions existed. *Id*. at *32. The Court reasoned that at the class certification stage, all that mattered was the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation. *Id*. at *33. In this instance, the Court observed that Defendant uniformly treated its door-to-door workers as outside the scope of IMWL based on its position that the workers were independent contractors who fell within the outside salesperson exemption. *Id*. at *34. Accordingly, the Court concluded that these were common issues as to liability. *Id*. The Court further opined that despite individual questions about damages, the commonality requirement could be satisfied. Regarding predominance, the Court noted that the inquiry would focus on whether the evidence was common or individual-specific. *Id*. at *28. To determine if an individual is an employee or a contractor under IMWL, several factors are considered. Regarding the first factor of control, the Court observed that many alleged differences between the levels of control over different door-to-door workers were based on whether Defendant's management followed a uniform corporate policy. *Id*. at *41. However, the common issues – such as requiring the door-to-door workers to follow rules, policies, and procedures – related to the control that Defendant had over them. *Id*. at *44. Accordingly, the Court concluded that common issues predominated. Similarly, the Court determined that the inquiry into the remaining factors – such as whether a worker was an integral part of the Defendant's business, whether Defendant was significantly invested in its business in a way that eclipsed the investment of the door-to-door workers, whether a worker's opportunity for profit and loss was determined by Defendant, and the permanency of relationship – all showed predominance of common questions over individual ones. *Id*. at *46-51. Accordingly, the Court held that Plaintiff satisfied the Rule 23 requirements, and certified the proposed class.

***Woods, et al. v. Club Cabaret, Inc.,* 2015 U.S. Dist. LEXIS 145588 (C.D. Ill. Sept. 28, 2015).** Plaintiff, an adult entertainer, brought an action alleging that Defendant misclassified her and other adult entertainers as independent contractors and denied them minimum wages in violation of the FLSA and the Illinois Minimum Wage Law ("IMWL"). *Id.* at *1. Defendant provided adult entertainment, and also provided other services such as food, hair care, and nail care. *Id*. at *2. Defendant employed managers, bartenders, cooks, waitresses, and dancers. *Id*. at *3. Plaintiff contended that before hiring, dancers filled out an application, had an interview, and were told to obtain an adult-entertainment permit with the County. *Id*. Plaintiff contended that once hired they were required to follow a work schedule that the club manager fixed and work a minimum of 24 hours per week. Plaintiff contended that every aspect of their engagement with Defendant was regulated by Defendant; however, because of their independent contractor status, Defendant did not pay them any wages. Plaintiffs instead were required to pay the club a fee and kept the gratuities they received from customers. *Id*. at *5-6. Plaintiff sought conditional certification of a collective action pursuant to 29 U.S.C. § 216(b), which the Court granted. At the outset, the Court noted that Plaintiff had made a modest showing that she was similarly-situated to members of the proposed collective action. The Court explained that Plaintiff and the collective action members all were current or former dancers who worked at a single location owned and operated by Defendant. *Id*. at *11. Second, the Court noted that the accompanying declarations and the independent contractor agreements established that the proposed collective action members were all subjected to the same working conditions. *Id*. Defendant argued that some entertainers entered into arbitration agreements, which excluded them from a collective action. The Court observed that the lone agreement containing an arbitration clause that Defendant submitted in support of its opposition was executed well after this action was filed. *Id*. at *13. The Court remarked that the timing of the agreement submitted by Defendant was not enough to defeat conditional certification. *Id*. at *14. Finally, Defendant claimed the Court could not conditionally certify the collective action because it must conduct a "case-by-case" analysis on this "complex and fact-intensive inquiry" concerning whether the dancers were employees or independent contractors. *Id.* The Court, however, remarked that it was not deciding the merits of the case when considering the § 216(b) certification question, and accordingly, it granted Plaintiff's motion to conditionally certify the class. *Id*. at *15.

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***Bonton, et al. v. Centerfold Entertainment Club, Inc*., 2015 U.S. Dist. LEXIS 65408 (W.D. Ark. May 19, 2015).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendant intentionally misclassified them as independent contractors in order to avoid paying them minimum and overtime wages in violation of the FLSA and the Arkansas Minimum Wage Act ("AMWA"). Plaintiffs also claimed that Defendant forced them to pay for the right to work as independent contractors and took improper deductions from their tips. *Id* at *1. Plaintiffs moved for class certification of the issue of liability under Rule 23, and the Court granted the motion. At the outset, the Court found that the exact size of the potential class was unclear, but the record showed that it was large enough to warrant class certification. *Id*. at *5. Accordingly, the Court concluded that the numerosity requirement was satisfied. The Court also found that questions such as whether an employer-employee relationship existed between the proposed class members and Defendant, or if Defendant was a covered employer under the AMWA, were common across the class. Hence, the Court ruled that the commonality requirement was satisfied. *Id*. at *5-6. In addition, the Court held that questions such as whether Defendant had a policy or practice of not paying minimum wage to dancers who performed at their clubs predominated over individual questions, thereby satisfying the predominance requirement. *Id*. at *8-9. Finally, the Court determined that a class action was the superior method of adjudication, and accordingly, certified a liability issue class pursuant to Rule 23. *Id*. at *10.

***Bosewell, et al. v. Panera Bread Co.,* 2015 U.S. Dist. LEXIS 144149 (E.D. Mo. Oct. 23, 2015).** Plaintiffs, a group of joint venture general managers ("JV GMs"), brought a putative class action alleging that Defendant failed to pay the full sum owed to them under their employment agreements. Plaintiffs entered into standard employment agreements with Defendant, and under the agreements, Defendant paid them a small annual salary. *Id.* at *4. The agreements also contained a buy-out clause, which entitled Plaintiffs to a one-time buy-out payment at the end of five years, based on the profitability of the manager's café. *Id.* Plaintiffs alleged that Defendant modified the agreements to include a cap on the buy-out, withholding the

money allegedly owed to Plaintiffs. *Id.* Plaintiffs asserted class claims for breach of contract and fraud under Missouri law, individual claims for fraud and unjust enrichment, and moved for certification of a class defined as all natural persons employed as JV GMs by Defendant at a defined period who received a capped buy-out payment. *Id.* at *5. Plaintiffs argued that their class-wide breach of contract and fraud claims satisfied all elements of Rule 23 and that the class consisting of at least 61 current and former JV GMs was readily ascertainable. *Id.* at *6. Agreeing with Plaintiffs, the Court granted the motion for class certification. The Court found that the central liability questions of whether Defendant breached the agreements by imposing a cap on the buy-out and whether Defendant intended to comply with the agreements' buy-out provisions at the time of entering into the agreement were capable of common resolution because every class member received a nearly identical agreement containing an identical buy-out provision, which Defendant either did or did not intend to comply with at the time of signing, and every class member signed the agreement, began working, and thereafter received a uniformly capped buy-out. *Id.* at *30-31. Further, the Court found no reason to believe that the named Plaintiffs' interest in pursuing their individual fraud and unjust enrichment claims would undermine their incentive to vigorously prosecute the class-wide claims. *Id.* at *32. Although the named Plaintiffs might have learned about the cap at a different time and in a different format than other class members, the Court found nothing that suggested that the defense of modification or novation, if any, would depend on the timing or format of the new agreements. *Id.* at *33. The Court determined that Plaintiffs shared the class' interest in procuring relief in the breach of contract and fraud claims, and there was no indication that their interests in procuring additional relief on their individual claims would be at the expense of other class members or would be otherwise antagonistic to the class' interest. The Court, therefore, found that Plaintiffs satisfied the typicality and adequacy requirements. *Id.* at *32-35. Defendant argued that its various defenses or arguments – including the defense of contract modification or novation – against liability would raise individual issues that would predominate the common issues of the case. The Court, however, found support in Plaintiffs' assertion that continued at-will employment was not valid consideration to create an enforceable modified or novated contract under Missouri law. *Id.* at *36-37. The Court further ruled that, even if Defendant's modification and novation defenses had merit, they might be resolved by common evidence because neither party provided evidence that any putative class members were uninformed of the cap or objected to the cap before receiving a buy-out. *Id.* at *38. Since Plaintiffs' punitive damages claims hinged on Defendant's motive in entering the agreement, which was capable of resolution on a class-wide basis, the Court concluded that Plaintiffs demonstrated that common issues would predominate. *Id.* at *41-42. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Conners, et al. v. Catfish Pies, Inc.,* Case No. 14-CV-2 (E.D. Ark. Feb. 20, 2015).** Plaintiffs brought a putative FLSA collective action against various Defendants challenging their tip policies. Prior to October 2013, Defendant Ben Biesenthal was president and part owner of Catfish Pies, Inc., Pizza Profits, Show Me Pies, Three Buddies, Inc., and Gusano's Pizzeria, Inc., n/k/a Hendrix Brand, Inc. Biesenthal is currently president and part owner of Crazy Pies, Pizza Profits, and Show Me Pies, and Tim Chappel is president and owner of Hendrix. Three Buddies provides administrative services to Catfish Pies, Pizza Profits, and Show Me Pies. *Id*. at 1. All Plaintiffs and opt-in Plaintiffs were not employees of all Defendants. *Id.* at 1-2. The Court had previously certified a collective action under 29 U.S.C. § 216(b). After a period of discovery, Defendants moved for decertification of the conditionally certified collective action and to sever, which the Court granted. The Court noted that Plaintiffs may be similarly-situated if they suffer from a single FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all Plaintiffs. *Id*. at 4. The Court found that Plaintiffs were not similarly-situated in this case because the "lack of employer-employee relationship" defense applied to some but not all Plaintiffs. *Id.* Although Defendants might have been acting pursuant to similar employee handbooks, the Court remarked that different Defendants employed different Plaintiffs, and all Plaintiffs did not have employer-employee relationship with all Defendants. *Id.* Accordingly, the Court decertified the action. Furthermore, the Court severed the named Plaintiffs' claims, holding that allowing their claims to be tried in one proceeding would be confusing to the jury and prejudicial to Defendants against whom they did not have claims. *Id.* at 5. The Court noted that it had already dismissed several named Plaintiffs' claims against Defendants with whom they failed to establish employer-employee relationships. *Id*. In addition, the Court maintained that although a similar tip policy was at issue in each circumstance, each case would

turn on whether a particular Defendants' enforcement of the policy violated the FLSA, which was an individualized inquiry. *Id.* The Court concluded that trying all the parties' claims in one trial would present additional obstacles to the jury, which was easily avoided by holding separate, and far more simple, trials. *Id.* Accordingly, the Court severed the named Plaintiffs' claims into four separate trials.

***Cruz, et al. v. TMI Property Management, Inc.,* 2015 U.S. Dist. LEXIS 147479 (D. Minn. Oct. 30, 2015).** Plaintiffs, a group of housekeepers, brought an action alleging that Defendant made them work off-the-clock and confiscated tips left by travelers in violation of the FLSA, the Minnesota Fair Labor Standards Act ("MFLSA"), and the Minnesota Payment of Wages Act ("MPWA"). Plaintiffs testified that Defendant required them to fold linens and prepare their cleaning carts prior to the start of their shifts, and after the end of their shifts, they also continued to clean rooms. *Id.* at *7-8. Several housekeepers also provided testimony that they did not take rest or meal breaks, did not use the rest room, and did not eat in the rooms they cleaned. *Id.* at *9-12. Plaintiffs further claimed that Defendant did not have a formal policy regarding tips, and that the supervisors frequently entered the room before the housekeepers and emptied thank-you envelopes including tips. *Id.* at *12. Following conditional certification of a FLSA collective action, Plaintiffs moved for Rule 23 certification of a class of all current and former housekeepers who worked for Defendant beginning April 15, 2011. Defendant also moved to decertify the conditionally certified collective action pursuant to 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion and denied Defendant's motion for decertification. Certifying the class with respect to the issue of liability as to Plaintiffs' MFLSA and MPWA claims, the Court found that Plaintiffs met Rule 23's certification requirements. The Court agreed that Plaintiffs satisfied the numerosity requirement as they estimated that 67 individuals met the class definition. *Id.* at *18. Plaintiffs also satisfied the commonality and predominance requirements as the questions – of whether Defendant required Plaintiffs to work off-the-clock, whether Defendant allowed them to take rest and meal breaks as required by law, and whether Defendant unlawfully took class members' tips – could be answered on a class-wide basis. *Id.* at *25-28. While the Court acknowledged that there might be individual questions regarding the amount of time that Defendant required a particular individual to work off-the-clock or how often Defendant failed to pay the individuals in a timely manner, it found that those issues related to damages could be handled in a separate phase of litigation. *Id.* at *27-28. Because Plaintiffs sought redress of a similar grievances under the same legal and remedial theories, the Court concluded that Plaintiffs' MPWA and MFLSA claims were typical of those of the potential class members. *Id.* at *33. The Court rejected Defendant's argument regarding the adequacy of the named Plaintiffs to act as class representatives, and found that Defendant failed to raise an issue sufficient to call into question the named Plaintiff's ability to fairly and adequately protect the interests of the proposed class. *Id.* at *36. The Court, therefore, concluded that a class action was the superior method of adjudicating Plaintiffs' MPWA and MFLSA claims with respect to issue of Defendant's liability, and accordingly, granted Plaintiffs' motion for class certification. Seeking decertification of the conditionally certified collective action, Defendant argued that determining whether Defendant was subject to liability for overtime or minimum wage violations would require a highly individualized inquiry as to each class member's circumstances every day of every week. *Id.* at *45. Defendant asserted that, given Plaintiffs' differing hourly rates, different schedules, and varying amounts of alleged off-the-clock work, liability could not be determined on a class-wide basis. The Court, however, found that the factual and employment settings factors supported denying Defendant's decertification motion. There was no dispute that all collective action members worked at the same location, had the same job title, and alleged that they performed off-the-clock work. *Id.* at *52. The Court also determined that most of Defendant's purported individualized defenses, including the statute of limitations defense against an opt-in Plaintiff, were either questions that could be resolved on a collective basis or questions that relate to damages rather than to liability. *Id.* at *56. Accordingly, the Court denied Defendant's motion for decertification and granted Plaintiffs' motion for class certification.

***Davenport, et al. v. Charter Communications, LLC*, 2015 U.S. Dist. LEXIS 3409 (E.D. Mo. Jan. 13, 2015).** Plaintiffs, a group of call center employees, brought an action alleging a failure to pay them for the time it took them to access computer applications when beginning to work and to close down computer applications at the end of work. The Court previously had granted FLSA conditional certification of a collective action comprising of non-supervisory hourly employee commonly referred to as advisors, representatives, or agents who worked in Defendant's call centers located in eight states. The Court,

however, had denied Plaintiffs' Rule 23 motion with respect to their Missouri state law claims, holding that individualized evidence defeated the requirements of superiority and predominance. Before the close of discovery, Defendant moved for decertification of the FLSA collective action. Defendant contended that the denial of Rule 23(b)(3) certification of Plaintiffs' Missouri claims demonstrated that Plaintiffs' FLSA collective action must likewise be decertified. Plaintiffs moved to stay or deny Defendant's decertification motion until after the close of all discovery. The Court granted Plaintiff's' motion and denied Defendant's motion. The Court observed that motions to decertify are typically resolved after the close of discovery. *Id.* at *12. Here, although discovery was not complete, the Court had already denied Rule 23 class certification of closely related state law wage & hour claims. The issue therefore was whether the denial of class certification of Plaintiffs' Missouri claims under Rule 23(b)(3) effectively precluded Plaintiffs from proceeding collectively on their FLSA claim and rendered additional discovery on the issue futile. The Court opined that its ruling on Plaintiffs' Rule 23 motion did not moot the FLSA certification issue. The Court noted that Rule 23 actions are fundamentally different from collective actions under the FLSA, and that the rigorous analysis required by Rule 23 does not apply with the same force in the FLSA context. *Id.* at *14-15. Instead, in order to proceed collectively, Plaintiffs need only demonstrate, based on the totality of evidence, that they are similarly-situated, which Plaintiffs asserted they could with additional discovery. *Id.* at *16. The Court thus granted Plaintiffs' motion to proceed with discovery before resolving Defendant's decertification motion.

***Emily, et al. v. Raineri Construction, LLC,* 2015 U.S. Dist. LEXIS 157076 (E.D. Mo. Nov. 20, 2015).** Plaintiff, an hourly construction worker, brought a putative collective action alleging that Defendants failed to pay overtime wages in violation of the FLSA. Plaintiff filed a motion for conditional certification under 29 U.S.C. § 216(b), and the Court granted the motion. *Id.* at *1. In support of his claim, Plaintiff presented declarations from current and former hourly construction workers indicating that during their periods of employment, they and other hourly paid workers sometimes worked over 40 hours per week and Defendants failed to pay them overtime wages. *Id*. at *6-7. In response, Defendants filed a declaration from Ashley Raineri averring that Plaintiff was paid overtime at a rate of time and one-half his regular rate of pay. *Id*. at *8. Raineri also alleged that the company's superintendents were responsible for monitoring and reporting the number of hours that crew worked, and that Plaintiff's contention that he was not compensated for hours he worked directly implicated the superintendents. *Id*. Raineri therefore contended that there was a conflict of interest such that crew members and superintendents could not be included in the same collective action of similarly-situated co-workers. *Id*. The Court noted that Plaintiff and the supporting declarations alleged that Defendants had a company-wide policy of not paying overtime and of reducing the number of hours worked by employees. *Id*. at *9. The Court found that this was sufficient evidence to demonstrate that the putative collective action members were victims of a single decision, policy, or plan. *Id*. at *9-10. The Court noted that *Harris v. Chipotle Mexican Grill, Inc.*, 49 F. Supp. 3d 564 (D. Miss. 2014), conditionally certified a collective action after finding that the hourly-paid managers were similarly-situated to the crew members, and were subjected to the same policy. *Id*. at *12. Similar to *Harris*, the Court concluded that in the early stages of litigation there was no basis to determine the extent of the superintendents' responsibilities and control over Defendants' pay policies. *Id*. Accordingly, the Court found that Plaintiff had met his modest burden for conditional certification, and granted the motion. *Id*. at *13.

***Hussein, et al. v. Capital Building Services Group, Inc.*, 2015 U.S. Dist. LEXIS 157572 (D. Minn. Nov. 20, 2015)**. Plaintiffs, a group of employees, brought an action asserting minimum wage, overtime, record-keeping, retaliation, and method of payment violations under the FLSA, the Minnesota Fair Labor Standards Act, the Minnesota Payment of Wages Act, and the Minnesota Whistleblower Act. Plaintiffs filed a motion for conditional certification of their FLSA claims under 29 U.S.C. § 216(b), which the Court granted. Plaintiffs asserted that the members of the proposed FLSA collective action were similarly-situated because they performed the same job duties, they worked in Minnesota under the same direct managers, they were subject to identical payroll and time-keeping policies, and they were subject to a common plan or practice of Defendant's under-reporting and failure to pay Plaintiffs for regular and overtime work. *Id*. at *19. The Court observed that the eight employee declarations that Plaintiffs submitted provided a colorable basis for the Court to conclude, for the purposes of the first stage of

conditional certification, that Plaintiffs were similarly-situated to putative collective action members, and that Defendant's policy or plan with respect to payment of regular and overtime wages inflicted a common injury on Plaintiffs and members of the putative collective action. *Id*. at *19. The Court also observed that while Plaintiffs were not always denied overtime wages in exactly the same manner, Plaintiffs may be considered similarly-situated when they suffered a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proved a violation as to all Plaintiffs. *Id*. at *22-23. The Court found that Plaintiffs had demonstrated common practices in which their pay did not reflect all hours worked, and Plaintiffs had no way to check their hours to verify accurate reporting and payment because they contended that Defendant did not provide them with earnings statement and pay stubs. *Id*. at *23. Given Plaintiffs' allegations of earnings statement and record-keeping violations, the Court remarked that it was also not surprising that Plaintiffs generally lacked documentary evidence in support of their claims. *Id*. at *28. Defendant argued that Plaintiffs' allegations were conclusory, overly broad, and that their vagueness made them impossible to refute. The Court disagreed and found that at the early stage of conditional certification under § 216(b) it would make no credibility determinations or factual findings. *Id*. at *28. Given the lenient standard of review at the first stage of conditional certification, the Court held that Plaintiffs' allegations and evidence sufficiently established that Plaintiffs and putative collective action members were similarly-situated. The Court thereby granted Plaintiffs' motion for conditional certification.

***Judkins, et al. v. Southerncare, Inc.*, 2015 U.S. Dist. LEXIS 1769 (S.D. Iowa. Jan. 6, 2015).** Plaintiff, a former community relations specialist ("CRS"), brought an FLSA collective action on behalf of herself and 311 CRSs alleging that the Defendant misclassified CRSs as exempt from the overtime pay and routinely required to them work overtime. The Court conditionally certified the collective action, and 28 individuals opted-in. However, in barring four individuals, the Court dismissed their claims for failure to comply with the discovery order. *Id*. at *2. Plaintiffs subsequently moved for final, second stage certification, which the Court denied. Although Defendant acknowledged that there was a company-wide job description for the CRS position, it argued that the collective action should be decertified because the amount of discretion and independent judgment exercised by each Plaintiff varied significantly. The Court noted that the major job functions of a CRS included working with clinicians to develop and implement a comprehensive marketing plan for various medical personnel and community organizations. The CRSs made visits to doctor's offices, nursing homes, and other locations in order to generate referrals to Defendant hospice centers. Plaintiffs testified that they had at least some oversight or input from their director about where to spend their time. Defendant argued that the Plaintiffs were told different things about overtime, worked different amounts of overtime, and differed in their time-keeping practices. The Court remarked that minor differences between Plaintiffs' experiences, even with regard to an essential element of their case, does not foreclose the possibility of collective action adjudication. *Id.* at *15. Here, not only did Defendant apply a blanket overtime exemption and an identical job description to every CRS, Plaintiffs' actual job duties were similar as well. Although there were differences among Plaintiffs, the Court concluded that overall, they were similarly-situated. Although Defendant argued that the various defenses available to it would be individual as to each Plaintiff, thereby rendering a collective action highly inefficient, the Court agreed with Plaintiff that damages issues did not preclude the collective adjudication of the exemption issue. *Id.* at *17. Finally, Defendant asserted that because Plaintiffs were so few in number, and because the issues would require individualized testimony, there was minimal efficiency in treating these claims in one case. The Court, however, reasoned that although determining if an exemption applies may be an inherently fact-based inquiry, that alone does not preclude a collective action where Plaintiffs share common job traits. *Id.* at *18. Additionally, the Court opined that although there may be a need for individual testimony, the relatively small number of Plaintiffs mitigated any concern about procedural inefficiency. Accordingly, the Court denied Defendant's motion for decertification.

***Lucas, et al. v. Mike McMurrin Trucking, Inc.,* 2015 U.S. Dist. LEXIS 135338 (N.D. Iowa Oct. 5, 2015).** Plaintiffs, a group of current and former truck drivers, brought an action alleging Defendant violated the FLSA and the Iowa Wage Payment Collection Law ("IWPCL"). Previously the Court had conditionally certified Plaintiffs' FLSA collective action. Therefore, Plaintiffs moved for class certification of their IWPCL claims under Rule 23, which the Court denied. Plaintiffs argued that there were 46 proposed class members, and generally there was a presumption that numerosity exists with more than 40 members, and

did not exist with fewer than 20 members. *Id*. at *6. Plaintiffs asserted that fear of retaliation would prevent proposed class members from bringing individual suits, and therefore their motion should be granted. The Court remarked that because Plaintiffs did not present any evidence demonstrating a basis for this argument, it would give only limited consideration to this factor. *Id*. at *8. The Court, however, found that several factors weighed in favor of finding numerosity. First, the Court determined that based on the proposed class members' length of employment and hourly rate of some class members, recoveries could be relatively small. *Id*. at *9. Second, the Court opined that many, if not all, proposed class members may not have the financial wherewithal to institute individual lawsuits. *Id*. at *10. The Court, however, concluded that other factors weighing against numerosity made class certification inappropriate. The Court agreed with Defendants' argument that the close geographic proximity of the majority of proposed class members weighed against class certification. *Id*. at *10-11. The Court explained that Plaintiffs were aware of all of the potential class members, as well as their addresses and their dates of employment with Defendants, and therefore this factor also weighed against class certification. *Id*. at *11. The Court remarked that the fact that class members lived close to each other, and that Plaintiffs had knowledge of all class members, meant that the class was not so numerous so as to make the joinder impracticable. *Id*. at *12. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Melgar, et al. v. O.K. Foods, Inc.,* 2015 U.S. Dist. LEXIS 41807 (W.D. Ark. Mar. 31, 2015).** Plaintiffs, a group of production employees, brought a putative class action alleging that Defendant failed to pay them for time spent donning and doffing protective gear, travelling to and from workstations, and time spent waiting for the production line to start. *Id.* at *3. Plaintiffs asserted claims for violations of the Arkansas Minimum Wage Act, unjust enrichment, and breach of implied contract. Plaintiffs later added a collective action claim pursuant to the FLSA and sought conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). Plaintiffs contended that they were all similarly-situated because Defendant paid all its hourly production employees on a "line time" basis for time spent on the production line, and required them to don and doff certain equipment, including during their meal breaks. *Id.* at *6. The Court granted Plaintiffs' motion. Defendant contended that it paid Plaintiffs for eight minutes per shift to compensate for time spent donning and doffing protective items, and therefore, the Court would have to make individualized inquiries into the amount of time each employee spent on donning and doffing above the eight minutes. *Id.* at *7. Defendant also asserted that Plaintiffs could not show a common decision, policy, or plan that affected all putative collective action members in a similar fashion because of significant differences in the types of sanitary and protective items Defendant required then to don, in the time required to don and doff their respective equipment throughout a shift, and the time it took to take them off. *Id.* The Court, however, concluded that Plaintiffs met their burden of showing that they were similarly-situated to the putative collective action members because Plaintiffs showed that they all worked in the same plant and Defendant subjected them to common policies regarding donning and doffing protective gear, hygiene, and sanitation. *Id.* at *8. The Court therefore granted Plaintiffs' motion for conditional certification under § 216(b).

***Petrone, et al. v. Werner Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 109225 (D. Neb. Aug. 12, 2015).** Plaintiffs, a group of drivers, brought an FLSA collective action alleging that Defendant failed to compensate them for breaks less than 20 minutes, and failed to compensate for sleeping periods in excess of eight hours in violation of the continuous workday rule. Plaintiffs filed two separate actions, Petrone I alleging FLSA claims, and Petrone II alleging Nebraska law claims based on the same facts as Petrone I. Id. at *7. The cases were consolidated, and both the collective action and the class action were certified. Defendant moved to decertify the class action and the collective action, and the Court denied the motion. Defendant argued that individual issues predominated, that damages could not be proven on a class-wide basis, and that thousands of class members lacked standing. The Court first noted that the class consisted of approximately 50,000 class members, making individualized litigation impractical. Id. at *9. The Court next observed that Plaintiffs possessed the same interests and suffered same injuries even though some factual variations existed. The Court reasoned that Plaintiffs pointed to a common policy or practice to demonstrate how they were not properly compensated, thereby satisfying the commonality and predominance requirements. Id. As to the issue of damages, the Court observed that Plaintiffs sought damages for the class-wide injury resulting from Defendant's failure to pay minimum wage. Id. at *10. The

Court, therefore, held that common questions of the class predominated, even with some factual variations present. The Court concluded that because Plaintiffs' damages calculation could produce just and reasonable inferences based on their own records, they could prove damages on a class-wide basis. Id. at *11. Finally, Defendant argued that the class contained members who did not suffer damages. The Court rejected this argument, finding that the lack-of-injury rule was not applicable to Nebraska state law. Id. Accordingly, the Court denied Defendant's motion for decertification.

***Tinsley, et al. v. Covenant Care Services, LLC,* 2015 U.S. Dist. LEXIS 39163 (E.D. Mo. Mar. 27, 2015).** Plaintiff brought a collective action alleging that Defendant failed to pay him and all other similarly-situated employees, for all hours worked in a workweek, including straight time and overtime compensation in violation of the FLSA. Plaintiff represented a group of current and former employees who worked for Defendant as full-time individualized supported living aides. *Id*. at *3. Plaintiff moved for conditional certification pursuant to § 216(b) of the FLSA, which the Court granted. While Defendant conceded that Plaintiff had met the notice stage burden and agreed to conditional certification of Plaintiff's FLSA claims, Defendant did not waive any argument related to possible decertification of the conditionally certified class, Rule 23 class certification, or any other argument in the action. *Id*. Plaintiff submitted the sworn statements of himself and another employee, Belinda Miller, in which they averred that they were hourly paid and handled client interactions on behalf of Defendant. Plaintiff and Miller affirmed that they did not receive overtime compensation for all work performed in excess of 40 hours in a workweek, and that they were typically scheduled to work in excess of 40 hours per week. *Id*. at *4. Further, based on conversations with other aides, Plaintiff and Miller stated that the other employees did not receive overtime compensation for hours worked in excess of 40 hours. *Id*. The Court found that Plaintiff had sufficiently alleged that the putative class members were together the victims of a single decision, policy or plan. *Id*. Accordingly, the Court granted Plaintiff's motion for conditional certification, and approved the parties' proposed notice plan modelled on examples provided on the Federal Judicial Center's website.

***Vanhorn, et al. v. Tasneem Enterprise, Inc.,* 2015 U.S. Dist. LEXIS 1933 (E.D. Ark. Jan. 8, 2015).** Plaintiff, individually and on behalf of others similarly-situated, brought a collective action alleging minimum wage and overtime wage violations under the FLSA and the Arkansas Minimum Wage Act. Defendant moved for partial summary judgment as to the claims Plaintiff purported to bring on behalf of the other employees as a collective action. The Court granted the motion. The Court noted that although this case had been pending a year, Plaintiff had not filed a motion to conditionally certify a collective action in spite of having had the names and addresses of all potential collective action members since April of 2014. Further, no other employee had given consent to join this action, and trial was set for April of 2015. *Id*. at *4-5. Further, the affidavits of Defendant's four former and current employees stated affirmatively that they did not consider themselves to be similarly-situated to Plaintiff with regard to his FLSA claims against Defendant. *Id*. at *5. Other than his own affidavit, Plaintiff had not offered evidence of any potential member of the collective action to support prosecution of a collective action. Because the discovery deadline had passed and the trial was only a few months away, the Court found that Defendant was entitled to certainty in the nature of the action. *Id*. Accordingly, the Court granted Defendant's partial motion for summary judgment as to the collective action claims. At the same time, the Court did not dismiss Plaintiff's individual claims.

(ix) Ninth Circuit

***Alcantar, et al. v. Hobart Service,* 2015 U.S. App. LEXIS 15687 (9th Cir. Sept. 3, 2015).** Plaintiff, a service technician, brought a putative class action alleging that Defendant failed to compensate its technicians for the time they spent commuting in Defendant's vehicles to and from their homes to Defendant's worksites in violation of California law. *Id.* at *3. Defendant compensated technicians for the time they spent fixing equipment and for the time they spent driving to and from different assignments. Defendant also compensated technicians, if they commuted in service vehicles, for the time they spent driving from their homes to their first assignments and from their last assignments back home, but only to the extent such travel took longer than their "normal commutes." *Id.* at *4-5. Plaintiff claimed that California law required Defendant to compensate technicians for their normal commute time. Plaintiff conceded that technicians could leave their work vehicles at their branch offices and drive their personal

vehicles to and from their homes, but argued that technicians would have been liable for any break-ins or damage to vehicles left at the branch offices, which did not provide sufficient or secure parking space, and therefore, technicians had no choice but to drive their work vehicles home at night. *Id.* at *6-7. Plaintiff moved for certification of a class of service technicians employed by Defendant in the four years preceding the filing of the action. The District Court denied Plaintiff's motion on the basis that Plaintiff failed to satisfy the commonality and predominance requirements. *Id.* at *8. The District Court then granted Defendant's motion for summary judgment as to Plaintiff's overtime claim for commute time, finding that, because there was no dispute that Defendant did not expressly require technicians to commute in its vehicles, Defendant was not required to compensate for the commute time. *Id.* at *16. The District Court also granted Defendant's second motion for summary judgment because Plaintiff failed to comply with the notice requirements of the Private Attorney General Act ("PAGA"). On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded. The Ninth Circuit found that the District Court erred in denying class certification because it evaluated the merits of Plaintiff's case rather than focusing on whether the questions presented were common to the class. *Id.* at *14. The District Court had held that Plaintiff failed to meet the commonality requirement because he offered no evidence demonstrating that Defendant had a uniform policy requiring technicians to commute in their service vehicles. *Id.* at *13. The Ninth Circuit, however, identified a common question of fact as to whether Defendant provided a genuine choice for its technicians to use company vehicles for their commute. Plaintiff asserted that technicians, by virtue of their inability to park at Defendant's facilities, were forced to drive Defendant's vehicles to work, and, as a result of the rules applicable to the use of its vehicles, Defendant exercised sufficient control over them to render the time compensable. *Id.* at *13-14. The Ninth Circuit, therefore, ruled that the District Court erred as a matter of law in denying class certification. The Ninth Circuit also reversed the District Court's order granting summary judgment as to Plaintiff's overtime claim for commute time. The Ninth Circuit held that Plaintiff raised a genuine dispute of material fact as to whether Defendant required technicians, as a practical matter, to commute in Defendant's vehicles, and as to whether the choice to commute was genuine or illusory. *Id.* at *19-20. The Ninth Circuit, however, affirmed the District Court's dismissal of Plaintiff's PAGA claim for failure to comply with the statute's notice requirements, since the pre-lawsuit letter in which Plaintiff disclosed his allegations against Defendant did not contain sufficient facts to comply with the statute's notice requirements. *Id*. at *22. Accordingly, the Ninth Circuit affirmed in part and reversed in part the District Court's judgment and remanded for further proceedings.

***Amey, et al. v. Cinemark USA, Inc.,* 2015 U.S. Dist. LEXIS 63524 (N.D. Cal. May 13, 2015).** Plaintiffs brought a putative class action alleging that Defendant's uniform policies regularly deprived employees of meal and rest breaks, failed to provide them with reporting time pay ("RTP"), forced them to work off-the-clock without pay, and failed to report the proper hours worked and hourly rates on their wage statement. *Id.* at *2. Asserting violations of the California Labor Code and the Private Attorney General Act ("PAGA"), Plaintiffs moved for class certification consisting of all non-exempt employees of Defendant's theatres since December 2008. *Id.* at *4. The Court denied class certification, finding that Plaintiffs failed to show a uniform policy or practice that could give rise to common questions under Rule 23. Although Plaintiffs argued that common questions of law and fact existed because Defendant implemented uniform policies across all of its theatres that resulted in California Labor Code violations, that Defendant had a uniform practice of understaffing theatres that resulted in the routine denial of employees' meal and rest break periods, and RTP violation resulted in uncompensated overtime, the Court found no single common question of law to the class. *Id.* at *20-32. Plaintiffs did not contend that Defendant's written meal and rest break policy violated the California Labor Code, but argued that Defendant had a policy that facilitated meal and rest break violations. Plaintiffs, however, produced no direct evidence that Defendant had such an informal policy, such as testimony from salaried general managers regarding Defendant's managerial training or any written memoranda. *Id.* at *25. The evidence showed that the practice of scheduling breaks differed between managers and Plaintiffs failed to produce sufficient evidence to show that managers' failure to provide the breaks was uniform or reflected a policy instituted by Defendant. *Id.* at *26-27. Instead, the evidence revealed several other facts that defeated Plaintiffs' theory of class certification. While some witnesses testified that they did not inform management of missed meal and/or rest breaks, some employees voluntarily took a shorter rest break or waived their break altogether. *Id.* at *29. Although the evidence showed that general managers, senior assistant managers, and assistant managers altered

employees' punch records to reflect timely breaks when they were in fact missed or late, Plaintiffs presented no evidence that it was connected to any policy (as opposed to individual managers' efforts to avoid getting in trouble). *Id.* at *31. Plaintiffs similarly were unable to show any evidence of a consistent policy of failing to credit employees with RTP while sending them home before completing half of their shift. Because the issue whether Defendant sent an employee home early depended almost entirely on the manager on-duty, the Court found that it undermined Plaintiffs' argument that Defendant had a uniform policy. *Id.* at *34. Plaintiffs also argued that Defendant routinely circumvented overtime pay requirements by forcing employees to work off-the-clock before or after they clocked-in or clocked-out of work. *Id.* at *36. Plaintiffs asserted that Defendant's policy of understaffing and its strong discouragement of overtime work forced employees to work off-the-clock in order to finish their tasks without getting disciplined. *Id.* The Court, however, found no evidence demonstrating that Defendant knowingly caused employees throughout the proposed class to work off-the-clock without providing them with compensation. *Id.* at *39. Defendant's written policies provided for overtime pay, and some class members never experienced any overtime pay violations. Under these circumstances, the Court concluded that class certification was inappropriate. Because Plaintiffs' failed to properly plead violations of the California Labor Code as a "direct" wage statement claim, the Court also refused to certify Plaintiffs' wage statement claims. *Id.* at *63. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Antemate, et al. v. Estenson Logistics, LLC*, 2015 U.S. Dist. LEXIS 83543 (C.D. Cal. June 15, 2015).** Plaintiff brought a class action on behalf of current and former truck drivers and yard hostlers alleging that Defendant failed to pay overtime wages, to provide meal breaks, and to authorize and permit rest breaks and all related derivative claims in violation of California law. Plaintiff moved for class certification of two putative classes including: (i) truck drivers and yard hostlers who received a safety bonus under Defendant's driver safety bonus program ("safety bonus class"); and (ii) a class of yard hostlers ("yard hostler class"). *Id.* at *1. At the outset, the Court observed that the parties agreed that the safety bonus class, excluding the truck drivers, was certifiable and accordingly, granted certification of the class. *Id.* at *2. As to the yard hostler class, Defendant conceded that class certification was proper as to Plaintiff's overtime claims, but argued that certification should not extend to Plaintiff's meal and rest break claims. Defendant contended that Plaintiff had not established commonality or typicality under Rule 23(a), and that Rule 23(b)(3) was not met because common questions would predominate. *Id*. at *6. The Court found that Plaintiff had established commonality because even if individual questions arose, Plaintiff's theory of liability, supported by multiple declarations and depositions, presented questions of law and fact common to the class. *Id*. at *8. The Court reasoned that despite the fact that Defendant did or did not maintain the allegedly uniform policies and practices, a common legal question arose concerning whether this conduct violated California meal and rest break requirements. The Court also found that Plaintiff had established typicality because Plaintiff offered substantial evidence to support his theory that uniform policies and practices created an environment in which yard hostlers were pressured to skip, delay, or shorten breaks whenever the workload was backed-up. *Id*. at *8-9. Finally, regarding the Rule 23(b)(3) requirement, the Court held that the proposed class members, California yard hostlers, all appeared equally subject to Defendant's alleged policies and practices, regardless of the particular facility where they work. In other words, Plaintiff's theory of liability, premised on uniform policies applicable to all class members, constituted a significant aspect of the case that could be resolved for all members of the class in a single adjudication. *Id.* at *11. Thus, the Court concluded that Plaintiff had established that the yard hostler class was certifiable under Rule 23(b)(3), and the Court granted Plaintiff's motion for class certification.

***Ash, et al. v. Bayside Solutions, Inc.*, 2015 U.S. Dist. LEXIS 11323 (N.D. Cal. Jan. 30, 2015).** Plaintiffs brought an FLSA action alleging that Defendant denied employees overtime compensation. Defendant, an employment agency, placed Plaintiffs with Chevron. Each Plaintiff signed a standard employment agreement with Defendant, which stated that they would be paid at the regular exempt rate for each hour of work with no overtime. *Id.* at *3. Plaintiffs moved for conditional certification on behalf of all employees employed by Defendant pursuant to the agreement, who worked in excess of 40 hours in one week, and did not receive overtime compensation. The Court granted the motion. Defendant argued that Plaintiffs were not hourly employees and hence not eligible for overtime. Defendant asserted that one of its representatives inadvertently used the agreement with the compensation provision at issue when hiring

Plaintiffs, when in fact Plaintiffs should have been classified as exempt and not entitled to overtime. *Id.* at *7. Further, Defendant contended that the four named Plaintiffs and three other independent contractors for Chevron entered into the agreement with the wrong compensation provision, and that upon realizing the error, it had offered the impacted Chevron contractors a $200 per week increase in their wages as consideration for signing a corrected agreement reflecting that they were properly classified as exempt and were paid on a flat salary basis. *Id.* at *7-8. The Court reasoned that Plaintiffs' allegation was not that Defendant improperly classified them as exempt; rather, Plaintiffs alleged that Defendant did not classify them as exempt at all, but that Plaintiffs were classified as hourly employees and not paid overtime as required by law. Further, the Court opined that whether the use of the agreement was inadvertent and Plaintiffs were in fact exempt employees, and thus exempt from overtime requirements, was an affirmative defense that was more suitable for the second step of the conditional certification process. *Id.* at *9. Plaintiffs provided declarations stating that they entered into the agreement, worked in excess of 40 hours a week, and were not paid overtime, and estimated that 140 other employees entered into the same agreement. *Id*. at *12-13. The Court thus found that Plaintiffs met their burden of making substantial allegations that the proposed collective action members were subject to an illegal policy of not paying overtime compensation to hourly employees, and accordingly, granted conditional certification pursuant to 29 U.S.C. § 216(b).

Avilez, et al. v. Pinkerton Government Services, Inc., **596 Fed. Appx. 579 (9th Cir. Mar. 9, 2015).** Plaintiff, a security guard, brought a class action alleging that Defendant violated California's meal break statutes. Previously, the District Court had certified various classes of current and former employees. On appeal, the Ninth Circuit vacated the District Court's order and remanded for entry of a revised class certification order. *Id.* at *579. The Ninth Circuit found that the District Court abused its discretion by certifying classes and sub-classes that included employees who had signed class action waivers. The Ninth Circuit opined that Plaintiff's arbitration agreement did not contain a class action waiver and, as the classes and sub-classes included individuals who signed class action waivers, Plaintiff was not an adequate representative of the class and her claim lacked typicality. *Id* *580. The Ninth Circuit held that since the meal break and wage statement sub-classes included employees who signed class action waivers, the District Court's class certification order was improper. *Id.* Accordingly, the Ninth Circuit remanded the action, and directed the District Court to enter a revised certification decision.

Bowerman, et al. v. Field Asset Services, Inc., **2015 U.S. Dist. LEXIS 37988 (N.D. Cal. Mar. 24, 2015).** Plaintiffs brought a putative class action alleging that Defendant, a business entity that arranged cleaning, maintenance, and restoration of foreclosed properties by hiring third-party vendors, misclassified its vendors as independent contractors instead of employees, and as a result, systematically under-compensated them in violation of the California Labor Code. Plaintiffs moved for certification of a class consisting of all individuals whom Defendant designated as independent contractors, who personally performed property preservations work in California pursuant to Defendant's work orders, and who did not work for any other entity more than 30% of the time while working for Defendant during the class period. *Id.* at *3. The Court granted Plaintiffs' motion. First, the Court found that Plaintiffs established ascertainability by showing that the objective characteristics of the proposed class definition would enable the identification of the vendors who qualified as class members. *Id.* at *17. The Court noted that the vendor declarations submitted by both the parties indicated that most vendors would be able to self-identify as being in or out of the class. *Id.* at *21. Second, the Court found that Plaintiffs established numerosity as 347 vendors qualified for class membership. *Id.* at *44. Third, the Court ruled that Plaintiffs established commonality as Plaintiffs' claim raised the common question of whether Defendant misclassified putative class members as independent contractors instead of employees. *Id.* at *45. Fourth, the Court determined that Plaintiffs established typicality as the named Plaintiff's claims arose from the same conduct that provided the basis for all class members' claims, *i.e.*, Defendant's alleged misclassification and consequent failure to pay overtime wages and indemnify costs. *Id.* at *46. Further, the Court found that Plaintiffs established predominance as Plaintiffs showed that, by limiting the class to vendors who "personally performed property preservation work" pursuant to Defendant's work order and who did not "primarily perform rehabilitation or remodel work," any variation among class members with respect to how often and to what extent they negotiated and/or bid for their contracts with Defendant would be greatly diminished.

Id. at *30. Plaintiffs also produced evidence showing that Defendant distributed to vendors pricelists containing the compensation rates for property preservation work performed under its work orders, and Defendant did not identify any evidence indicating significant variation among class members' power of negotiation over the pricelists. *Id.* at *30-31. The Court thus found that the proposed class definition, limiting the class to a group of vendors whose powers of negotiation and bidding were sufficiently similar, favored class certification. *Id.* at *31. The Court reasoned that although the class definition continued to encompass some vendors who hire, manage, and pay their own workers, and some who did not, such variation did not defeat predominance in light of the substantial commonalities among the sub-set of vendors who continued to qualify for class members. *Id.* at *35. The Court therefore concluded that questions common to the class predominated over individual ones. Finally, the Court held that Plaintiffs established superiority by asserting that liability could be established based on the common question of whether Defendant violated the California Labor Code, and damages could be considered only once liability was established. *Id.* at *40. The Court also approved Plaintiffs' proposed trial plan, and determined that the need for individualized hearings to determine damages did not, by itself, defeat class certification. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Brewer, et al. v. General Nutrition Corp.*, 2015 U.S. Dist. LEXIS 172689 (N.D. Cal. Dec. 28, 2015).** Plaintiffs, a group of non-exempt employees, brought a class action against Defendant alleging, among other things, that as a matter of corporate policy and practice, Defendant did not compensate Plaintiffs for working during meal and rest breaks, time spent making bank deposits, and performing other "closing duties." *Id*. at *3 The Court had previously granted class certification, resulting in several sub-classes that included meal and rest breaks sub-classes; a sub-class of all sales associates and assistant managers who worked at least one closing shift and who used an automobile to make a bank deposit ("reimbursement sub-class"); and a sub-class regarding the "final pay/waiting time penalties" claims. *Id.* at *4-5. After discovery, Defendant moved to decertify the class. The Court denied the motion to decertify as to each of the sub-classes. *Id.* at *8. In regards to the meal and rest break sub-classes, in rejecting Defendant's argument that the class was not properly certified due to a lack of damages for some individuals, the Court noted it would be an error to focus on whether some individuals were able to take breaks or chose to forego breaks. *Id.* at *3. The Court further found that to the extent the individual off-the-clock claims were based on the theory that Plaintiffs worked during their lunch breaks despite clocking-out, this did not undermine a class claim relying on the accuracy of time clock data. *Id.* at *4. Thus, the Court denied the motion to decertify as to the meal and rest break sub-classes. *Id.* In regard to the reimbursement sub-class, Defendant argued that the sub-class lacked predominance. The Court rejected this position, noting that common questions predominated because Defendant maintained several common policies, including: (i) closing duties that required taking the money deposit to the bank; and (ii) reimbursement for driving to the bank was only required if the bank was not on the employee's route home. *Id.* at *4-5. Finally, as to the sub-class of voluntarily terminated group of Plaintiffs in the "final pay/waiting time penalties" sub-class, Defendant asserted that there was no class representative who was voluntarily terminated and paid by direct deposit, and thus the sub-class was without an adequate representative. *Id.* at *6. The Court, however, denied the motion to decertify the sub-class on the condition that Plaintiffs offer an adequate class representative for the sub-class and make such representative available immediately for deposition no later than two weeks prior to the first day of trial. *Id.* Accordingly, the Court conditionally denied Defendant's motion to decertify the voluntarily terminated Plaintiffs of the "final pay/waiting time penalties" sub-class based on that condition. *Id.* at *8.

***Brown, et al. v. Abercrombie & Fitch Co.,* Case No. 14-CV-1242 (C.D. Cal. July 16, 2015).** Plaintiffs, a group of current and former employees, brought a class action alleging that Defendants failed to indemnify employees for expenses, failed provide rest breaks, and failed to provide accurate wage statements. Plaintiffs moved to certify six sub-classes consisting of approximately 62,000 non-exempt employees. As a whole, the Court observed that this action was brought on behalf of all non-exempt hourly employees who worked for Defendants during the class period. *Id*. at 9. Plaintiffs divided the broad class into several sub-classes based on the legal claims asserted and sought certification of each of those sub-classes. *Id*. at 10. Plaintiffs' first four sub-classes revolved around § 450 of the California Labor Code, which prohibits an employer from compelling or coercing any employee to patronize his or her employer in the purchase of

anything of value. *Id*. Plaintiffs asserted that Defendants coerced their employees into purchasing its clothing: (i) to realize profits from those purchases; and (ii) required employees to wear the clothing as a marketing strategy, such that the employees would effectively act as walking advertisements for Defendants. *Id*. at *11. Plaintiffs alleged that Defendants required them to wear distinctive apparel that constituted a uniform yet failed to indemnify the employees for those expenses. *Id*. Plaintiffs also contended that Defendants coerced them to purchase specific types of footwear. *Id*. at 12. Plaintiffs asserted that despite Defendants' formal written policy of not requiring employees to purchase or wear Defendants' clothes, their managers coerced store employees to purchase Defendants' clothing. *Id*. at 13. The Court remarked that as Plaintiffs' theory was grounded on an alleged unwritten policy, one significant question was common to all members of the first and second sub-classes, *i.e.*, the existence of such an unwritten policy or practice. *Id*. at 14. The Court observed that Plaintiffs had presented evidence of a common practice of informal policy of pressurizing employees to purchase clothing. *Id*. at 17. Accordingly, the Court concluded Plaintiffs showed common questions based on an asserted policy or practice of coercing store employees to purchase Defendants' clothing. *Id*. Similarly, the Court found that Plaintiffs established common questions as to the uniform sub-class and the footwear sub-class. *Id*. at 17-18. The Court noted that the central inquiry underlying the § 450 claims was whether the sub-class members were coerced into purchasing clothing. *Id*. at 22. Pursuant to Plaintiffs' theory of the case, the main question common to all members of the first sub-class was whether Defendants had a practice or informal policy of coercing store employees into purchasing its clothing. *Id*. at 23. Defendants asserted that individual differences among sub-class members predominated over the common questions in this case. *Id*. In essence, Defendants argued that because they had no informal policy or practice of coercing employees to make purchases, Plaintiffs' claims depended entirely on alleged oral statements from certain managers as well as employees' individual subjective feelings as to whether they were required to purchase clothing. *Id*. The Court reasoned that Plaintiffs did not merely rely on the perceptions of individual employees, for they relied on e-mails among upper level managers evidencing a "top-down" pressure of employees to purchase AAA clothing. *Id*. The Court concluded Plaintiffs' had presented sufficient evidence of a company-wide policy or practice, and therefore, satisfied the predominance requirement. *Id*. Similarly, the Court found that common issues predominated over individual issues in the remaining sub-classes, and granted Plaintiffs' motion for class certification.

***Campbell, et al. v. Vitran Express, Inc.*, 2015 U.S. Dist. LEXIS 155512 (C.D. Cal. Nov. 12, 2015).** Plaintiffs, a group of drivers, brought an action alleging that Defendant had an unofficial policy of discouraging and denying drivers their meal and rest breaks in violation of the California Labor Code. Plaintiffs also asserted claims under the Private Attorney General Act ("PAGA"). The Court granted summary judgment to Defendant holding that Plaintiffs' claims were preempted by the Federal Aviation Administration Authorization Act ("FAAAA"). On appeal, the order was reversed. On remand, Plaintiffs filed a motion for class certification, and the Court granted the motion. The Court found that Plaintiffs demonstrated that there were common questions of law and fact arising from Defendant's alleged practice of violating California labor and unfair competition laws relating to meal and rest breaks. *Id*. at *12. The common questions included whether Defendant maintained an unofficial policy of impeding and discouraging legally mandated meal and rest breaks, and whether Defendant's official meal and rest break policy comported with California requirements. *Id*. The Court ruled that Plaintiffs established the typicality requirement as their allegations mirrored the claims of the putative class members who also worked as drivers at various terminals during the class period, and were similarly subjected to Defendant's unofficial meal and rest break policy. *Id*. at *13. Plaintiffs argued that common question predominated over any individualized issues, because Defendant's unofficial policies and facially defective policies applied to all drivers, thereby rendering the issue of liability amenable to class-wide proof. Plaintiffs contended that the question as to whether Defendant implemented an unofficial policy of pressuring its drivers to forego lunch breaks predominated. Plaintiffs submitted declarations from 13 different drivers who worked at four of Defendant's five terminals. The declarations were identical and all alleged that the employees were constantly intimidated and threatened to comply with Defendant's falsification of records and forced to work through their meal and rest breaks. *Id*. at *21. The Court held that Plaintiffs had offered sufficient evidence to support the existence of a uniform, unofficial policy that violated the applicable law. *Id*. at *22. The Court concluded that even if Defendant showed that some employees found time to take a break during the

workday, the question of whether Defendant complied with its legal responsibility predominated across the class. *Id*. at *25-26. Plaintiffs also alleged that Defendant's company policies were facially defective because they failed to fully and accurately state the meal and rest break requirements mandated by California law. The Court noted that Plaintiffs had submitted substantial evidence from putative class members and one supervisor showing that Defendant's policies strayed from California's meal and rest break requirements. *Id*. at *31. The Court observed that the defective policy claim like the unofficial policy hinged on the evidentiary record. Accordingly, the Court found that Plaintiffs satisfied the predominance requirement. The Court, therefore, granted Plaintiffs' motion for class certification.

***Casarotto, et al. v. Exploration Drilling, Inc.,* 2015 U.S. Dist. LEXIS 167636 (D. Mont. Dec. 15, 2015).** Plaintiff, a flowback operator, filed a motion to conditionally certify a collective action pursuant to 29 U.S.C. § 216(b). The Magistrate Judge recommended granting Plaintiff's motion in part. The Court adopted the Magistrate Judge's report and recommendation. In filing Rule 72 objections to the report and recommendation, Defendant argued that the Plaintiffs' declarations filed in support of his motion were incompetent. *Id.* at *3. The Court noted that the declarations were mostly based on personal knowledge, and although one declarant had included some hearsay, his declaration was not incompetent. *Id.* at *4. Second, Defendant objected to the two-step test used by the Magistrate Judge and argued that this Court should apply the test set forth in *Shushan v. University of Colorado*, 32 F.R.D. 263 (D. Colo. 1990), wherein the Court had utilized Rule 23 requirements to FLSA conditional certification. The Court remarked that no case law authorities in the Ninth Circuit had favorably cited *Shushan* or its method for certifying collective actions, and had instead followed the majority approach and proceeded under the two-step test. *Id.* The Court further noted that if Congress intended to tie the requirements of Rule 23 to 29 U.S.C. § 216(b), pursuant to *Shushan*, it could have explicitly done so; however, the Congress used the term "similarly-situated" to have a different standard applied to collective actions brought under § 216(b). *Id.* at *5. The Court found that Plaintiff provided substantial allegations that Defendant subjected him and other flowback operators to a policy that violated the FLSA, and given the lenient standard at the first step of conditional certification, he met his burden of showing that he and the putative collective action members were similarly-situated. *Id.* at *6. Third, Defendant objected that the statute of limitations could not be equitably tolled until the date that it supplied the contact information on putative collective action members to Plaintiff. The Court noted that Defendant opposed the motion and relied on the often-rejected approach used in *Shushan* and delayed the conditional certification process as long as it could. Therefore, the Court reasoned that equitable tolling countered the advantage that Defendant gained by withholding potential Plaintiffs' contact information, and delaying the order on conditional certification through no fault of Plaintiff and collective action members. *Id.* at *7. Additionally, tolling did not prejudice Defendant as it was on notice of the potential claims when Plaintiff filed this action. *Id.* at *8. Defendant also asserted that the proposed § 216(b) notices lacked neutrality. The Court, however, disagreed and stated that in the introduction, the initial notice contained the statement that the Court had not yet ruled on the merits of claims or defenses asserted by any party to the case. *Id.* The Court granted approval to provide the notices to potential collective action members for the previous three years. *Id.* at *9. Finally, the Court found that Defendant was not entitled to preliminary discovery as the Court did not have to resolve factual disputes, decide substantive issues on the merits, or make credibility determinations at the conditional certification stage. Accordingly, the Court adopted the Magistrate Judge's recommendations.

***Collinge, et al. v. IntelliQuick Delivery, Inc.,* 2015 U.S. Dist. LEXIS 35858 (D. Ariz. Mar. 23, 2015).** Plaintiffs, a group of current and former delivery drivers, brought an action alleging that Defendant misclassified them as independent contractors in violation of the FLSA and various state wage & hour laws. The Court had conditionally certified Plaintiffs' FLSA collective action, and subsequently Defendant moved for decertification, arguing that Plaintiffs and the collective action members were not similarly-situated. Plaintiffs also sought class certification of four sub-classes of freight drivers, route drivers, on-demand drivers, and FMLA-covered drivers. The Court denied Defendant's motion, and granted Plaintiffs' motion in part. As to Defendant's motion, Plaintiffs claimed that opt-in class members were similarly-situated to the named plaintiffs because they were victims of a common policy or plan that mischaracterized them as independent contractors when in fact they were employees. Both parties agreed that the test for determining whether the drivers were employees was the economic realities test, which utilized a non-

exhaustive list of six factors set forth by the Ninth Circuit in *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d. 748 (9th Cir. 1978). *Id*. at *6. Defendant conceded that Plaintiffs were similarly-situated as to *Real* factors four, five and six, but argued that numerous disparities within the collective action as to *Real* factors one, two and three, including: (i) the degree of the employee's control over the work performed; (ii) the employee's opportunity for profit or loss; and (iii) the employee's investment in equipment used for the task. *Id*. at *7-8. The Court noted that all of Defendant's drivers were subject to the same work contract that, according to Defendant, set forth the parameters of the working relationship. *Id*. at *8. More importantly, once hired, Defendant trained the drivers and subjected them to a series of uniform standard operating procedures. *Id*. Despite this evidence, Defendant asserted that it exercised a disparate degree of control over its individual drivers' work performance. The Court observed that the declaration of a driver, on which Defendant relied on to establish that they did not exercise enough control, was too vague to be informative. *Id*. at *12. Accordingly, based on the evidence, the Court concluded that all drivers were similarly-situated with the other drivers. Second, Defendant argued that drivers were not similarly-situated with regard to the second *Real* factor. Defendant pointed out that the three named Plaintiffs were able to increase profits by requesting more on-demand work beyond regular routed delivery work; were able to order deliveries to achieve maximum deliveries; and were able to reduce operating costs by investing in a vehicle with good gas mileage. *Id*. at *22. The Court found that Defendant's argument failed because they did not establish that Defendant deprived other drivers of these same opportunities. *Id*. Finally, Defendant asserted that the drivers were not similarly-situated with regard to the degree with which they invested in their own equipment or materials. Defendant pointed out that various Plaintiffs purchased their own cargo scanners and other communication devices, whereas others did not. The Court observed that the evidence established that at least with respect to those items, Plaintiffs did invest in equipment required for the job to varying degrees, which weighed in favor of decertification. *Id*. at *24. The Court, however, remarked that the drivers were similarly-situated with regards to five of the six economic realities test factors, which was sufficient to defeat Defendant's decertification motion. The Court reasoned that there was nothing unfair about litigating a single corporate decision in a collective action, especially where there was robust evidence that the workers performed uniform, cookie-cutter tasks mandated by a one-size-fits-all corporate manual. *Id*. at *26. Accordingly, the Court denied Defendant's motion for decertification. Relative to Plaintiffs' motion for Rule 23 class certification on the state claims, the Court granted it in part, but denied it as to claims for unjust enrichment and restitution for Defendant's allegedly unconscionable contracts. Because a class-wide proceeding would not be able to generate common answers apt to drive the resolution of Plaintiffs' unjust enrichment claims, the Court concluded that commonality was lacking and accordingly, denied class certification under Rule 23.

***Cortes, et al. v. Market Connect Group, Inc.,* 2015 U.S. Dist. LEXIS 133750 (S.D. Cal. Sept. 30, 2015).** Plaintiff brought a putative class action alleging that Defendant, a nationwide service organization, violated the California Labor Code through the combined effect of its handbook policies, actual practices, and time-keeping system. *Id.* at *4. Defendant employed hourly non-exempt sales staff, which it called field representatives, who worked at retail stores and promoted sales. *Id.* at *2. Defendant used two software systems – Komtel and Natural Insight – to record time, and both systems recorded time in blocks. *Id.* Plaintiff alleged that Defendant's time-keeping system violated the California Labor Code because both the systems failed to capture the gaps in shift times, and neither system allowed employees to record meal or rest breaks. *Id.* Plaintiff further alleged that although Defendant did not subject its employees to daily observation or instruction, it issued a standardized, nationwide field handbook that outlined the company's employment policies and procedures, and the policies and actual practices violated California's Labor Code. *Id.* at *3-4. Plaintiff also alleged that Defendant failed to reimburse the expenses associated with employees' use of computers, printers, internet connections, and cameras ("technology expenses"), and the expenses associated with employees' use of vehicles to travel between multiple assignments on the same day ("mileage expense"). *Id.* at *19. Plaintiff moved for certification of a class of all of Defendant's non-exempt, hourly employees, and sub-classes for his meal and rest period claims, and reimbursement for former employee claims. The Court granted in part and denied in part Plaintiff's motion for class certification. The Court found that the nature of the work, work assignments, and working conditions made meal and rest break claims difficult to certify. *Id.* at *12. The evidence showed that the employees worked varying schedules without regular supervision, many worked part-time, and some moved from one

assignment to another during the day, thereby showing that most class members might have taken breaks as desired. *Id.* The evidence also suggested that at least some of Defendant's employees either took breaks that complied with California law or followed the policies of the stores in which they worked, and thus there was insufficient evidence showing that the entire class was subjected to the same non-compliant practice with regard to meal and rest breaks. The Court thus found that Plaintiff's proposed meal and rest break class failed to raise a common issue, and the amount of variations or possible variation in practice precluded a finding of predominance as to the sub-class. *Id.* at *17-18. The Court similarly determined that different travel requirements precluded class treatment for Plaintiff's mileage claim. Although it was undisputed that Defendant required some employees to travel between assignments, but did not pay them for their travel, Defendant pointed to evidence that it subjected different types of employees to different scheduling requirements and allowed employees to choose the days to carry them out within the deadline given, and for some it was optional. *Id.* at *21-23. The Court, however, reasoned that there was a significant common question concerning the necessity of the technology expenses because Defendant's handbooks required employees to have access to a personal computer and the internet, and required them to download and review materials for each new assignment, but Defendant failed to reimburse employees for these expenses. *Id.* at *19-20. The Court therefore concluded that Plaintiff's reimbursement claims, and all derivative claims, including a former employee sub-class, were suitable for class-wide treatment. *Id.* at *27. Accordingly, the Court granted in part Plaintiff's motion for class certification.

***David, et al. v. Bankers Life And Casualty Co.,* 2015 U.S. Dist. LEXIS 85968 (W.D. Wash. June 30, 2015).** Plaintiffs brought a state court class action alleging that Defendant failed to pay overtime pay in violation of the Washington Minimum Wage Act. Defendant, an insurance company, contracted with insurance sales agents to sell its products. While Plaintiffs claimed that Defendant's agents were employees, Defendant contended that its agents were independent contractors. After Defendant removed the action, the Court remanded the case, finding that Defendant failed to establish that the amount-in-controversy exceeded $5 million. On remand, the state trial court certified a state-wide class of more than 1,000 agents and former agents, following which Plaintiffs asserted a claim for damages exceeding $16.9 million. Defendant again removed the case and moved to decertify the class, which the Court granted. Previously, the state trial court had certified a class of all individuals who worked as agents for Defendant in Washington between June 16, 2008 and December 2, 2013, and who were classified as independent contractors. *Id*. at *2-3. The state trial court held that Defendant exerted a substantial degree of control over what products agents could sell, as well as their training, prospecting, marketing, sales, and customer service methods. *Id*. at *3. The state trial court emphasized that, under Washington law, it should liberally construe the requirements of Washington Civil Rule 23 and err in favor of certification, although it must conduct a rigorous analysis of each of Rule 23's requirements to determine whether class certification is appropriate. *Id*. Defendant argued that the state trial court's liberal construction of Washington Rule 23 was inconsistent with how federal Rule 23 is interpreted, and that the state trial court's ruling should be viewed as erroneous or at least revisited now that the action had been removed. *Id*. Defendant further contended that the certified class failed to satisfy Rule 23's commonality and predominance requirements, as Defendant did not control how its agents performed their job duties and the agents controlled their ability to make profits. *Id*. at *3-4. The Court found the evidence established some agents, depending on such factors as their seniority and their manager, had control over their schedules, location, and work hours; could forego reporting to managers; were permitted to sell products other than those of Defendant; and were able to hold other employment. *Id*. at *17-18. The Court observed that was not the case for all class members, and such variations would materially affect the employment-status analysis. *Id*. at *18. Looking at the economic reality of agents' experiences, the Court determined that different class members had different relationships with the company during the class period. *Id*. at *19. The Court opined that determining whether class members were employees or contractors under the economic-dependence test would require an individualized inquiry into each agent's employment experience. *Id*. If the class action was maintained, the Court would have to undertake individualized inquiries into each agent's ability to regulate his own hours. *Id*. at *22. Because a central question in this case was not subject to common proof and would necessitate mini-trials that would overwhelm the litigation, the Court concluded that common issues did not predominate. *Id*. at *22-23. Accordingly, the Court granted Defendant's motion to decertify the class.

***Frlekin, et al. v. Apple, Inc.,* 2015 U.S. Dist. LEXIS 92768 (N.D. Cal. July 16, 2015).** Plaintiffs, a group of hourly-paid and non-exempt employees, brought a class action seeking compensation for time spent undergoing exit searches pursuant to Defendant's bag search and technology-card search policies and for time spent waiting for such searches. *Id.* at *4. Concerned with internal theft of its products, Defendant implemented a written policy called the "employee package and bag searches" policy, which imposed mandatory searches of employees' bags, purses, backpacks or briefcases whenever they left the store. *Id* at *5-6. Defendant kept employee time-keeping systems within the store and required employees to clock-out prior to undergoing a search, and thus employees' recorded hours worked which did not account for the time waiting for a search to be completed. *Id.* at *9. Plaintiffs alleged that under the FLSA and various state laws, including the California Labor Code, the time spent waiting for bag searches to be completed was compensable. *Id.* Defendant moved for summary judgment against all individually-named Plaintiffs for all claims. The Court denied summary judgment as to Plaintiffs' California state law claims in light of the varying fact patterns regarding wait times and reasons for bringing a bag. *Id.* at *4. Following the U.S. Supreme Court's review of *Busk v. Integrity Staffing Solutions, Inc.,* 713 F.3d 525 (9th Cir. 2013), which addressed the compensability of security screenings under the FLSA, the Court later dismissed Plaintiffs' FLSA claims, as well as New York, Massachusetts, and Ohio state law claims. Plaintiffs then moved for certification of a class of over 12,400 current and former hourly-paid and non-exempt specialists, managers, and "genius bar" employees who worked in Defendant's 52 retail stores in California since July 25, 2009. *Id.* at *3-4. The Court granted Plaintiffs' motion because Plaintiffs met Rule 23's requirements. First, the Court found that Plaintiffs met the requirements of ascertainability, numerosity, commonality, and typicality. Plaintiffs submitted that they could identify more than 12,400 employees through Defendant's computer-based employee records, and that they all allegedly suffered a similar injury, *i.e.,* unpaid wages due to Defendant's enforcement of bag search policy. *Id.* at *14. Further, the Court determined that Plaintiffs met the adequacy requirement as the interests of each class representative were aligned with the class members. *Id.* at *15. Finally, the Court limited the theory of liability to the issue of whether Defendant had to pay Plaintiffs for standing in line without regard to the reason they brought the bag. The Court had earlier raised a concern that individual issues would predominate in a class-wide adjudication because employees could choose not to bring a bag in the first place, and inquired as to whether the case could be limited to the issue of whether Defendant had to pay Plaintiffs for standing in line without regard to the reason they brought the bag. *Id.* at *19. After two rounds of supplemental briefing on the issue, Plaintiffs' counsel agreed to limit the theory of liability to the main issue, and the Court therefore certified the class to adjudicate whether or not Defendant had to compensate employees for time spent waiting for bag searches to be completed "based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience." *Id.* at *21. Because the notice would invite members of the class with special needs to bring a bag to work to intervene or to opt-out, the Court noted that consideration of issues raised by way of intervention would be manageable, and thus, common issues would predominate over any individual issues likely to be actually raised. *Id.* at *21-22. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Frlekin, et al. v. Apple, Inc.,* 2015 U.S. Dist. LEXIS 151937 (N.D. Cal. Nov. 7, 2015).** Plaintiffs, a group of hourly non-exempt employees, brought an action seeking compensation for time spent waiting for and undergoing exit searches pursuant to Defendant's bag search and technology-card search policies. *Id.* at *4. Defendant implemented a written policy called the "Employee Package and Bag Searches" policy, which imposed mandatory searches of employees' bags, purses, backpacks, or briefcases whenever they left the store. *Id.* Defendant kept employee time-keeping systems within the store and required employees to clock-out prior to undergoing a search, and thus their recorded hours worked did not account for the time waiting for a search to be completed. *Id.* at *7. Plaintiffs alleged that under the FLSA and various states' labor laws, the time spent waiting for bag searches to be completed was compensable. *Id.* Following denial of summary judgment to Defendant as to Plaintiffs' California state law claims, Plaintiffs moved to certify a class of current or former hourly-paid employees who worked at one or more California retail stores from July 2009 to the present. *Id.* at *8-9. The Court granted Plaintiffs' motion. It certified the class to adjudicate whether or not Defendant had to compensate its employees for time spent waiting for bag searches "based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience." *Id.* The Court also gave both parties a second opportunity to move for

summary judgment. After both parties filed summary judgment motions, the Court granted Defendant's motion for summary judgment and denied Plaintiffs' motion. The Court found that simply because the bag searches solely benefitted Defendant and were mandatory did not mean that the time was compensable, particularly when employees could have decided not to bring bags to work. The Court noted that Plaintiffs brought bags for personal convenience, and that some employees did not bring bags to work and thus avoided the exit bag search. *Id.* at *20-21. The Court also found that Defendant's searches had no relationship to Plaintiffs' job responsibilities; instead, they were peripheral activities relating to Defendant's theft polices. *Id.* at *33. According to the Court, Defendant could have alleviated theft concerns by prohibiting its employees from bringing personal bags or personal Apple devices into the store. However, Defendant took the lesser step of giving its employees the optional benefit of bringing such items to work, which came with the condition that they must undergo searches when leaving the store. *Id.* at *28. The Court therefore concluded that participating in the exit bag search was completely optional, not a work requirement, and thus not compensable. Accordingly, the Court granted Defendant's motion for summary judgment, and denied Plaintiffs' motion for summary judgment.

***Green, et al. v. Federal Express Corp.,* 2015 U.S. App. LEXIS 10500 (9th Cir. June 22, 2015).** Plaintiff, a handler and customer service agent, brought a class action alleging that FedEx failed to pay hourly employees for work during unpaid meal and rest breaks, and failed to pay for all hours worked, including off-the-clock work. Plaintiff sought to certify two classes of employees that FedEx failed to pay, including: (i) for all clocked from the time they started their scheduled shift and from the time they ended their shift to the time they clocked-out (the "unpaid on-the-clock class"); and (ii) for work performed during unpaid meal breaks (the "working meal break class"). The District Court denied Plaintiff's motion. On appeal, the Ninth Circuit affirmed the District Court's order. The Ninth Circuit held that absent a policy that prevented FedEx employees from using that time for their own benefit, Plaintiff could not show class-wide control by FedEx. *Id*. at *3. Without demonstrating class-wide control, Plaintiff could not satisfy the requirements of Rule 23(b)(3), because individual fact inquiries concerning whether FedEx controlled each employee would predominate over any common question. *Id*. at *3-4. The Ninth Circuit concluded that the District Court's finding – that FedEx did not have a policy limiting how employees could use their time when they were clocked-in but not on-shift – was not clearly erroneous. *Id*. at *4. Each of FedEx's Rule 30(b)(6) designees had testified that FedEx did not have a policy limiting what an employee could do with their time when they were clocked-in but not on-shift. *Id*. The designees had also testified that they saw no reason why the employees would not be able to leave the FedEx premises after clocking-in as long as they returned and were ready to work by the time their shift started. *Id*. While some employees at the Los Angeles branch thought that they could not leave the premises after clocking-in, employees at the San Diego office testified that they were free to leave the premises after clocking-in. *Id*. at *4-5. The Ninth Circuit thus determined that taken together, this evidence demonstrated that the District Court's conclusion was not clearly erroneous relative to the issue that FedEx did not have a uniform policy that automatically placed all of the potential class members under FedEx's control as soon as they clocked-in. *Id*. at *5. The Ninth Circuit found that the District Court did not abuse its discretion by refusing to certify the working meal break class. *Id*. The District Court had concluded that Plaintiff's evidence did not adequately tie her allegation that FedEx failed to pay employees for time spent working on meal breaks to a proper and reliable measure of damages for work done on those breaks. *Id*. at *6. The Ninth Circuit opined that Plaintiff's common method of proof – electronic scans of packages during designated meal breaks – did not show that FedEx knew or should have known that its employees were working during their break periods. *Id*. The Ninth Circuit reasoned that FedEx had no obligation to sift through the volumes of electronic data produced by the scanning devices to determine whether its employees were actually taking their authorized breaks. *Id*. at *7. The Ninth Circuit thus held that Plaintiff had failed to provide a common method of proof that would require FedEx to compensate its employees on a class-wide basis. *Id*. For these reasons, the Ninth Circuit ruled that the District Court's decision to deny class certification under Rule 23(b)(3) was not an abuse of discretion. *Id*.

***Hanks, et al. v. Briad Restaurant Group, LLC*, 2015 U.S. Dist. LEXIS 23536 (D. Nev. Feb. 24, 2015).** Plaintiffs, a group of restaurant employees, brought a class action alleging that Defendant failed to pay the lawful minimum wage because Defendant improperly claimed eligibility to compensate employees at a

reduced minimum wage rate under Article XV, § 16 of the Nevada Constitution. The Court granted Defendant's motion to dismiss in part, and denied Plaintiffs' motion for class certification. *Id.* at *2. First, Defendant argued that Plaintiffs' claims under the Nevada Constitution should be dismissed because there was no private right of action or relief provided under the statute. *Id.* at *9-10. Whether a private cause of action can be implied is a question of legislative intent, and the Court observed that without this intent, it could not create a cause of action no matter how desirable that might be as a policy matter, or how compatible with the statute. *Id.* at *11-12. Here, neither party disputed that §§ 608.102 and 608.104 of the Nevada Amendment Code ("NAC") do not explicitly provide for a private right of action, and the Court did not find intent by the Nevada Legislature to create a private right of action pursuant to these regulations. The Minimum Wage Amendment ("MWA"), however, provided that an employee claiming violation of this section may bring an action and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section. *Id.* at *12-13. Thus, the Court found that it was the MWA, and not the NAC, which provides a private right of action for minimum wage violations by employers. *Id.* at *13. Accordingly, the Court dismissed with prejudice Plaintiffs' claim under §§ 608.102 and 608.104. *Id.* Defendant also contended that Plaintiffs' claim of an alleged violation of the MWA should be dismissed for failure to allege a claim upon which relief may be granted. The MWA requires that employers provide qualifying health benefits when it pays an employee a wage less than the upper-tier minimum wage. Qualifying health benefits are benefits for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10% of the employee's gross taxable income from the employer. *Id.* Plaintiffs alleged that Defendant offered three of the named Plaintiffs the company health insurance plan, which failed to cover those categories of health care expenses that are generally a deductible by an employee on his or her individual federal income tax return, if such expenses had been borne directly by the employee. *Id.* Plaintiffs also alleged that the health plan offered had premium costs that exceeded the constitutionally-prescribed maximums. The Court opined that these allegations sufficiently plead a cause of action for violations of the MWA, and thus denied Defendant's motion as to this claim. *Id.* at *14. Plaintiff also sought certification of a class comprised of all employees in Nevada who received less than the upper-tier hourly minimum wage set forth in Nevada Constitution. *Id.* at *16. The only evidence Plaintiffs provided was a table showing the Nevada minimum wage rates over the past eight years and a resume setting forth their law firm's qualifications for representing the proposed class. The Court observed that a party seeking class certification must provide at least some evidence to support each contested Rule 23 requirement for certification. *Id.* at *20. Because Plaintiffs failed to provide such evidentiary support, the Court denied the motion for class certification without prejudice. *Id.*

***Hurst, et al. v. First Student, Inc.,* 2015 U.S. Dist. LEXIS 143638 (D. Ore. Oct. 22, 2015).** Plaintiff, a bus driver, brought a putative class action in state court alleging that Defendant failed to pay drivers for hours spent completing driver training and an orientation program and sought unpaid minimum wages and a civil penalty under Oregon labor laws. After the state court certified the class, Defendant removed the case. Defendant then moved for summary judgment against the civil penalty portion of the case, and for an order decertifying the civil penalty class, which the Court denied. Defendant filed a motion for summary judgment on the basis that Plaintiff's civil penalty claim was time-barred from collecting civil penalty. Defendant argued that Plaintiff's claim could be split into two separate causes of action, including one for unpaid minimum wages, and one for an additional civil penalty. The Court, however, found that based on a plain reading of ORS § 653.055, where there is a single act by an employer (*e.g.*, failing to pay a minimum wage for hours worked), Oregon case law authorities have held that civil penalty can arise from an employer's failure to pay minimum wages, and is not a separate cause of action. *Id*. at *6. The Court determined that the common contention was whether Defendant employed Plaintiff and others similarly-situated during its training program and failed to pay them a minimum wage. *Id*. at *8. The Court remarked that the answer to this question would establish whether Defendant was liable for damages to the entire class. *Id*. Accordingly, the Court concluded that Plaintiff met the typicality requirement because an employer's single act or course of conduct giving rise to class members' claims was sufficient to show typicality. *Id*. As to the adequacy requirement, Defendant contended that Plaintiff's inability to collect a civil penalty created a conflict with class members who were entitled to the penalty. *Id*. at *9. The Court, however, remarked that once a Plaintiff proves a violation of Oregon's minimum wage law, Defendant is liable for unpaid minimum wages and is potentially liable for a civil penalty. *Id*. The Court noted that

collection of a civil penalty was limited by a three-year statute of limitations. *Id*. Plaintiff did not dispute that he was outside the limitations period, and the Court noted that the only difference between Plaintiff and the individuals outside the statute of limitations was the amount of damages that they could collect if Defendant was liable for failing to pay minimum wage. *Id*. The Court observed that under the Ninth Circuit law, the measure of damages was not a disabling conflict of interest; in other words, so long as Plaintiffs were harmed by the same conduct, disparities in how much they were harmed did not defeat class certification. *Id*. Accordingly, the Court denied Defendant's motion for summary judgment on Plaintiff's individual claim for civil penalties, and declined to decertify the civil penalty portion of the class.

***Johnson, et al. v. The Goodyear Tire & Rubber Co.*, Case No. 15-CV-5745 (C.D. Cal. Dec. 22, 2015).** Plaintiff, an employee at an auto service center owned by Defendant, a tire wholesaler that also operates auto services centers offering retail automotive repair services, claimed that he was not paid for taking money to the bank after hours, that his bonus was not factored into overtime, and that his wage statements were deficient with respect to the monies paid and including an employee identification number. Plaintiffs brought this action under the FLSA and various California state laws regulating payment of wages. Plaintiff moved for class certification under Rule 23 of two sub-classes regarding the California claims, including one relating to employees who were not paid enough (either overtime or base pay that they were owed) and one relating to defective wage statements. *Id.* at 2. The Court denied certification as to all classes, finding that Plaintiff failed to demonstrate predominance of common questions as required by Rule 23(b)(3). *Id.* Regarding the uncompensated bank runs, the Court held that because the company's policy required paying employees for this time and the testimony indicated that the policy's application varied based on supervisors and locations, class certification was not appropriate because there was no common policy of denying payment. *Id.* at 3-4. Similarly, with respect to the overtime calculation, Plaintiff did not produce sufficient evidence that the alleged violation was subject to class-wide proof. On the deficient wage statements, the Court held that because the application of the identification number law differed based on whether employees utilized paper or electronic wage statements, common issues did not predominate. In light of these factors, the Court denied class certification. *Id.* at 6.

***Kellgren, et al. v. Petco Animal Supplies, Inc.,* 2015 U.S. Dist. LEXIS 118615 (S.D. Cal. Sept. 3, 2015).** Plaintiff brought a collective action alleging that Defendant willfully and improperly classified Assistant Store Managers ("ASMs") as exempt under the FLSA. Plaintiff claimed that he performed primarily non-managerial duties, and that he was denied overtime pay because of the alleged willful misclassification. Plaintiff moved for conditional certification, which the Court granted. *Id.* at *18. The written job description for the ASM position circulated by Defendant's company headquarters showed that the ASMs maintained the same, company-wide job description. *Id.* at *7-8. The testimony of Defendant's corporate designee, Lance Schwimmer, also established that all ASMs participated in the same training program to ensure uniformity in stores nationwide. *Id.* at *8. Defendant provided an Assistant Manager Training Guide to train ASMs nationwide. The Court also noted the testimony of Plaintiff and two opt-in Plaintiffs, that not only shown that ASMs were subject to the same company-wide job description and corporate policies, but also that they performed similar tasks and duties while working as ASMs. *Id.* Additionally, Schwimmer testified that all ASMs were classified as exempt from the FLSA's overtime provisions and were paid on a salaried basis. The Court reasoned that while the exemption status may not alone establish that potential collective action members were similarly-situated, Plaintiff presented evidence beyond ASMs' exempt status to demonstrate similarity. *Id.* at *9-10. Defendant argued that Plaintiff failed to show he was similarly-situated to potential collective action members with respect to performing primarily non-exempt duties as an ASM. *Id.* The Court observed that arguments pertaining to the merits of claims during the first stage of the collective action certification analysis were not determinative. *Id.* at *12. Plaintiff showed that he and potential opt-in Plaintiffs were commonly affected by Defendant' centralized policies and procedures for ASMs. *Id.* at *12-13. Further, the Court remarked that if ASMs were entitled to overtime wages, it was because of Defendant's overarching policy to classify ASMs as exempt, despite the non-managerial duties they primarily perform. *Id.* at *13. The Court opined that Plaintiff had established the necessary common treatment of all ASMs to warrant notice to potential opt-ins and conditionally certify the collective action. *Id.* at *13-14. Moreover, the Court held that Plaintiff was not required to show that Defendant's policies for training, instructing, and compensating ASMs were unlawful at the initial state of the certification analysis,

and that requiring Plaintiff to establish that ASMs were misclassified as exempt employees at this stage forced it to prematurely decide the merits of Plaintiff's claim based on a disputed and incomplete factual record. *Id.* Accordingly, the Court granted Plaintiff's motion to conditionally certify the collective action pursuant to 29 U.S.C. § 216(b). *Id.* at *18.

***Kenneth, et al. v. Enterprise Drilling Fluids, Inc.,* 2015 U.S. Dist. LEXIS 146388 (E.D. Cal. Oct. 28, 2015).** Plaintiff, a mud engineer, brought an action under the FLSA and the California Labor Code seeking wages and compensation for meal and rest periods. Plaintiff alleged that Defendant required mud engineers to work 24-hour shifts, often for periods of two weeks or more at Defendant's worksite, and that they routinely worked with no actual rest period. *Id.* at *3. Plaintiff also alleged that Defendant regularly and systematically, as a policy and practice, failed to pay Plaintiff and class members all wages due. *Id.* at *4. Plaintiff sought certification of a class of all mud engineers who worked for Defendant for hours which they were not compensated at the minimum wage or fully compensated at the properly calculated overtime wage. *Id*. Plaintiff also sought to represent a California-based class, including all mud engineers or mud engineer trainees in California who worked for Defendant within the four years preceding the filing of this action. *Id.* at *5. In addition, Plaintiff identified a sub-class which included only class members that ended their employment with Defendant during the class period, but who were not timely paid the accrued and unpaid wages owed to them. *Id.* Defendant moved to dismiss Plaintiff's class claims and strike the class allegation on the basis that Plaintiff was not similarly-situated to the other individuals in the FLSA collective action. Defendant argued that the collective action definition was improper because Plaintiff defined the FLSA collective action to include mud engineers who worked for Defendant Enterprise Drilling Fluids, Inc., Berry Petroleum Company, LLC., and/or Linn Operating Inc., and thereby attempted to join three different and separate classes into one. *Id.* at *8. Plaintiff acknowledged the error and sought leave to amend the complaint. The Court granted Defendant's motion to dismiss with leave to amend. *Id.* As to the California-based class and its sub-class, Defendant argued that classes could not satisfy Rule 23 requirements. The Court disagreed. Although Plaintiff failed to state the number of mud engineers with whom he worked, or facts to support a determination that the proposed sub-class was sufficiently numerous to satisfy the requirements of Rule 23(a), the Court noted that Plaintiff alleged facts sufficient to support his assertion that he was an adequate representative, and that common issues predominated over individual inquiries. *Id.* at *13-17. In his complaint, Plaintiff alleged that Defendant acted as co-employers and/or joint employers of Plaintiff and the class members, and subjected Plaintiff and the class members to the same unlawful business practices. *Id.* at *13. Plaintiff also alleged that Defendant determined the class members' daily rate of pay, set their hours and/or work schedule, and had the power to cause the class members to work and/or prevent them working. *Id.* at *16. Plaintiff further alleged that Defendant had a policy and practice of failing to pay Plaintiff and class members the wages due to them and a policy and practice of failing to properly calculate overtime pay due to them. *Id.* The Court therefore found that the pleadings sufficiently supported that a class action was the superior method of adjudicating the claims. *Id.* at *18. The Court therefore denied Defendant's motion to strike the class action allegations and granted leave to Plaintiff to file a second amended complaint.

***Kilbourne, et al. v. The Coca-Cola Co.,* 2015 U.S. Dist. LEXIS 118756 (S.D. Cal. July 29, 2015).** Plaintiff, a delivery driver, brought a putative class action alleging that Defendant, despite having an official policy prohibiting off-the-clock work, practiced a *de facto* policy of requiring drivers to keep working through their breaks in violation of the California Labor Code. *Id.* at *2-2. Plaintiff alleged that drivers routinely performed work activities – specifically, generating invoices, delivering products, and driving between customer locations – while clocked-out for meal periods. *Id.* at *3. Plaintiff moved for certification of a class of 1,445 current and former employees in California for unpaid off-the-clock claims and proposed two sub-classes for his off-the-clock and derivative claims. Plaintiff alleged that Defendant's own records would show that drivers worked off-the-clock. *Id.* Defendant required each driver to record work hours using the Kronos computerized time-keeping system, and Plaintiff contended that Defendant maintained a "corporate charge" or directive requiring its supervisors to review driver manifests and a document register, which would show that drivers worked off-the-clock. *Id.* at *4. Thus, according to Plaintiff, the existence of Defendant's records, coupled with the corporate charge or directive, would generate a common, class-wide answer to the question of whether Defendant had constructive knowledge of drivers working off-the-clock.

Id. at *26. The Court denied class certification, finding that Plaintiff failed to show commonality. *Id.* Specifically, Plaintiff failed to demonstrate the existence of Defendant's purported directive requiring supervisors to review the document registers during driver debriefs. *Id.* at *26-27. The Court found that the delivery optimization modules, upon which Plaintiff relied to support his driver debrief process, were not company-wide directives, but training materials that articulated a recommended process, which each individual distribution center decided whether or not to implement. *Id.* at *27. Furthermore, Defendant offered significant evidence in the form of declarations from approximately 20 Distribution Center Managers throughout California, who represented that they did not follow the recommended debrief process outlined in the modules, and that the distribution centers did not have one common, streamlined approach to reviewing or using driver records. *Id.* at *30. The Court reasoned that determining whether supervisors reviewed document registers during driver debriefs or otherwise and thus had constructive knowledge of employees working off-the-clock would require an inquiry into each distribution center or supervisor's respective practices. Plaintiff argued that the existence of Defendant's Kronos records and document registers alone were sufficient to establish a common method of proof among the class. *Id.* at *31-33. While it was undisputed that Defendant supervisors reviewed Kronos records for missed meal periods, the Court held that Plaintiff failed to provide evidence that Defendant required supervisors to review document registers or the documents that would show that drivers worked while clocking-out for lunch. *Id.* at *33-34. The Court thus concluded that, without evidence of a company-wide practice of reviewing and comparing the Kronos data with the document registers, Plaintiff's purportedly common method of proof amounted to no more than determining liability on an individualized basis. *Id.* *41-42. Accordingly, the Court denied Plaintiff's motion for class certification.

***McCowen, et al. v. Trimac Transportation Services Inc.,* 2015 U.S. Dist. LEXIS 171591 (N.D. Cal. Dec. 23, 2015)**. Plaintiff, a truck driver, brought a putative class action alleging that Defendant was liable for a wide variety of wage & hour violations under the California Labor Code, including failure to pay drivers the compensation they were due and failure to provide meal and rest breaks. Plaintiff sought to certify four sub-classes, asserting claims under the California Labor Code, California's Unfair Competition Law, Industrial Welfare Commission Wage Order Nine, and the California Private Attorneys General Act. The Court granted Plaintiff's motion for class certification. *Id.* at *2. Defendant did not oppose certification of the wage claims or of the derivative claims to the extent they were based on the wage claims. *Id.* at *10. Defendant opposed certification of the meal and rest break claims on the grounds that they failed to meet the commonality and typicality requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b). *Id.* Defendant argued that the record was insufficient to establish that its employees were uniformly deprived of meal and rest breaks. *Id.* at *15. The Court rejected this argument, holding that common legal and factual questions existed regarding the extent of such conduct. *Id.* at *18. As to the typicality requirement, the Court found that the named Plaintiff was a California-based local, intrastate driver who worked for Defendant throughout the relevant class period, and frequently missed meal breaks. *Id.* at *20-22. Accordingly, the Court found that the typicality requirement was met. *Id.* at *21-22. The Court further determined that the predominance requirement was established since Plaintiff sufficiently demonstrated that class-wide legal questions predominated because the legality of Defendant's compensation system, which was applied uniformly to drivers, was at the foundation of each of the wage claims. *Id.* at *24. Finally, the Court ruled that superiority was satisfied as class treatment was likely to reduce litigation costs and promote efficiency. *Id.* at *28. Accordingly, the Court granted Plaintiff's motion for class certification. *Id.* at *29.

***Medlock, et al. v. Taco Bell Corp.*, 2015 U.S. Dist. LEXIS 167132 (E.D. Cal. Dec. 11, 2015).** In these consolidated class actions, Plaintiffs asserted claims against Defendants arising from alleged violations of the California Labor Code relating to payment of minimum wages and overtime and the provision of meal and rest breaks. Plaintiffs also asserted claims under the Private Attorney General Act ("PAGA"). Plaintiffs moved to certify eight sub-classes. The Court only certified the meal break sub-class and denied the motion for certification of the seven other sub-classes. *Id*. at *5. The Court later granted Plaintiffs' motion to amend the class certification order in part, and certified a meal premium class and a rest break class. *Id*. at *7. Defendants filed a motion to decertify the class, and the Court denied the motion. Defendants argued that Plaintiffs failed to meet the commonality and typicality requirements. Defendants asserted that

the named Plaintiffs were not typical to the class. The Court, however, noted that all three named Plaintiffs were non-exempt employees of Defendants during the class period, and were subjected to Defendants' policies for meal period and rest break scheduling. *Id*. at *13. Therefore, the Court concluded that Plaintiffs were typical to the class. Plaintiffs argued that California law requires employers to provide meal breaks to the fifth hour of work and that Defendants' meal break policy violated California law because they provided for meal breaks after the fifth hour of work. *Id*. at *14. Plaintiffs pointed to §§ 226.7 and 512 of the Labor Code, and the Industrial Welfare Commission's ("IWC") Wage Order No. 5, in support of their argument that an employer must give mandatory meal breaks after the fifth hour. *Id*. at *14-16. In order to establish commonality, Plaintiffs focused on language in Defendants' "Hourly Employee Guide," which stated that an employee was required to take a full 30-minute, uninterrupted meal period after 5 hours of work, unless 6 hours completed their work. *Id*. at *16-17. The Court found that the wording of the Hourly Employee Guide was persuasive evidence, which supported Plaintiffs' claim that Defendants had a policy to not give meal breaks until after the fifth hour of work. *Id*. at *23. The Court also acknowledged the language in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), where the California Supreme Court stated that employer liability with respect to a class of employees may be premised on a uniform policy which violates California wage & hour law. *Id*. The Court concluded that Plaintiffs identified a common issue that established this liability, and accordingly, denied Defendants' motion as to extended meal break class. In their underpaid meal period premium class, Plaintiffs contended that the automatic payment system generally underpaid employees for meal premiums because it paid only a half-hour's worth of pay when California law requires a full hour's worth of pay. *Id*. at *27. The Court ruled that Plaintiffs met the commonality requirement because the focus of the action would be on the conduct of Defendants and their policy as opposed to the conduct of the individual class members. *Id*. at *28. Similarly, the Court found that Defendants' written policy documents suggested that Defendants did not authorize a second rest break in some circumstances where California law requires a second rest break. *Id*. at *31. Finding that this was an issue common to the entire class, the Court held that the commonality requirement was satisfied. Accordingly, the Court denied Defendants' motion to decertify Plaintiffs' underpaid meal period premium class and rest period class.

***Melgar, et al. v. CSK Auto, Inc.,* 2015 U.S. Dist. LEXIS 170833 (N.D. Cal. Dec. 22, 2015).** Plaintiffs, a group of Store Managers ("SMs"), Assistant Store Managers ("ASMs"), and Retail Service Specialists ("RSSs"), brought a putative class action for Defendant's failure to reimburse business expenses pursuant to California Labor Code. Defendant had a policy that required each store to make a daily bank deposit. Plaintiffs alleged that they regularly used personal vehicles to make trips to the bank, and Defendant did not reimburse them for these expenses even after numerous complaints about not being reimbursed. *Id.* at *3-4. In seeking certification, Plaintiffs proposed a class of all current and former employees of Defendant who worked at least one shift as SMs, ASMs, and/or RSSs in California at any time from June 26, 2009, through the conclusion of the action. *Id.* at *2. The Court granted certification, but narrowed the class definition as all current and former employees for Defendant who worked at least one shift as SMs, ASMs, and/or RSSs in the State of California at any time from June 26, 2009 through the date of class certification, who used a personal vehicle to make a bank deposit on behalf of Defendant, and who was not reimbursed for incurring that business expense. *Id.* at *40. In narrowing the class definition, the Court agreed with Defendant that the proposed class definition was overbroad and was not reasonably tied to the alleged wrongful conduct. *Id.* at *17. The Court noted that Defendant had a clear policy communicated to employees that they were entitled to reimbursement for use of personal vehicles for company business if the employee first made a request for reimbursement, and a class could not be certified if it was apparent that it could contain many employees who did not suffer an injury. *Id.* at *17-18. The Court further found the proposed class definition problematic in that it put an end date for the class period as "through the conclusion of this action," and Plaintiff did not explain how the end date was workable. *Id.* at *19. The Court therefore modified the class definition. To the extent Defendant criticized the use of self-identification as an unreliable process, the Court pointed out that Defendant could have kept records indicating whether an employee used a personal vehicle to make a bank deposit and whether the employee was reimbursed for that business expense, and thus Defendant's failure should not be held against its employees so as to preclude class certification. *Id.* at *23. The Court found that any potential conflict due to the unique interests of SMs could be dealt with by setting up sub-classes. The Court acknowledged that there might

be potential conflict unique to SMs such that their interests might be different from those of ASMs and RSSs. *Id.* at *38. The Court therefore proposed to redefine the class by creating an ASM/RSS sub-class and a SM sub-class. The Court otherwise found that Plaintiffs met Rule 23 requirements. The Court noted that a fair number of the 4,000 employees used their personal vehicles to make a bank deposit but were not reimbursed, and there was a common proof that Defendant expected daily bank deposits to be made, knew that personal vehicles could be used to make the trips, and did not do anything at a company-wide level to encourage reimbursement requests other than making its policies available to employees. *Id.* at *27-28. While the Court agreed that some individualized inquiries were likely, because each class member would have to affirmatively certify that he or she used a personal vehicle and was not reimbursed, it noted that the individualized inquiries would not be as extensive as Defendant suggested. *Id.* at *31-32. To the extent Defendant argued that the affirmative defenses of equitable estoppel and laches would lead to individualized inquiries, the Court noted that Defendant gave no indication that its defense would be different from the rejected waiver defense, *i.e.,* that the employee failed to make a request for reimbursement for the first instance. *Id.* at *33-34. The Court accordingly granted in part Plaintiffs' motion for class certification.

***Minns, et al. v. Advanced Clinical Employment Staffing LLC,* 2015 U.S. Dist. LEXIS 71946 (N.D. Cal. June 2, 2015).** Plaintiffs, a group of healthcare providers, brought an action against Defendants alleging violations of the FLSA and the California Labor Code. Defendant Advanced Clinical Employment Staffing, LLC ("ACES") contracted with Defendant Sutter East Bay Hospitals ("Sutter") to provide temporary employees during labor disputes between Sutter and its permanent employees. *Id*. at *2-3. Plaintiffs also alleged that Defendant HRN Services Inc. ("HRN") contracted with ACES to provide nurses to Sutter. *Id*. at *3. Plaintiffs claimed that Defendants failed to pay for all hours worked, failed to pay a premium wage for missed meal and rest periods, and failed to provide accurate wage statements. *Id*. at *4. Plaintiffs moved for class certification, and the Court granted the motion. HRN contended that the sub-class of HRN employees was not sufficiently numerous and that its employees were not geographically dispersed. At the outset, the Court observed that Rule 23 does not require class members to be geographically dispersed to maintain a class action. *Id*. at *19. The Court remarked that Plaintiffs submitted evidence showing that there were over 1,400 class members, 149 of whom were employed by HRN, and these individuals traveled to California from 32 different states. *Id*. at *20. Accordingly, the Court concluded that Plaintiffs satisfied the numerosity requirement. HRN further contended that the class was defined too broadly, making it unmanageable. HRN also argued that the proposed class included a great number of individuals who could not have been harmed by HRN's allegedly unlawful conduct, and that the class and sub-class were improperly based on subjective criteria. *Id*. The Court opined that contrary to HRN's arguments, the class and the sub-class were defined in objective terms based on employment with HRN and/or ACES and placement in California during the labor dispute, and that the class members could be identified from Defendants' employment records. *Id*. at *21. The Court explained that the class definitions did not rely on any subjective criteria, and that the challenged practices applied to the entire class and sub-class. *Id*. Accordingly, the Court concluded that the class definitions were not overly broad. Plaintiffs contended that common issues predominated and that Plaintiffs could prove their claims through common proof. Plaintiffs asserted that common questions – such as whether traveling by bus to cross picket lines was a principal activity and therefore, compensable, and whether waiting at the hospital upon arrival and prior to departure was compensable – predominated over individual issues. The Court found that these issues could be established thorough common proof. For example, whether Defendants were joint employers could be determined based upon the contracts between Defendants and class members. *Id*. at *24. In addition, the Court observed that Defendants' liability for transit time and waiting time depended on whether traveling by bus to cross a picket line was a principal activity of a strike replacement nurse, which could be determined by common proof. *Id*. With regard to meal and rest breaks, the Court determined that Plaintiffs had submitted evidence that prior to May 2013, Defendants had a policy of not paying missed meal and rest breaks, and that they did not inform class members of their entitlement to take a second meal break. *Id*. The Court, therefore, reasoned that this too could be determined through common proof. *Id*. at *26. Accordingly, the Court held that common issues predominated and granted Plaintiffs' motion for class certification.

***Moore, et al. v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 2015 U.S. Dist. LEXIS 159477 (C.D. Cal. Nov. 16, 2015).** Plaintiff, on behalf of a group of current and former employees, alleged that Defendants failed to compensate them for time spent off-the-clock undergoing mandatory exit inspections in violation of the California Labor Code. Plaintiff contended that Defendants required all hourly employees to have an exit inspection each time an employee left the store for a rest break, meal break, or at the end of their shift. *Id*. at *7. Plaintiff asserted that Defendants' 2011 New Hire Orientation manual included a chart entitled "end of shift routine" that identified certain tasks and expectations regarding those tasks such as: (i) clean up/close all incomplete projects; (ii) unlock belongings; and (iii) bag checked at front. *Id*. at *7-8. Plaintiff moved for class certification, and the Court granted the motion. The Court noted that Plaintiff presented common questions such as whether the manual and handbook required employees to: (i) use clear bags when bringing personal items into the stores; (ii) lock those items in lockers while they were working; and (iii) undergo exit inspections before they exited the store. *Id*. at *36. Defendants argued that even if the bag checks occurred off-the-clock, the time spent waiting for and undergoing exit inspections was *de minimis* and not compensable. *Id*. at *38. The Court observed that Defendants had not raised their *de minimis* defense in their pleadings, and even if they did, the common questions; *i.e.*, testimony by Plaintiff and her experts explaining whether off-the-clock inspections were required and/or permitted, and how much time employees spent waiting for and undergoing bag checks, were susceptible to common proof. *Id*. at *39. Accordingly, the Court concluded that Plaintiff satisfied the commonality requirement. As to predominance, Defendants argued that its policy was not uniformly carried out. The Court, however, rejected this argument, finding that to the extent that there were minor deviations from the policy at the store level, they had not yet been shown to predominate over the critical common question, *i.e.*, whether the application of Defendant's written exit inspection policy resulted in employees not being properly compensated for their work. *Id*. at *65. The Court remarked that even if Defendants succeeded in showing that their written policy was applied in different ways in different stores, common questions still predominated over any individual ones that would likely arise. *Id*. at *66. The Court reasoned that liability questions – such as: (i) whether time spent waiting for and undergoing exit inspections was hours worked under California law, (ii) whether hourly employees were paid for all hours worked, and (iii) Defendants' *de minimis* defense – were all susceptible to common proof, and predominated over individual questions. The Court held that those questions could all be answered through common evidence, and did not require individualized determinations. Accordingly, the Court granted Plaintiff's motion for class certification.

***Nelson, et al. v. Avon Products, Inc.*, 2015 U.S. Dist. LEXIS 51104 (N.D. Cal. April 17, 2015).** Plaintiffs, a group of District Sales Managers ("DSMs"), brought a putative class action alleging that Defendant improperly misclassified them as exempt from overtime wages in violation of the California Labor Code. Plaintiffs alleged that Defendant hired them mainly for recruiting representatives to sell its products, and provided them with materials to assist in prospecting and training representatives, including promotional materials, product samples, recruiting tents, and other props. *Id.* at *3-4. Plaintiffs also alleged that they exercised no control over Defendant's operating or managerial policies, and Defendant subjected them to substantial supervision. *Id.* at *4. Plaintiffs moved to certify a class of all individuals employed by Defendant in California as DSMs from April 8, 2009 to the present. The Court granted Plaintiffs' motion, finding that Plaintiffs met all the Rule 23 requirements. While Defendant did not dispute that the class was sufficiently numerous, it vigorously disputed commonality. Defendant contended that individualized inquiries would be necessary to determine how each DSM spent his or her time. The Court, however, considered each of Plaintiffs' proposed common questions to determine its capability of generating common answers, and held that Plaintiffs satisfied the commonality requirement. First, the Court found that the question of whether DSMs' duties and responsibilities involved work directly related to management policies or general operations could be determined on a class-wide basis because it did not rise or fall depending on how much time each DSM engaged in those activities. *Id.* at *19. Second, the Court found that the question of whether DSMs customarily and regularly exercised discretion and independent judgment was susceptible to common proof because Plaintiffs alleged that California precluded them from exercising direct control over representatives who were independent contractors. *Id.* at *20-21. Third, the Court found that the question of whether DSMs worked under general supervision was susceptible to common proof because the evidence showed that Defendant subjected class members to far more than just general supervision, including a uniform attendance policy, access to each DSM's

daily calendar, and the monitoring of a DSM's performance goals. *Id.* at *21-22. The Court, however, found that the question of whether DSMs' duties and responsibilities involved the performance of non-manual work was not susceptible to class-wide resolution due to the wide disparity in testimony from named Plaintiffs and other DSMs regarding how much of their work involved manual labor. *Id.* at *19. Because even a single common question could satisfy the commonality requirement, the Court concluded that Plaintiffs met the commonality requirement. The Court also found that Plaintiffs met the typicality requirement as the named Plaintiffs and absent class members' claims were reasonably co-extensive with one another and slight variations in the manner in which Plaintiffs performed their jobs did not render them atypical. *Id.* at *24. Finally, the Court ruled that, even though individual differences existed among the named Plaintiffs and absent class members, the issues common to the class members predominated over those differences. The Court noted that Defendant's own argument that DSMs' responsibilities were directly related to management policies because they independently managed their own Avon business undercut Defendant's argument that individual inquiries would be required. *Id.* at *30. Because Plaintiffs did not base their theory on the specific type of supervision one Division Manager imposed on one DSM, but rather on Defendant's corporate policies that gave Division Managers wide latitude to exercise supervisory control over DSMs, and to impose additional supervision as needed, the Court concluded that the individual differences among DSMs as to whether they worked under only general supervision did not render class treatment inferior to individual actions. *Id.* at *31-32. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Nikmanesh, et al. v. Wal-Mart Stores, Inc.*, Case No. 15-CV-202 (C.D. Cal. Aug. 18, 2015)**. Plaintiffs, a group of current and former pharmacists, brought a collective action alleging that Defendant required them to take a training course, but paid them only for the course and the classroom portion, and did not compensate them for time spent on the home study and test portions. *Id*. at 2. In asserting FLSA violations, Plaintiffs estimated they worked anywhere from 11 to 20 hours of overtime to complete those portions of the course. *Id*. Plaintiffs sought to conditionally certify a collective action consisting of all current and former non-exempt employees who took the training course and were not compensated for the home study and test portions. *Id*. The Court granted the motion. The Court noted that at this early stage, Plaintiffs had to show that the course was an employer-sponsored training course, and that Plaintiffs were similarly-situated to the putative collective action members. *Id*. at 5. Under the facts of this case, the Court remarked that to show that an employer-sponsored training course is working time, Plaintiffs must show that at least one of the following criteria was not met: (i) attendance was outside the employee's regular working hours; (ii) attendance was in fact voluntary; (iii) the course, lecture, or meeting was not directly related to the employee's job; and (iv) the employee did not perform any productive work during such attendance. *Id*. The Court observed that there was no dispute that Defendant sponsored the course, and therefore, under the relevant regulations it was considered as hours worked, so long as it was directly related to the pharmacist's job. *Id*. at 6. Defendant argued that the training provided advancement for the pharmacists, and that it was not required for their present positions. The Court found that the training merely equipped pharmacists to perform another task in their existing roles. *Id*. Accordingly, the Court concluded that Plaintiffs met their modest burden of showing that the course was employer-sponsored and directly related to the pharmacist's job. *Id*. Defendant also argued that Plaintiffs failed to show that they were similarly-situated to other Plaintiffs. Defendant contended that even if they failed to properly pay for hours worked on the course, this was not unlawful under the FLSA unless it resulted in underpayment of overtime or weekly minimum wages. *Id*. at 7. Therefore, according to Defendant, Plaintiffs must show that other pharmacists either took the course on an overtime basis or received less than a weekly minimum wage for the cumulative hours they worked. *Id*. The Court rejected this argument, finding that while collective action treatment required Plaintiffs to be similarly-situated, it did not require all inquiries to be common ones, and that the potential need for case-by-case review was not enough to defeat conditional certification at the early stage. *Id*. Accordingly, the Court conditionally certified the collective action pursuant to 29 U.S.C. § 216(b).

***O'Connor, et al. v. Uber Technologies, Inc.,* 2015 U.S. Dist. LEXIS 116482 (N.D. Cal. Sept. 1, 2015).** Plaintiffs, a group of drivers, brought a putative class action alleging that Defendant misclassified them as independent contractors, and thereby denied them various California Labor Code protections. Specifically,

Plaintiffs alleged that Defendant uniformly failed to reimburse its drivers for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, and uniformly failed to pass on the entire amount of any tip or gratuity that was paid, given to, or left for an employee by a patron. *Id.* at *5-6. Representing a putative class of approximately 160,000 drivers in the state of California, Plaintiffs moved for class certification. The Court granted Plaintiffs' motion, finding that Plaintiffs met their burden of showing that a class could be certified on both the threshold employment classification question and their claim for converted tips under the Labor Code. *Id.* at *9. First, the Court found that Plaintiffs met the ascertainability requirement as Defendant maintained business records with respect to each of its drivers, and thus membership in the class could be easily ascertained from the records. *Id.* at *22. Second, the Court determined that Plaintiffs met the numerosity requirement as the records showed that roughly 160,000 individuals drove for Defendant in California since August 2009, which would meet the class definition. *Id.* at *24. Third, the Court reasoned that Plaintiffs met the commonality requirement as numerous legal questions in the litigation would have answers common to each class member, including the common issue of whether all class members should be classified as employees or independent contractors. *Id.* at *25. Fourth, the Court held that Plaintiffs met the typicality and adequacy requirements as the named Plaintiffs' legal claims arose from essentially the same conduct underlying their fellow class members' claims, and none of the named Plaintiffs' credibility problems were sufficiently severe to undermine their ability to serve as class representatives. *Id.* at *34-39. In addition, the Court found that Plaintiffs met the predominance requirement as it appeared that common questions would substantially predominate over individual inquiries with respect to class members' proper employment classification, and every consideration under the California common-law test of employment could be adjudicated with common proof on a class-wide basis. *Id.* at *112. Specifically, the Court noted that Defendant exercised a uniform amount of control over its drivers' work schedules; Defendant maintained a uniform ability to monitor certain aspect of its drivers' performance, and a uniform right to unilaterally terminate its drivers without cause. *Id.* at *61-78. The Court, therefore, concluded that the threshold question of class members' employment status could be adjudicated on a class-wide basis. Accordingly, the Court granted Plaintiffs' motion for class certification, but excluded all drivers who electronically accepted any contract with Defendant or its subsidiaries unless the driver timely opted-out of the contract's arbitration agreement from the class definition, finding that individualized issues as to whether Defendant's recent arbitration clauses were enforceable against class members would predominate over questions common to all putative class members regarding arbitration. *Id.* at *121-28.

***O'Connor, et al. v. Uber Technologies, Inc.,* 2015 U.S. Dist. LEXIS 165182 (N.D. Cal. Dec. 9, 2015).** Plaintiffs, a group of current and former drivers, brought an action alleging that Defendant misclassified them as independent contractors in violation of various protections in the California Labor Code. Plaintiffs brought claims for expense reimbursement and converted tips. *Id*. at *3. Previously, the Court had certified a class under Rule 23, but excluded all drivers who operated for a distinct third-party transportation company. *Id*. at *4-5. Plaintiffs then filed a supplemental motion for class certification of: (i) an expense reimbursement class; and (ii) a sub-class of drivers who worked for distinct third-party transportation companies. *Id*. at *5. The Court granted the motion in part. The Court observed that in its previous order, it declined to include in the class any drivers who drive through a third-party transportation company, as it was concerned that including the drivers would result in material variations that could defeat predominance. *Id*. at *10. The Court had explained that it was not foreclosing class certification for such drivers, but that a sub-class might be necessary if Plaintiffs were to demonstrate that an additional class of such drivers could be certified. *Id*. Thus, the Court had concluded in its previous order that while Plaintiffs could certify a sub-class of drivers who drive for Defendant more than 30 hours a week, Plaintiffs did not meet their burden to how such a class could be certified. *Id*. at *11. The Court had explained that Plaintiffs did not offer concrete evidence to show how many members of the sub-class could be identified for ascertainability purposes. *Id*. As to Plaintiffs' new motion, the Court concluded that Plaintiffs failed to submit proof that they could define and objectively identify all drivers who drove for Defendant more than 30 hours per week. For this reason, the Court declined to certify a class of drivers who drive FOR a third-party transportation company. *Id*. at *14. The Court noted that in its previous certification order, it had excluded drivers who accepted contracts between June 21, 2014, and November 10, 2014 containing the Court's approved notice and opt-out procedures. *Id*. at *18. In doing so, the Court had relied on *Gentry v.*

Superior Court, 42 Cal. 4th 443 (2007), where the California Supreme Court held that contract with a conspicuous but meaningful opt-out class was procedurally unconscionable, if the agreement did not adequately disclose the disadvantages of the arbitration. *Id*. Relying on *Gentry*, the Court had found that determining whether a party felt free to opt-out required an individualized inquiry, it had excluded those drivers. *Id*. at *19. The Court further stated that in *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899 (2015), the California Supreme Court held that the contract drafter was under no obligation to highlight an arbitration clause, and any state law imposing such an obligation was preempted by the Federal Arbitration Act. *Id*. Plaintiffs argued that the arbitration agreement contained a non-severable waiver for claims under the Private Attorney General Act ("PAGA"), making it unenforceable without every inquiring into whether there is procedural unconscionability. *Id*. The Court observed that when the illegal object is the very essence and mainspring of an agreement, the offending clauses cannot be severed. *Id*. at *40. Accordingly, the Court ruled that because the PAGA waiver could not be severed from the arbitration agreement, the arbitration agreement as a whole was unenforceable on public policy grounds. *Id*. at *43. Because the arbitration agreements were unenforceable, the Court concluded that it would not need to perform an individualized inquiry to determine if a driver was subject to general economic pressures per *Gentry*. *Id*. at *48. Accordingly, the Court certified the class of drivers who did not opt-out of Defendant's contracts from June 2014 to November 2014. *Id*. at *49. The Court also certified a class consisting of individuals to pursue their tips claim and expense reimbursement claim. *Id*. at *63.

***Ogiamien, et al. v. Nordstrom, Inc.*, 2015 U.S. Dist. LEXIS 22128 (C.D. Cal. Feb. 24, 2015).** Plaintiff brought a class action alleging that Defendant failed to pay her and other non-exempt employees for the time spent on the bag check at the beginning and end of rest breaks and for waiting in line to conduct the bag check. Plaintiff moved for certification of a class comprised of non-exempt employees at Defendant's retail locations, excluding those who worked as commissioned salespersons at Defendant's full-line stores for the time periods during which they held that position, and excluding those who signed Nordstrom's Dispute Resolution Agreement, which contained a class action waiver. *Id*. at *3. The Court denied the motion for failure to establish predominance. The controlling issue before the Court was whether the common questions regarding the bag check policy and lost wages predominated over individual questions of liability, such as how many employees did not carry bags or were not checked. *Id.* at *8. The Court noted that case law precedents are less willing to certify classes where individualized inquiries are necessary to determine liability. *Id.* Here, Plaintiff conceded that employees without bags were not subject to the policy, and acknowledged that she could have avoided the inspections if she chose not to bring her bag. Further, Defendant's expert, who analyzed more than 1,700 employees in 12 different stores, found that more than a quarter of employees he observed left the store without any bags. The Court reasoned that if an employee did not carry a bag to work, the bag-check policy did not create any liability for Defendant with respect to that employee, and there were simply no lost wages. *Id.* at *9. Additionally, Plaintiff did not identify a specific company-wide policy or practice that allegedly gave rise to consistent liability. The plain language of the policy only stated that bags needed to be checked without mentioning the frequency. Although Plaintiff asserted that the bag checks were mandatory, the Court opined that the relevant question was not whether a bag check was mandatory once commenced, but whether the store mandated that all employees undergo checking before they left the workplace. *Id.* at *11. Here, the actual language of the policy did not indicate that bag checks were required each time an employee left the store, and at best, the language in the policy was ambiguous. Because Defendant's unrebutted evidence strongly suggested that the policy was tailored for random checks in design and in practice, the Court rejected Plaintiff's claims of lapsed enforcement. *Id.* at *12. Thus, without a specific, unlawful policy to establish consistent liability, the Court ruled that it would have to identify which employees took bags to work, identify the days the bags were carried, and determine whether a random inspection was conducted on those days. *Id.* at *15-16. Accordingly, the Court concluded that these individual questions predominated over questions affecting the entire class, and denied the motion for class certification.

***Palana, et al. v. Mission Bay Inc.,* 2015 U.S. Dist. LEXIS 88091 (N.D. Cal. July 7, 2015).** Plaintiffs, a group of former care workers, brought an action alleging that Defendant misclassified them as exempt employees, and failed to pay them overtime and to provide meal and rest breaks in violation of the FLSA and the California Labor Code. Plaintiffs moved for certification of three classes, including: (i) an overtime

class comprised of hourly employees who worked over 40 hours in a week or eight hours a day without overtime wages; (ii) a meal period class consisting of hourly employees who worked shifts of six hours or more without an unpaid 30 minute meal period; and (iii) a rest break class of hourly employees who worked shifts of more than six hours without unpaid 10-minute rest breaks every four hours or a fraction thereof. *Id*. at *6-7. The Court granted the motion. First, the Court found that Plaintiffs satisfied the numerosity requirement because they showed that there were 147 employees in the overtime class and estimated that most of the 152 employees for whom they received data qualified for the meal and rest break classes. Second, the Court determined that the questions of whether Defendant's uniform policy of denying overtime wages violated the FLSA and California law, and whether Defendant's uniform policy violated California law because it failed to pay Plaintiffs for an on-duty meal and to provide rest breaks, were common to the class. *Id.* at *9. Third, the Court opined that Plaintiffs satisfied the typicality requirements because Defendant subjected Plaintiffs to the same policies and they suffered the same injury as a result of the policies as did the class members. Fourth, regarding the adequacy requirement, Defendant asserted that the named Plaintiff Palana demanded $20,000 from Defendant to settle his case, and the named Plaintiff Soliven harassed a former employee and promised him that he would get $30,000 if he was part of the lawsuit. The Court noted that there is inadequacy only where the class representative's credibility is questioned on issues directly relevant to the litigation or there are confirmed examples of dishonesty. *Id.* at *12. Thus, because Defendant failed to show that the credibility of Palana and Soliven involved issues directly relevant to the litigation, the Court opined that they were adequate class representatives. Although Defendant's written policies stated that overtime would not be paid unless approved by management first, they argued that the Court could not determine whether Defendant properly classified any individual employee as exempt without a mini-trial on the exemption defense. *Id.* at *16. Plaintiffs contended that even if some employees did perform some work inside of clients' homes, in contravention of Defendant's policies, it was incidental to their jobs as caregivers and could not satisfy the requirements of the exemption under the FLSA or California law. The Court observed that the common question of whether a care worker employee, who performed, incidental to his or her work, some work inside a client's home was exempt from overtime pay under the FLSA or the California Labor Code predominated over questions affecting individual Plaintiffs and was a question for a jury's determination. Thus, the Court opined that the question of whether Plaintiffs were exempt, which was common to all class members and could be resolved on a class-wide basis, predominated. *Id.* at *19. Regarding the meal break class, the Court concluded that Plaintiffs' assertion that Defendant enacted a uniform meal break policy that required employees to remain on-duty during meal breaks, thereby violating California law, constituted a question susceptible to common proof and capable of class-wide resolution. *Id.* at *20-21. The Court also opined that Plaintiffs' theory of liability that Defendant violated wage & hour requirements by failing to adopt a policy that authorized and permitted rest breaks was a legal issue capable of class-wide resolution. *Id.* at *22. Finally, the Court reasoned that because the complexities of class action treatment did not outweigh the benefits of considering common issues in one trial, class action treatment was the superior method of adjudication. *Id.* at *23. Accordingly, the Court certified Plaintiffs' proposed classes.

***Pena, et al. v. Taylor Farms Pacific, Inc.*, 2015 U.S. Dist. LEXIS 16180 (E.D. Cal. Feb. 9, 2015).**
Plaintiffs, a group of food production and processing employees, brought a putative class action alleging that Defendant failed to pay them for time spent donning and doffing mandatory personal protective equipment, and failed to provide them duty-free rest and meal breaks as required by the California Labor Code. Plaintiffs moved for certification of a class consisting of Defendant's current or former non-exempt hourly employees who worked at any time in the last four years. *Id.* at *6. Plaintiffs also proposed four sub-classes, including: (i) a donning and doffing sub-class; (ii) a mixed hourly worker sub-class; (iii) a waiting time penalties sub-class; and (iv) a wage statement sub-class. *Id.* at *7. The Court partly granted and partly denied Plaintiffs' motion. First, the Court denied certification of the donning and doffing sub-class. Although Plaintiffs complained that Defendant uniformly required them to perform off-the-clock donning, doffing, and sanitizing activities, they failed to show the predominance of common questions. Despite testimony from several dozen employees that Defendant required off-the-clock donning and doffing, an effectively equal body of testimony from the named Plaintiffs and putative class members described on-the-clock donning and doffing. *Id.* at *25. Several deponents who testified to donning and doffing off-the-clock also contradicted themselves, testifying also to doing so on-the-clock. *Id.* Further, the

time for donning and doffing varied for each employee, and depended on their locations and efficiency. The Court found that, in light of such disparate applications, each class member would be required to make an individual case to establish Defendant's liability. *Id.* at *26. The Court therefore denied certification to the donning and doffing sub-class. Second, the Court granted certification of the mixed hourly worker sub-class as to their meal break claims. Plaintiffs defined this sub-class to include those who were required to be back at work within 30 minutes for meal breaks and within 10 minutes for rest breaks. *Id.* at *32. Plaintiffs described common issue of law and fact only as to the meal break violation asserting a company-wide policy. Defendant's employee handbook provided for a 30 minute lunch period without pay if employees worked more than 6 hours per day. *Id.* at *45. It informed employees that a supervisor would advise them of the length and time of the lunch period. *Id.* The handbook further provided for one additional 10-minute paid rest period after ten hours of work. *Id.* The Court found that Defendant's policy did not comply with California law, and the policy, as described in the handbook and its waiver practices, superseded the need for individual inquires. *Id.* at *52. Plaintiffs, however, failed to put forth any similar evidence on their rest break claim. Although the time-keeping data showed several thousand instances of meal break violations inconsistent with the policy expressed in the handbook, the evidence did not disclose when employees took rest breaks; therefore, Plaintiffs could not show whether Defendant actually offered putative class members rest breaks or not. *Id.* at *47-50. The Court therefore denied certification to the mixed hourly worker sub-class on their rest break claims. Third, the Court granted certification to the waiting time sub-class to the extent the claims were derivative of the meal break claims and contingent upon the same evidence. *Id*. at *64. Finally, the Court denied certification to the wage statement class, finding that Plaintiffs had not provided sufficient evidence to allow certification. Plaintiffs offered only one wage statement to show that Defendant offered non-compliant wage statements, and did not even show that all class members in fact received pay stubs. *Id.* at *70. Accordingly, the Court partly granted and partly denied Plaintiffs' motion for class certification.

***Rai, et al. v. Santa Clara Valley Transportation Authority,* 2015 U.S. Dist. LEXIS 22175 (N.D. Cal. Feb. 24, 2015).** Plaintiffs, a group of transportation operators, brought a putative class action alleging that Defendant forced them to work off-the-clock without compensation in violation of the California Labor Code. Plaintiffs moved for class certification, which the Court granted. The Court found that Plaintiffs satisfied the numerosity requirement as the evidence indicated that Defendant employed at least 1,083 people during the proposed class period. *Id.* at *14. Second, the Court determined that Plaintiffs satisfied the commonality requirement by presenting substantial evidence that Defendant maintained a policy not to pay operators for "split shift travel time" and not to compensate them for "pre-departure time" and "turn-in time." *Id.* at *17-18. Plaintiffs also presented evidence that Defendant maintained common policies and practices not to compensate operators for the time spent on checking bulletin boards and time spent with supervisors, and a common policy of compensating operators for driving time based on a pre-determined schedule rather than the actual time the operators spent driving. *Id.* at *25-26. As to these policies, the Court held that Plaintiffs raised common questions of whether the categories of time for which Plaintiffs sought payment were compensable and whether Defendant's compensation scheme violated law. Because the resolution of these questions would resolve "in one stroke" whether the class members have a legal right to compensation for the categories of time mentioned, the Court determined that Plaintiffs satisfied the commonality requirement. *Id.* at *28. Third, the Court ruled that Plaintiffs satisfied the typicality requirement because their claims were reasonably coextensive with the claims of the other class members. Although Plaintiffs' claims were not substantially identical to the other class members' claims, the Court found that the differences did not negate the fact that all proposed class members' claims were grounded on Defendant's same policies, practices and procedures. *Id.* at *37. Fourth, while Plaintiffs presented sufficient justification for their chosen strategy to establish that it was a method by which they could prosecute the action vigorously on behalf of the class, the Court found that the proposed class counsel's engagement in alleged misconduct in another lawsuit did not rise to a level sufficient to establish that they were not qualified and competent to represent Plaintiffs. *Id.* at *41-43. Further, the Court opined that Plaintiffs satisfied the predominance requirement under Rule 23(b)(3). In light of the prevailing nature of the common questions identified, the Court rejected Defendant's assertion that individual issues essential to liability predominated. *Id.* at *45. Plaintiffs also sufficiently explained to the Court as to how they intended to prove damages for their unpaid wages claims on a class-wide basis. Particularly, Plaintiffs

offered the opinion of an expert who asserted that he could determine damages using standard methodology premised on data common to all class members. *Id.* at *49. Finally, the Court concluded that Plaintiffs satisfied the superiority requirement because the damages at issue were too modest for individual lawsuits to be practical, and each class member's potential damages recovery did not provide the incentive for any individual to bring a solo action prosecuting his or her rights. *Id.* at *52-53. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Randolph, et al. v. Centene Management Co., LLC,* 2015 U.S. Dist. LEXIS 58873 (W.D. Wash. May 4, 2015).** Plaintiff brought a putative collective action alleging that Defendant uniformly misclassified her and other case managers as exempt from the FLSA's overtime protections. Plaintiff sought to conditionally certify a collective action consisting of case managers who worked as utilization review nurses for Defendant. The Court granted Plaintiff's motion. *Id.* at *11. Plaintiff submitted her own declaration and the declarations of nine opt-in Plaintiffs asserting that they worked for Defendant as case managers during the relevant statutory period, that they performed the same primary job duty, that they received compensation in the same manner, and that Defendant subjected them to similar performance standards and expectations. *Id*. at *7-8. They also attested that Defendant misclassified them as exempt and denied them overtime pay. *Id.* at *8. Although Defendant contended that the "cookie cutter" declarations submitted by Plaintiff were insufficient to establish her burden, the Court found that at the lenient first stage of conditional certification, the use of similarly worded or even cookie cutter declarations was not fatal to a motion to certify an FLSA collective action. *Id*. Defendant also attempted to highlight the individual differences between Plaintiff and putative collective action members' job duties. The Court, however, stated that in deciding whether potential Plaintiffs should receive notice, individual differences between putative collective action members need not be considered. *Id*. at *9. Defendant further argued that the Court should deny Plaintiff's motion because of manageability concerns, but the Court found the argument premature. *Id*. at *9-10. The Court determined that Plaintiff had met her burden of showing that she and the putative collective action members were similarly-situated, as she had submitted evidence that she and the putative collective action members had similar job titles, primary job duties, compensation policies, and performance standards. *Id*. at *10. Further, the Court found that Plaintiff's submissions indicated strong similarities among the putative collective action members and thus a reasonable basis for Plaintiff's claims of class-wide injury. *Id*. The Court thus concluded that this showing satisfied the lenient standard for conditional certification, and accordingly, granted Plaintiff's motion. *Id.* As a result, the Court directed the parties to meet and confer to determine whether they could provide a stipulated § 216 (b) notice form, and accordingly, reserved ruling on the proposed notice. *Id.* at *10-11. In addition, the Court directed Defendant to provide Plaintiff with a list of all collective action members and their contact information. *Id.* at *11.

***Robinson, et al. v. Open Top Sightseeing San Francisco, LLC*, 2015 U.S. Dist. LEXIS 171555 (N.D. Cal. Dec. 22, 2015)**. Plaintiff brought a collective and class action against Defendant, a provider of sightseeing tours, alleging that Defendant failed to pay tour operators at an overtime rate for weeks where they worked more than 40 hours. Plaintiff filed a motion for class certification. The Court granted Plaintiff's motion. *Id.* at *1-2. Plaintiff had previously moved for conditional certification of an FLSA opt-in collective action, which the Court had granted. Plaintiff then moved for Rule 23 certification of two additional classes, including: (i) a "California class" to whom Defendant allegedly did not provide accurate wage statements and who also endured waiting time penalties; and (ii) a "section 17200 class" who were employed by Defendant prior to November 2009. *Id.* at *3-4. In regards to the Rule 23(a) factors to assess for class certification, while the Court found the numerosity, commonality, and typicality factors to be easily met, the parties disputed the factor of adequacy of representation. *Id.* at *7-9. Defendant challenged the adequacy of the named Plaintiff based on the fact that he was a former employee and that he only worked for Defendant for a few months. However, Plaintiff successfully moved the Court to add a new class representative, thus mooting this argument. *Id.* at *8. Defendant also challenged the adequacy of Plaintiff's counsel, accusing them of offering money to class members to keep them in the class. *Id.* at *8-9. In support of this argument, Defendant submitted a declaration of a putative class member who asserted that he was offered $800 by an employee of Plaintiff's counsel to meet with him after he withdrew his opt-in consent form. *Id.* at *9. After holding an evidentiary hearing, the Court found that there was not enough

evidence presented to implicate Plaintiff's counsel so as to render them inadequate. *Id.* at *11-12. The Court also found that the Rule 23(b) factors were met, noting that predominance existed since the claims all involved a failure to pay overtime, failure to provide accurate wage statements, and failure to pay wages due upon termination. *Id.* at *12-13. Accordingly, the Court granted Plaintiff's motion for class certification. *Id.* at *14.

***Sandoval, et al. v. M1 Auto Collisions Centers,* 2015 U.S. Dist. LEXIS 120136 (N.D. Cal. Sept. 9, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendant's compensation scheme violated the FLSA and the California Labor Law. Plaintiffs alleged that Defendant's method of compensating rest breaks based on a "flag hour," which was an estimate of the amount of time it took to complete a particular job, did not compensate workers for rest breaks. *Id*. at *3. Plaintiffs also contended that Defendant's overtime compensation practices violated both the FLSA and the California Labor Law, and that Defendant did not compensate them for activities such as cleaning and attending meetings. *Id*. Plaintiffs sought to certify three classes, including: (i) a global piece-rate class; (ii) an overtime class; and (iii) a tolling class and three sub-classes, including an Autovest sub-class; a Serramonte sub-class; and a M1 sub-class. The Court partly granted the motion for conditional certification. Defendant first challenged Plaintiffs' standing with respect to the M1 sub-class, because no named class representatives worked at Defendant's Sunnyvale, Fremont, and Concord locations. *Id*. at *17. The Court noted that all three locations were part of the same legal entity registered under a fictitious name, with the real owner listed as M1 Collision Care Centers, Inc. *Id*. at *18. Since the named Plaintiff Sandoval worked at the Concord location, the Court concluded that he had a standing to represent a class of workers from all three locations. *Id*. The Court denied class certification as to the tolling class, finding that this case was related to *Juarez v. Ali*, Case No. 08-CV-121859, where class certification had been denied. *Id*. at *19. The Court found that by bringing this action, class members from *Juarez* were seeking to re-litigate class certification. *Id*. at *19-20. Plaintiffs next relied on *Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864 (2013), where the California Supreme Court found that commonality exists on the question whether Defendant's piece-rate policy failed to compensate piece-rate workers with a separate payment for rest breaks in violation of California law. *Id*. at *25. The Court found that this case was similar to *Bluford*, as here Plaintiffs were paid an hourly flag rate based on an estimate of how long it took the average employee to perform the repair, including time for, among other things, rest breaks. *Id*. at *26-27. As this issue was common to all potential class members, the Court opined that the commonality requirement was satisfied. *Id*. at *29. The Court, however, found that Plaintiffs failed to show commonality on their non-repair tasks claim, because there was no evidence that Defendant maintained a formal policy of not compensating workers for training and waiting time. *Id*. at *32. Similarly, the Court determined that Plaintiffs did not show commonality on their overtime claims because Plaintiffs based their argument on the fact that Defendant should have calculated how many flag hours were completed during the first eight hours of work and paid overtime rates based on any flag hours completed thereafter. *Id*. at *35. The Court held that determining whether Defendant violated California overtime laws under this method appeared to be impossible to prove with common evidence. *Id*. at *36. The Court, however, ruled that Plaintiffs established commonality on their claim for violation of § 226 of the Labor Code, which requires employers to provide an accurate itemized statement in writing of the wages earned. *Id*. at *40. Finding that Plaintiffs also satisfied the other provisions of Rule 23, the Court certified a class limited to Plaintiffs' rest break and § 226 violations, consisting of all non-exempt piece-rate workers who worked for Defendant during the class period. *Id*. at *56.

***Saravia, et al. v. Dynamex, Inc.*, 2015 U.S. Dist. LEXIS 136516 (N.D. Cal. Oct. 6, 2015).** Plaintiff, a delivery driver, brought a collective action alleging that Defendant misclassified him and other drivers as independent contractors and denied them minimum and overtime wages in violation of the FLSA. Plaintiffs moved for conditional certification of a collective action. The Court granted the motion. The Court noted that Plaintiff submitted evidence that the delivery drivers had similar duties, as they performed local deliveries to Defendant's customers pursuant to the terms negotiated by Defendant. *Id*. at *24. The drivers signed agreements that classified them as independent contractors. The agreements did not have specific end dates, and did not include overtime or minimum wage protections. *Id*. at *24-25. Drivers were also responsible for paying many of their own expenses. *Id*. at *25. The Court observed that the deposition

testimony of Defendant's Rule 30(b)(6) witness and the declarations of several opt-in Plaintiffs supported Plaintiffs' allegations. *Id.* The Court remarked that these similarities demonstrated that there was some factual basis for Plaintiff's allegations that Defendant misclassified its delivery drivers as independent contractors and improperly denied them minimum wages and overtime pay. *Id.* Defendant contended that there were numerous material difference among service providers that would make conditional certification inappropriate. Defendant demonstrated that while the agreements followed the same template as Plaintiff's agreement, they included different pay structures, such as straight commission, a per-route fee, or some combination of the two. *Id.* Defendant therefore argued that determining whether its delivery drivers were misclassified was a fact-intensive determination. Defendant cited to *Silverman v. Smithkline Beecham Corp.*, 2007 U.S. Dist. LEXIS 80030 (C.D. Cal. Oct. 15, 2007), where conditional certification was denied because the members of the collective action worked in eight different business units that operated in different ways, and Plaintiff failed to provide evidence that the alleged similarities were common across the different business units. *Id*. at *29. The Court remarked that while Defendant's transportation services providers used different business models and pay structures, they performed the same duties, they were all subject to the agreements based on the same templates, and they were all classified as independent contractors. *Id.* The Court reasoned that this case was far different from *Silverman*, and that Plaintiffs satisfied their modest burden at the conditional certification stage under 29 U.S.C. § 216(b). Accordingly, the Court conditionally certified the collective action.

***Scott-George, et al. v. PVH Corp.*, 2015 U.S. Dist. LEXIS 157410 (E.D. Cal. Nov. 19, 2015).** Plaintiffs, a group of non-exempt employees, brought a collective action alleging that Defendant violated the FLSA by denying them overtime compensation and subjecting them to numerous illegal policies and procedures. Plaintiffs sought certification of eight sub-classes. The Court granted Plaintiff's motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). Defendant argued that Plaintiffs' two overtime sub-classes did not meet the numerosity requirement because Defendant's time records indicated that only 58 non-exempt California employees worked over 12 hours in one day. *Id*. at *8. Defendant contended that membership in the security bag check sub-class (sub-class III) was impossible to ascertain because there was no way to know which employees were subjected to bag checks. *Id*. at *9. Defendant argued that Plaintiffs' pay card sub-class (sub-class IV) might be mooted by the settlement in *Chavez v. PVH Corp.*, Case No. 13-CV-01797 (N.D. Cal.). *Id*. Defendant also contended that Plaintiffs failed to show numerosity concerning the meal period sub-class (sub-class V). *Id*. At the outset, the Court noted that although not all of the non-exempt employees would be included in each class, a large percentage of those employees were all subjected to the same pay structure. *Id*. at *10. As to the overtime sub-class, the Court observed that even if Defendant's number was true, 58 class members was sufficient for numerosity. *Id*. Defendant argued that determining the identify of class members for sub-class III was impossible because there was no way to determine which employees were subjected to bag checks. The Court remarked that a large percentage of the employees would have carried bags or purses to work in order to carry their belongings, such as wallets, keys, and phones. *Id*. at *11. These employees would be part of the sub-class and would therefore satisfy numerosity. *Id*. The Court also determined that because final approval of the settlement had not yet been granted in *Chavez*, it would not base its determination of whether to certify a class on the probability of what might happen in another legal matter. *Id*. Accordingly, the Court found that Plaintiffs satisfied numerosity. Defendant further asserted that common questions of law did not predominate for sub-class III's claims because individualized inquiries were required to determine whether time spent undergoing bag checks was compensable and to determine whether the *de minimis* defense was applicable. The Court observed that that the bag check policy was a universal policy that was applied to all employees who brought purses or bags to work. *Id*. at *27. Even assuming that the *de minimis* defense applied, the Court opined that the question of whether it was a valid defense was a common question that would generate a class-wide answer. *Id*. at *28. Likewise, the Court found that the legality of Defendant's policy that entailed automatic pay card issuing to employees did not require the Court to delve into each employee's subjective perception, and therefore Plaintiffs met the predominance requirement for sub-class IV. *Id*. at *29. Defendant also argued that managers had discretion as to the precise time an employee could take meal or rest breaks, and thus, common questions did not predominate for sub-classes V and VI. Defendant acknowledged that its policy provided a 30 minute meal period for every 5 consecutive hours, and a 10 minute paid break for every 4 hours worked. The meal and

rest period policies were distributed to store managers via memos from Defendant's Human Resources Department with instructions to review the policy with all employees. *Id*. at *31. Plaintiffs averred that both policies were facially defective, and there was nothing ambiguous about the language of Defendant's policy. *Id*. The Court observed that the reasonable inferences that could be drawn by Plaintiffs' allegations constituted sufficient evidence to satisfy Plaintiff's burden of establishing predominance. *Id*. at *32-33. Accordingly, the Court certified the various sub-classes.

***Senne, et al. v. Kansas City Royals Baseball Corp.,* 2015 U.S. Dist. LEXIS 143011 (N.D. Cal. Oct. 20, 2015).** Plaintiffs, a group of minor league baseball players, brought a collective action under the FLSA alleging that Defendants, Major League Baseball ("MLB"), its member franchises, and its former Commissioner, failed to pay them the minimum wages and overtime compensation. According to the complaint, the Major League Rules ("MLR") gave MLB and the franchises extensive control over minor league baseball and the franchises paid the salaries and benefits of the minor league players. *Id.* at *44-45. Under the Minor League Uniform Player Contract ("UPC"), minor league players received payment only during the championship season despite obligating them to perform professional services on a calendar year basis, including the championship playing season, training season, exhibition games, and any official play-off series. *Id.* at *48-49. The UPC also required the minor league players to participate in the exhibition games and maintain their playing condition and weight during the off-season without any pay. *Id.* Plaintiffs moved for conditional certification of a collective action of all minor league players who worked for the MLB or any MLB franchise under the UPC since February 7, 2011. *Id.* at *49. Plaintiffs contended that they were similarly-situated under the FLSA because, under the MLR and the UPC, all of them worked without compensation during the off-season, played six to seven games a week, engaged in protracted travel during the championship season without receiving overtime pay, and adhered to the same grueling daily schedule on game days without receiving minimum wages. *Id.* at *84. Plaintiffs also claimed that during the championship seasons they worked more than 40 hours a week without any overtime compensation, and offered 40 declarations by minor league players which contended they shared common duties, responsibilities, and obligations regardless of the franchise or affiliate. *Id.* The Court granted Plaintiffs' motion, finding that Plaintiffs met their lenient burden of showing that they were similarly-situated. *Id.* at *85. The Court noted that all of the declarations submitted by Plaintiffs stated that the players performed work during the off-season without any compensation. *Id.* Defendants argued that conditional certification should not be granted because the nature and quantity of the work performed by Plaintiffs during the off-season varied depending on numerous factors, including skill level and team, and that the activities Plaintiffs performed did not constitute work under the FLSA. The Court rejected these arguments and stated that such contentions could be appropriately addressed at the second stage certification process, when it could analyze the disparate factual and employment settings of the individual Plaintiffs and various defenses available to Defendants with respect to the individual Plaintiffs. *Id.* at *86. Plaintiffs demonstrated a nexus between their claims based on the fact that Defendants subjected them all to a uniform policy of paying a set salary without regard to the number of hours worked in a week, and therefore the Court concluded that Plaintiffs' allegations that they were subject to a uniform policy that resulted in failure to meet the minimum wage requirements and overtime compensation of the FLSA were sufficient under 29 U.S.C. § 216 (b). *Id.* at *90-91. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Taylor, et al. v. FedEx Freight, Inc.,* 2015 U.S. Dist. LEXIS 64177 (E.D. Cal. May 15, 2015).** Plaintiff, a truck driver, brought a putative class action alleging that Defendant, a leading transportation company, violated the California Labor Code by failing to pay adequate wages. Specifically, Plaintiff alleged that because Defendant compensated drivers solely based upon the mileage they drove, the compensation did not take into account non-driving activities performed during the course of a trip, including pre-and-post-trip inspections, trip related paperwork/placarding, and limited delay intervals. *Id.* at *7. Plaintiff also alleged that Defendant did not provide meal and rest breaks and failed to provide accurate wage statements. *Id.* at *3. Plaintiff moved to certify a class of current and former line-haul drivers based on Defendant's alleged failure to pay adequate wages. *Id.* at *2. The Magistrate Judge recommended certifying the class. First, the Magistrate Judge found that Plaintiff met the numerosity requirement, as the evidence demonstrated that there were at least 100 line-haul drivers in California during the defined class period. Second, the

Magistrate Judge determined that Plaintiff met the commonality requirement as Plaintiff challenged uniform policies and systemic practices that applied uniformly to the class of employees. *Id.* at *19. Because Defendant did not dispute the existence of the company-wide policy of mileage pay for non-driving activities, the Magistrate Judge concluded that the issue of whether Defendant's policies and practices complied with California's specific requirement was the type of question that could be answered on a class-wide basis. *Id.* at *18-19. Third, the Magistrate Judge ruled that Plaintiff met the typicality requirement as he presented a theory that involved Defendant's common practice and policy of denying all class members minimum wage for hours worked, and Plaintiff suffered the same injury as a result of the policies. *Id.* at *20. Fourth, the Magistrate Judge found that Plaintiff met the adequacy requirement as his current claims and interests were identical to the class, and his litigation record demonstrated his zealous advocacy on behalf of the class. *Id.* at *23. The Magistrate Judge noted that in Plaintiff's deposition, he admitted that he had filed several lawsuits against Defendant and would have filed more if he was still working; however, the Magistrate Judge opined that this did not rise to a level sufficient to show that he was an unduly antagonistic litigant against Defendant. Further, the fact that he had reached a settlement with Defendant in another class action alleging similar unpaid wage claims militated against any concern that Plaintiff was improperly motivated by animus toward Defendant. *Id.* at *21-24. The Magistrate Judge therefore concluded that Plaintiff was an adequate class representative. Further, the Magistrate Judge found that Plaintiff met the predominance requirement as Defendant's uniform pay policy was amenable to class-wide treatment. *Id.* at *30. Although Defendant argued that it was difficult to determine whether drivers used compensated time to perform other non-driving activities, the Magistrate Judge noted that Plaintiff's theory of liability did not require identifying specific hours that Defendant did not compensate below minimum wages; rather Plaintiff asserted that Defendant's pay plan systematically failed to separately compensate employees for non-driving activities, which was an appropriate class question that predominated over any individual questions. *Id.* at *32-34. Finally, the Magistrate Judge ruled that class action was a superior method to resolve the issue because all class members' allegations were based on uniform policies and practices giving rise to predominantly common questions of fact and law. *Id.* at *47. Accordingly, the Magistrate Judge recommended granting Plaintiffs' motion for class certification.

***Thurmond, et al. v. Presidential Limousine,* 2015 U.S. Dist. LEXIS 109588 (D. Nev. Aug. 19, 2015).** Plaintiffs, a group of limousine drivers, brought a collective action alleging that Defendant failed to pay them minimum wage and overtime in violation of the FLSA. Plaintiffs sought conditional certification of a collective action comprised of similarly-situated limousine drivers who worked for Defendant and were not paid overtime and minimum wages, and who were required to improperly share a portion of their tips with Defendant and/or their managers and owners. *Id.* at *2. The Court granted the motion in part. *Id.* at *11. Noting that the burden placed on Plaintiffs at the conditional certification stage is minimal, the Court found that Plaintiffs met their threshold burden of showing that they were similarly-situated to other limousine drivers employed by Defendant who did not receive overtime pay. *Id*. at *6-7. The Court, however, found that Plaintiffs failed to show that they were similarly-situated to a proposed collective action of drivers who were not paid minimum wage and/or required to share a portion of their tips with Defendant and/or their owners and managers. *Id.* at *7. Accordingly, the Court granted in part Plaintiffs' motion for conditional certification pursuant to 29 U.S.C. § 216(b).

***Torres, et al. v. Mercer Canyons, Inc.,* 2015 U.S. Dist. LEXIS 50492 (E.D. Wash. April 8, 2015).** Plaintiffs, a group of farm workers, brought a putative class action alleging that Defendant violated the Migrant and Seasonal Agricultural Worker Protection Act and the Washington Consumer Protection Act by not informing them about the availability of higher-paying H-2A visa jobs. According to the complaint, Defendant hired the Washington Farm Labor Association to help it recruit H-2A workers for the 2013 season, and the DOL approved Defendant's H-2A application and issued a clearance order approving 44 workers for a defined period. *Id.* at *2. Plaintiffs alleged that Defendant never informed them of these jobs. In seeking class certification, Plaintiffs proposed an "inaccurate information class" consisting of all domestic migrant and seasonal farm workers employed as vineyard workers by Defendant in 2012, who sought employment or worked at Defendant's farm for a defined period. *Id.* at *4. Plaintiffs also proposed a sub-class of "unequal pay workers" who received less than $12 per hour without further referrals. *Id.* The Court granted class certification, finding that Plaintiffs met the Rule 23 requirements. First, the Court held

that the proposed class and sub-class were sufficiently ascertainable, as the class could be determined through employment documents of Defendant and its contractors, and the sub-class by Defendant's payroll records. *Id.* at *6-7. Second, the Court determined that Plaintiffs met the numerosity requirement, since the putative class consisted of more than 600 identified individuals, and the sub-class of more than 200. *Id.* at *8. Third, the Court found that Plaintiffs met the commonality requirement because Plaintiffs presented the common question of whether Defendant had a consistent practice of failing to tell its workers about the availability of $12 per hour work for the inaccurate information class, and the question of whether Defendant had a practice of willfully withholding wages by failing to pay $12 per hour for the work covered by the clearance order for the sub-class. *Id.* at *8-9. Fourth, the Court ruled that Plaintiffs met the typicality requirement, as the representative Plaintiffs' claims arose from the same practice or course of conduct as those of the class members. Fifth, the Court concluded that Plaintiff met the adequacy requirement, for there was no evidence of any conflicts, Plaintiffs' attorneys were qualified and experienced, and the named Plaintiffs were able to act on behalf of the entire class. Further, the Court found that Plaintiffs met the predominance requirement as the question of whether Defendant had a policy to provide misleading information to job-seekers predominated over the exact interaction between individual job-seekers and Defendant. *Id.* at *16. Although Defendant contended that individual proof would be necessary to calculate the damages for each class member, the Court determined that a class action would be superior to other methods for resolving the controversy, since the cost of pursuing the claims individually outweighed any potential recovery, and there appeared to be no major impediments in managing the matter as a class action. *Id.* at *17. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Tschudy, et al. v. J.C. Penny Corp., Inc.,* 2015 U.S. Dist. LEXIS 165897 (S.D. Cal. Dec. 9, 2015).** Plaintiffs, a group of part-time associates, brought a class action alleging that Defendant's "My Time Off Policy" ("MTO Policy") violated § 227.3 of the California Labor Code, which requires that all part-time and full-time employees receive a *pro rata* share of their vacation benefits when their employment with Defendant terminates. *Id.* at *3. In moving for class certification, Plaintiff proposed a class of part-time non-management associates ("PTNMAs") and management associates ("MAs") employed in California by Defendant for a defined period, who did not received MTO deposits. *Id.* at *6. Defendant moved for decertification of the class or, in the alternative, to modify the class definition on the basis that the class definition was overbroad. The Court granted Defendant's motion and determined that the class definition was overly broad and ambiguous. *Id.* at *13. First, the Court found that MAs were improperly included in the class definition. Defendant subjected MAs to a different vacation benefits package, and Plaintiffs, all PTNMAs, participated in different vacation benefit plans with a different waiting period and additional terms. *Id.* at *8-9. Second, the Court determined that Defendant's current employees must be excluded from the class. Plaintiffs' central allegation was that Defendant violated § 227.3 by not paying them for unused vacation time at the time they terminated their employment with Defendant. Because current employees could not have such a claim, the Court held that they should be excluded from the class. *Id.* at *10. Third, the Court held that PTNMAs with arbitration provisions should be excluded from the class. Defendant asserted that all PTNMAs employed after July 2009 were subject to arbitration as part of the employment relationship, and thus putative class members with arbitration provisions could not be included in the class. Finally, the Court ruled that the class was so ambiguously defined that three of the four named Plaintiffs did not appear to be class members because they received MTP deposits during the class period. *Id.* at *19. In addition, the analysis revealed that members of the class who worked the requisite number of hours, but did not comply with the one year employment condition to work until the first of the following month, would have unique claims requiring the application of principles of equity and fairness to resolve their claims. *Id.* Given such ambiguity, the Court declined to certify the proposed class, but granted Plaintiffs leave to file an amended class definition. Accordingly, the Court granted Defendant's motion to decertify the class.

***Vasquez, et al. v. First Student, Inc.,* 2015 U.S. Dist. LEXIS 30631 (C.D. Cal. Mar. 12, 2015).** Plaintiff, a former school bus driver, brought a putative class action alleging that Defendant violated the California Labor Code by failing to pay its drivers minimum wages for all hours worked and by failing to provide accurate wage statements. Plaintiff also asserted that Defendant paid drivers based upon the activities they performed without accounting for rest breaks as required by the California Labor Code. Plaintiff moved for class certification and proposed various sub-classes, including: (i) a minimum wage sub-class;

(ii) a rest break class; (iii) a wage statement sub-class; (iv) a piece-rate wage statement sub-class; and (v) a derivative wage statement sub-class. The Court denied Plaintiff's motion, finding that Plaintiff failed to meet the predominance requirement. *Id.* at *14. At the outset, the Court found that Defendant did not use a piece-rate plan to pay drivers as Plaintiff asserted. The applicable collective bargaining agreement ("CBA") showed that Defendant paid its drivers on varying hourly wages depending on driver's seniority. Further, although Defendant allocated set hours for each task to the drivers, drivers had the opportunity to correct the schedule with the actual hours worked if they found any discrepancies. *Id.* at *17. The Court thus found that Defendant did not pay drivers a single rate based on the task itself, but rather based on his or her hourly wage rate for the number of hours worked. *Id.* According to the Court, to the extent this system involved any discrepancies, it could not be resolved on a class-wide basis. As the Court explained, for Plaintiff to prove Defendant's liability relying upon a piece-rate system, an individualized inquiry would have to be conducted to determine: (i) whether drivers actually worked more than the time allocated for each task on a given day; (ii) whether drivers filled out an exception form to indicate he or she worked more hours; and (iii) whether Defendant paid drivers for the extra time worked. *Id.* at *17-18. The Court determined that individual issues predominated over any common issues that might exist relating to Plaintiff's minimum wages claim, and accordingly, denied certification to the proposed minimum wage class. The Court next found that substantial manageability problems precluded certification for the proposed rest break class. Plaintiff submitted no viable method "of determining when (or if) a particular driver took a rest break on a particular day, short of obtaining testimony regarding each driver at each location." *Id.* at *21-22. The parties lacked any records of rest breaks and provided conflicting declarations. The Court therefore held that individualized inquiries, unassisted by wage statements or similar date, rendered the rest break class unmanageable. Finally, the Court denied certification to the wage statement class and the proposed sub-classes, finding lack of sufficient evidence to allow certification. The Court noted that Plaintiff submitted only her own non-compliant wage statement, thus failed to show a common class-wide injury. *Id.* at *25. The Court further noted that, to the extent that drivers received non-compliant wage statements, an individualized inquiry would be necessary to see which wage statements did not comply (and if any complied after Defendant contacted its third-party vendor, who generated wages statements, about the error). *Id.* at *26. Accordingly, the Court denied Plaintiff's motion for class certification.

***Walden, et al. v. State Of Nevada Department Of Corrections,* 2015 U.S. Dist. LEXIS 33129 (D. Nev. Mar. 16, 2015).** Plaintiffs, a group of correctional officers, brought a collective and class action on behalf of themselves and all other similarly-situated individuals alleging various causes of action for unpaid wages under both the FLSA and the Nevada Revised Statutes. Plaintiffs alleged that Defendant subjected all proposed class members to a common plan, policy, or practice of requiring them to perform various activities "off-the-clock" and without compensations allegedly in violation of the FLSA. *Id.* at *5-6. Plaintiffs further alleged that Defendant maintained this policy in regulations, operating procedures, and communications applicable to all its hourly paid correctional officer employees. *Id.* at *6. The uncompensated tasks allegedly included attending roll-call, picking up and dropping off equipment, and providing or receiving work-related information and communications prior to each shift. *Id.* Plaintiffs filed a motion for conditional certification of a collective action under 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion. *Id.* The Court found that Plaintiffs had sufficiently alleged that they were "similarly-situated" to the proposed opt-ins to grant circulation of § 216(b) notice. *Id.* at *5. Although the proposed notice was based in large part upon other forms approved for use, Defendant raised several objections to it, including limiting the class claims to individuals who were not sergeants or lieutenants, and requesting a specific date to be set for filing the consent to join. *Id.* at *6-10. While the Court overruled Defendant's objection to limit the class claims, finding no basis to such limit, it agreed and held that the notice should be amended to include a date by which to file the consent form. *Id.* at *7-8. The Court also ordered amendments to the proposed notice to include disciplinary issue information relating to the effect of joining the action, and the information about the required approval of certain settlement amounts that exceed the statutory cap. *Id.* at *8-9. The Court further tolled the statute of limitations during the notice period, finding that equity warranted such tolling. *Id.* at *10-11. Accordingly, the Court granted Plaintiffs' motion for circulation of notice pursuant to § 216(b). *Id.* at *11.

***Woods, et al. v. Vector Marketing Corp.*, 2015 U.S. Dist. LEXIS 32370 (N.D. Cal. Mar. 16, 2015).** Plaintiffs, a group of college-aged sales representatives ("SRs"), brought an action seeking minimum wage for the training program they underwent before starting as SRs. *Id*. at *3. Plaintiffs alleged that they were qualified as employees under the FLSA during their training program. Plaintiffs moved for conditional certification of a collective action, which the Court granted. This action was related to *Harris v. Vector Marketing Corp.*, Case No. 08-CV-5198, a similar FLSA claim by California SRs, where the Court had granted certification. *Id.* at *4. Here, it was undisputed that the training program and payment policy were sufficiently uniform to make Plaintiffs similarly-situated to the putative collective action members. Further, Defendant's Legal Affairs Manager attested that the training program was subject to certain company-wide policies that were in place since 2011, including requesting personal recruit lists on the third day of training and requesting that the trainees identify prospective customers during the second day of training. *Id.* at *8. The Manager also stated that over 90% of Defendant's SRs had completed the initial training seminar. *Id.* Although Defendant did not dispute conditional certification, it argued that the universe of individuals subject to conditional certification and notice was overbroad and included individuals who were not similarly-situated to Plaintiffs. Plaintiffs offered to meet and confer to address Defendant's objections, including those related to individuals who completed on-line-only training, those related to individuals who agreed to arbitration, those related to individuals who did not complete all three days of training and did not provide a personal recruitment list, those related to individuals whose claims were time-barred, and those related to excluding members of the certified *Harris* collective action. *Id.* at *9-10. As a result, the Court granted Plaintiffs' motion for conditional certification, subject to the parties' agreement on language defining the scope of the collective action. Plaintiffs proposed using a short Facebook advertisement, such that when a collective action member clicked on the advertisement, he or would be redirected to the case website that had the long-form notice and consent to join form. *Id.* at *12. The Court opined that using a Facebook advertisement was a useful form of ensuring actual notice because a substantial majority of the potential Plaintiffs were college-aged, who were particularly likely to maintain a social networking presence. The Court, however, opined that the exemplar ad provided by Plaintiffs needed refinement, and directed the parties to meet and confer regarding a stipulated form of the Facebook ad. The Court also concluded that electronic signatures were appropriate and granted Plaintiffs' request for electronic opt-ins. Electronic signatures were part of the ordinary course of business at Defendant's company, including with respect to its SRs, and Plaintiffs proposed sufficient safeguards, including a robust identity verification process, to ensure that the electronic signatures would be obtained in a way that minimized any disputes regarding authenticity. *Id.* at *17. Finally, the parties stipulated to toll the statute of limitations from May 15, 2014 through the date that the Court disposed of the parties' cross-motions for summary judgment. Plaintiffs also sought equitable tolling, on the basis of the delay caused by the case reassignment and argued that Defendant could have shortened the process of moving for conditional certification by informing Plaintiffs that it would not oppose substantial portions of the motion. The Court observed that consistent with the FLSA, good faith motion practice by a Defendant does not amount to wrongful conduct warranting equitable tolling of FLSA claims. *Id.* at *20. Further, the Court remarked that although the conduct of Defendant's counsel may not have been exemplary of the highest professional courtesy, Plaintiffs failed to show that counsel engaged in misconduct or misrepresentations reflective of bad faith or otherwise of the type that justified equitable tolling. *Id.* Thus, the Court denied Plaintiffs' request for equitable tolling.

Editor's Note: The notice provisions authorized by the Court in *Woods* represent some of the most pro-social media terms ever approved under 29 U.S.C. § 216(b).

***Woods, et al. v. Vector Marketing Corp.*, 2015 U.S. Dist. LEXIS 118678 (N.D. Cal. Sept. 4, 2015).** Plaintiff brought an action alleging that Defendant violated the FLSA and state labor laws by not paying trainees who underwent Defendant's mandatory three-day program. Defendant sold CUTCO-brand kitchen cutlers, kitchen accessories, and sporting knives through a "direct marketing" sales model that involved in-home sales appointments conducted by Defendant's sales representatives, whom Defendant required to attend training either on-line or via a three-day classroom seminar. *Id.* at *4-5. Although Defendant barred the trainees from selling any CUTCO knives during the training period, it asked them to make lists of potential customers and to schedule appointments with those people for demonstrations once training was completed. *Id.* at *7. Defendant also asked its trainees to provide a list of friends and other

potential recruits who might want to train to become Defendant's sales representatives. *Id.* Defendant did not pay its recruits for any time they spent in training. Plaintiff represented employees who attended the classroom seminar, and alleged that Defendant's recruits were its employees, and Defendant improperly denied them wages. *Id.* at *8. After the Court granted conditional certification of the collective action relative to Defendant's trainees in California, Plaintiff moved for conditional certification of a nationwide FLSA collective action and Rule 23 certification of classes of Defendant's employees who underwent in-person sales training in California, Florida, Illinois, Michigan, and New York. *Id.* at *12-15. The Court granted Plaintiff's motions, finding that the collective action members were similarly-situated and Plaintiff met the Rule 23 requirements for his state law class claims. The Court rejected Defendant's argument that a portion of the conditionally certified class should be decertified because there was a potential for variation on the issue of whether Defendant derived immediate advantage from the trainees' activities. *Id.* at *22. Specifically, Defendant argued that recruits that attended all three days of Defendant's training but who did not provide any recruit names to Defendant were not similarly-situated to those other recruits who provided recruit lists. *Id.* at *22-23. The Court found that any such variance was not sufficient to defeat final FLSA certification because it was undisputed that Defendant provided the same nationwide working environment for all its trainees and it had an undisputed policy of not compensating recruits for time spent in training. *Id.* at *23-24. Moreover, according to the Court, any such variance could be easily resolved at summary judgment or during a trial. *Id.* at *25. The Court therefore granted final certification of a collective action under the FLSA. In addition, the Court granted class certification relative to Plaintiff's state law claims, finding that Plaintiffs' proposed classes satisfied the Rule 23 requirements. The state-based classes included 23,000 potential members in California, 8,000 in Florida, 8,000 in New York, 4,000 in Illinois, and 3,000 in Michigan. *Id.* at *34. Plaintiff met the commonality requirement by raising the common question of whether Defendant's recruits were its employees under the laws of each of the five states at issue. *Id.* at *35. Plaintiff met the typicality and adequacy requirements, as there was no dispute that the named Plaintiff and putative class members suffered the exact same injury *i.e.*, all were denied wages for the time they spent in training and were subjected to the same uniform policies and practices during training. The Court held that Plaintiff had no conflict of interest with the class members, regardless of whether any particular individual provided a recruit list or not. *Id.* at *40-41. Because each state law class action could be resolved on a uniform basis using class-wide common proof, the Court concluded that Plaintiff also satisfied the predominance requirement. *Id.* at *43. Finally, the Court rejected Defendant's argument that low percentage of opt-in responses meant that class members had individual interests in controlling his or her own individual lawsuit against Defendant, reasoning that Defendant's position was predicated on a fundamentally flawed premise, and Defendant presented no evidence to support its argument. *Id.* at *45-46. Accordingly, the Court granted Plaintiff's motion for class certification and final certification of a collective action.

***Zackaria, et al. v. Wal-Mart Stores, Inc.,* 2015 U.S. Dist. LEXIS 67048 (C.D. Cal. May 18, 2015).** Plaintiff, an asset protection coordinator ("APC"), brought a putative class action alleging that Defendant knowingly misclassified him and other class members as exempt employees in violation of the California Labor Code and thus failed to pay them overtime compensation, missed meal periods, or rest breaks. *Id.* at *2. Plaintiffs moved for class certification of all California-based salaried APCs in California from four years preceding the filing of the action to the final judgment. The Court denied certification, finding that Plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3). *Id.* at *14. The payroll records suggested that the day-to-day activities and level of discretion exercised by employees varied greatly from one APC to the next. While APCs supervised anywhere from one to twelve of more hourly-paid asset protection associates ("APAs"), certain APCs supervised only one employee, which showed that some putative class members did not customarily and regularly direct the work of two or more other employees sufficient to satisfy the factors of the managerial exemption. *Id.* at *28-29. The record further showed significant variation among APCs relative to their authority to hire and fire. *Id.* at *31. While many APCs testified that they did not have the authority to hire or fire employees, some of their declarations indicated differences in the way store managers delegated hiring and firing responsibilities to the APCs. *Id.* at *32. Regarding the administrative exemption factors, although many APCs stated that their primary tasks included conducting quality control audits and described it as "ordinary inspection work" that only required filing out checklists, some stated that they worked more on quality, safety and health, and compliance

policy and it was actually supervisory work furthering the organization's goals regarding safety and security. *Id*. at *33-36. The Court also observed that the evidence suggested that the extent of supervision under which each APC operated differed by store and store manager, by experience level, by market asset protection manager, and over periods of time. *Id.* at *40. With such individualized APCs' work experiences, the Court concluded that the issue whether they primarily engaged in exempt duties could not be answered with common proof. *Id.* at *44-45. According to the Court, the common proof that APCs received very similar training and had identical overall job expectations was insufficient to establish the presence or absence of nearly all of the exemption conditions, and thus the merits could not be resolved without significant individualized inquiries. *Id.* at *49-50. The Court therefore held that common questions did not predominate, and accordingly, denied Plaintiff's motion for class certification. *Id.* at *50.

(x) Tenth Circuit

***Blair, et al. v. Transam Trucking, Inc.,* 2015 U.S. Dist. LEXIS 110188 (D. Kan. Aug. 20, 2015).** Plaintiffs, a group of truck drivers, brought an action alleging that Defendant, a trucking company, violated the FLSA and the Kansas Wage Payment Act ("KWPA") by misclassifying them as independent contractors and by failing to pay minimum wages and making improper deductions. Plaintiffs moved for conditional certification of a collective action under the FLSA and for class certification under Rule 23. *Id.* at *4. The Court found that Plaintiffs established all the Rule 23 requirements and granted the motions. Plaintiffs established ascertainability by proposing a sufficiently precise and objective class of all leased drivers employed by Defendant who entered into an independent contractor agreement with Defendant and who leased a truck through Defendant's wholly-owned subsidiary since August 21, 2006,. *Id.* at *9. Plaintiffs established numerosity by estimating that class members included more than 1,000 drivers. *Id* .at *10. Plaintiffs showed commonality by raising the common question of whether class members were employees or independent contractors. *Id.* at *11. Plaintiffs established typicality and adequacy of representation as the named Plaintiffs' claims were similar to the claims of other class members, and they had no interests that were antagonistic to the rest of the class. *Id.* at *12. Plaintiffs proved predominance by submitting common evidence of the owner-operator handbook and independent contractor agreement, and the equipment lease agreements that were substantially the same for all drivers; based on this evidence, Plaintiffs asserted that the question of whether Defendant had the right to control Plaintiffs could be determined from this common evidence. *Id.* at *20. Plaintiffs established superiority by establishing similar claims among class members that made a class action a preferable method to resolve the dispute. *Id.* at *21. The Court therefore concluded that Plaintiffs' proposed class satisfied the Rule 23 requirements and granted class certification for Plaintiffs' KWPA claims. In addition, the Court granted Plaintiffs' motion for conditional certification under the FLSA on the basis that Plaintiffs were similarly-situated. The Court agreed that all potential collective action members received the same training and handbook of polices, and entered into the same independent contractor and equipment lease agreements. *Id.* at *26. Further, they all had essentially the same job duties of driving to make deliveries, and Defendant paid them all under similar per-mileage pay polices. *Id*. The Court thus found that Plaintiffs established that they were victims of a single decision, policy, or plan, sufficient to grant conditional certification at this notice stage of the case pursuant to 29 U.S.C. § 216(b). *Id.* at *27. Accordingly, the Court granted Plaintiffs' motions for class certification and conditional certification of a collective action.

***Bustillos, et al. v. Board Of County Commissioners Of Hidalgo County,* 2015 U.S. Dist. LEXIS 143522 (D.N.M. Sept. 16, 2015).** Plaintiffs, a group of correctional officers, sergeants, and lieutenants, brought an action alleging that Defendant violated the FLSA and state wage & hour laws, as well as state law claims for breach of contract and unjust enrichment, by requiring them to work longer than the time allotted for their scheduled shifts without any compensation for the extra work. *Id.* at *2. According to the complaint, Defendant paid all Plaintiffs on the basis of pre-assigned shifts, did not allow them to leave their posts until relieved by the incoming employee for the next shift, and required them to do various clerical tasks after the end of their shift, such as reconciling call logs. *Id.* at *4. Plaintiffs alleged that Defendant's practice resulted not only in Plaintiffs losing regular pay for the work done after the end of their shifts, but also resulted in Plaintiffs losing out on overtime pay. *Id.* at *3. Proposing two sub-classes of employees, Plaintiffs moved for conditional certification of a collective action under the FLSA and certification of a class action under Rule 23 on their state law claims. Plaintiffs alleged that they performed largely the same

duties within the proposed sub-classes and that Defendant subjected them to the same practices and all suffered the same method of calculation of wages owed. *Id.* at *8-10. The Court conditionally certified the case as a collective action but denied Plaintiffs' request for class certification without prejudice. *Id.* at *83. In granting conditional certification, the Court found that Plaintiffs have pled sufficient facts to demonstrate that they were similarly-situated within the meaning of the FLSA. The Court noted that Defendant employed Plaintiffs and other putative collective action members and that they worked in the same location performing similar job duties. *Id.* at *86-87. Further, Plaintiffs were all members of the same bargaining unit governed by the same County Labor Ordinance, and their damages were all derived from the same decision, policy, or plan of allegedly requiring pre-shift, post-shift, or on-call work. *Id.* at *87. Plaintiffs also supported their assertion that they were similarly-situated to putative collective action members by presenting proof through Defendant's posted job descriptions, deposition testimony, and its policies and procedures manuals. *Id.* at *94. The Court thus concluded that Plaintiffs showed a colorable basis for the claim of similarity, and accordingly granted conditional certification of a collective action under 29 U.S.C. § 216(b). The Court, however, denied Plaintiffs' motion for class certification under Rule 23, finding that the class failed to meet the numerosity requirement. *Id.* at *100. Plaintiffs estimated 50 potential Plaintiffs and contended that joining each of them would be difficult in the extreme. Plaintiffs, however, failed to explain how joining those potential class members would be so difficult as only a handful of the proposed Plaintiffs resided out of state. *Id.* at *101. Further, Plaintiffs failed to establish that all 50 potential Plaintiffs were deprived of compensation, and at the hearing, Plaintiffs' counsel reiterated the possibility that significantly fewer than 50 people might join the litigation. *Id.* at *102. The Court therefore exercised its discretion in concluding that a class of potentially fewer than 50 employees did not satisfy Rule 23 requirement of numerosity. Although the Court found that Plaintiffs met all other requirements, including commonality and predominance, because of the uncertainty regarding the number of Plaintiffs eligible to join the action, the Court denied Plaintiffs' motion to certify under Rule 23 without prejudice and allowed Plaintiffs to renew their request later. *Id.* at *114. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for conditional certification of a collective action and certification of a class action.

***Colbert, et al. v. Monarch Transportation, LLC,* 2015 U.S. Dist. LEXIS 7586 (D. Kan. Jan. 23, 2015).** Plaintiff, a transportation aid, brought a collective action alleging that Defendant had a general policy and practice that willfully denied its hourly, non-exempt employees overtime pay in violation of the FLSA. Specifically, Plaintiff alleged that Defendant required its employees to work off-the-clock, including time before and after their shifts and during the mandatory unpaid meal break. Defendant admitted in its response brief that it operated under the policies with regard to automatic meal time deductions and on-call compensation. *Id*. at *2. Plaintiff moved for conditional certification of a collective action under § 216(b) of the FLSA for: (i) all hourly transportation aids, drivers, and others in similar positions who worked on-call for Defendant at any time during the last three years (the "on-call" collective action members), and (ii) all hourly, non-exempt employees who worked for Defendant and experienced an automatic meal break deduction at any time during the last three years (the "off-the-clock" collective action members). *Id*. at *6-7. The Court granted Plaintiff's motion. *Id.* at *19. Defendant focused its opposition on the fact that Plaintiff's declaration contained very conclusory and general allegations, and that she failed to provide the Court with names of any potential opt-in Plaintiffs, let alone actual declarations of other potential opt-in Plaintiffs. *Id*. at *8-9. The Court observed that there was not only Plaintiff's allegation that Defendant engaged in a pattern or practice of not paying overtime, but also Defendant's admission that the policies in question indeed existed. *Id*. at *16-17. Thus, the Court found that Plaintiff's allegations, combined with the fact that Defendant admitted to having the policies in question, was sufficient to satisfy the lenient notice-stage standard for conditional certification. *Id*. at *17. The Court approved Plaintiff's proposed notice of claims and consent to join. *Id*. at *18. The Court also directed Defendant to provide to Plaintiff a list of all employees constituting the collective action, with their last known addresses, phone numbers, and dates of employment in an agreeable format for mailing. *Id*. Accordingly, the Court granted Plaintiff's motion for conditional certification. *Id.* at *19.

***Geiger, et al. v. Z-Ultimate Self Defense Studios LLC,* 2015 U.S. Dist. LEXIS 32731 (D. Colo. Mar. 10, 2015).** Plaintiffs, a group of current and former chief instructors, brought a collective action alleging that Defendant misclassified them as independent contractors and failed to pay them minimum wage and

overtime pay in violation of the FLSA. Plaintiffs moved for conditional certification of the collective action pursuant to 29 U.S.C. § 216(b). Plaintiffs asserted that Defendant had created a complex matrix of corporate entities that operated martial arts dojos. They contended that this scheme was specifically designed to shield Defendant from liability for violations of state and federal law, including the FLSA. *Id*. at *8. The Court remarked that while Plaintiffs' proposed notice generally provided adequate notice to potential Plaintiffs, Plaintiffs failed to demonstrate a valid basis to include in the notice the statement, "You are eligible to join this lawsuit if you believe you were paid less than $670.62 in any one-week period." *Id.* at *10-11. The Court noted that the statement must be excised from the notice. The Court ruled that because potential issues concerning tolling of the statute of limitations may remain, the notice would be distributed to Chief Instructors who worked for Defendant between March 10, 2011 and the present. Further, the Court ordered that the form of notice delivered to potential Plaintiffs would provide that any and all consent to join forms must be received by Plaintiffs' counsel no later than June 10, 2015. *Id.* at *11. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action subject to amendment of Plaintiffs' proposed notice.

***Koehler, et al. v. Freightquote.com, Inc.,* 2014 U.S. Dist. LEXIS 182887 (D. Kan. Mar. 18, 2014).** In this action alleging that Defendant violated the FLSA by failing to pay overtime to three categories of its employees, Plaintiffs sought to represent sub-classes comprised of Defendant's employees who worked as account representatives, customer activation specialists, and truckload coverage specialists in the past three-year period. Plaintiffs alleged that Defendant violated the FLSA by classifying these employees as exempt from the FLSA's overtime requirements, thereby denying them overtime pay. *Id.* at *2. In granting Plaintiffs' motion, the Court found that the evidence supported Plaintiffs' argument that they were similarly-situated to the putative collective action members because they had similar job requirements and pay provisions, and Defendant classified them as exempt under a common decision. *Id.* at *11. Moreover, Defendant conceded that employees in the three relevant job categories had similar job duties and that it did not pay overtime to the employees working in those three job categories. *Id.* at *13. The Court found these facts sufficient to conditionally certify Plaintiffs' FLSA claims as a collective action under the lenient notice stage standard, and therefore granted Plaintiffs' motion. The Court, however, denied Plaintiffs' request to approve the proposed notice to putative collective action members giving the parties time to mutually agree on a notice form and submit a joint proposal. *Id.* at *15. The Court also denied Plaintiffs' request for putative collective action members' social security numbers and dates of birth, finding that Defendant had already provided the information Plaintiffs sought to locate potential collective action members, and that the putative collective action members' privacy interests outweighed Plaintiffs' need. *Id.* at *16-17. The Court further denied Plaintiffs' request to order Defendant to post the proposed notice in conspicuous locations at its offices because Plaintiffs failed to demonstrate the need to post such notice. *Id.* at *18. Finally, the Court denied Plaintiffs' request to toll the statute of limitations period for the putative collective action members from the date of filing of Plaintiffs' motion for conditional class certification until the close of the opt-in period, since the request was premature. *Id.* at *22-23. The Court determined that it lacked sufficient information about the potential collective action members' diligence and that Plaintiffs might raise the issue again at the conclusion of the opt-in period when the Court would have more information about the putative collective action members. *Id*. Accordingly, the Court granted Plaintiffs' motion for conditional certification and denied Plaintiffs' other requests.

***Lozoya, et al. v. AllPhase Landscape Construction, Inc.*, 2015 U.S. Dist. LEXIS 42066 (D. Col. Mar. 31, 2015).** Plaintiffs brought an action alleging that Defendant's alleged policy of failing to pay employees for time spent traveling to jobsites ("windshield time") and of taking deductions from wages for equipment damaged on the job violated the FLSA and Colorado's minimum wage law. The Court had previously conditionally certified an FLSA collective action consisting of all Defendant's current and former hourly employees who performed landscape services and/or snow removal within the state of Colorado on or after April 28, 2009. *Id.* at *2. Plaintiffs then sought to certify the same class under Rule 23 with respect to their state law claims, which the Court granted. *Id.* at *2-3. First, the Court found the putative class consisted of approximately 450 employees. *Id.* at *3-4. Hence, numerosity was clearly established. Second, Defendant argued that Plaintiffs failed to establish commonality because of differences in treatment between the different types of employees, *e.g.*, foremen received pay for travel time whereas

other employees did not, and that whether particular deductions were improper must be determined on an employee-by-employee basis. The Court found, however, that the issues of what Defendant's policies were and whether they were illegal were common to the class. *Id.* at *4. Third, Defendant argued that the named Plaintiffs were not typical of the class because they did not have each of the challenged types of deductions from their wages, none of them had deductions for H-2B visas, and none were irrigation technicians. The Court determined that Plaintiffs satisfied the typicality requirement because if they successfully proved that Defendant's policies were illegal, those types of differences among the Plaintiffs were predominantly an issue of individual damages. *Id.* at *5. Plaintiffs argued that certification was appropriate under Rule 23(b)(2) because they sought declaratory and injunctive relief to enjoin Defendant from continuing its allegedly illegal pay policies and procedures. *Id.* at *6. On the contrary, Defendant argued that Plaintiffs sought primarily money damages, and that Plaintiffs had not shown that the disputed policies were still in effect. Id. The Court ruled that class certification was appropriate under Rule 23(b)(2) because an injunction or declaratory relief could be fashioned that enjoined Defendant from continuing the main practices challenged in the complaint. *Id.* Finally, regarding Rule 23(b)(3)'s predominance requirement, Defendant argued that individualized questions predominated because certain employees did not have any deductions taken from their wages and foremen actually received pay for their travel time. Id. at *7. The Court concluded that Plaintiffs satisfied predominance because there were common questions as to what Defendant's policies were and whether they were illegal, and the more individualized issues could be dealt with as part of individual damages calculations. *Id.* Accordingly, the Court granted Plaintiffs' motion for class certification. *Id.*

***Turner, et al. v. Chipotle Mexican Grill, Inc.,* 2015 U.S. Dist. LEXIS 110933 (D. Colo. Aug. 21, 2015).** Plaintiffs, a group of employees of Chipotle Mexican Grill, brought an action pursuant to the FLSA and state laws of Arizona, California, Colorado, and New Jersey, alleging that Defendant had a company-wide policy of requiring non-exempt hourly paid employees to work off-the-clock without pay. *Id.* at *4. Defendant operated a chain of non-franchised Mexican-style restaurants and employed more than 217,000 hourly employees known as "crew members." *Id*. Although Defendant's official time-keeping policy explicitly prohibited any off-the-clock work, Plaintiffs alleged that Defendant deprived its hourly paid employees of compensation by incentivizing managers to understaff restaurants as well as through time-keeping devices that automatically punched employees off-the-clock, even if they continued working. *Id.* at *7. While Plaintiffs moved for conditional certification of a collective action, Defendant argued that the lead Plaintiff, Leah Turner, had her chance to seek national collective certification in a related action entitled *Harris v. Chipotle Mexican Grill, Inc.,* Case No. 13-CV-719, filed in the District Court of Minnesota, and thus her claim should be dismissed on claim preclusion and *res judicata* grounds and be limited to an individual action only. *Id.* at *9. The Court rejected Defendant's argument and granted Plaintiffs' motion. The Court noted that the named Plaintiff originally filed an action against Defendant in March 2013, but voluntarily dismissed it in October 2013, after consenting to join the *Harris* action then pending in Minnesota. Turner was excluded from the *Harris* action after the judge in that case rejected conditional certification of a nationwide collective action and limited the lawsuit to a single Minnesota store. *Id.* at *8. As a result, Turner re-filed her complaint in Colorado, moved for conditional certification of a collective action, and sought to toll the statute of limitations. Turner also included a proposed form of notice, a proposed consent to join form, three complaints filed with the Minnesota Department of Labor and Industry by Defendant's employees alleging new overtime violations, and declarations from four former employees supporting her allegations. *Id.* at *9. Finding that Plaintiffs' allegations established that the putative class members were together the victim of a single decision, policy, or plan, the Court granted conditional certification of a collective action. In doing so, the Court rejected the two-step certification approach to FLSA collective actions, finding that the FLSA was uniformly interpreted as allowing liberalized permissive joinder of any party Plaintiff "similarly-situated, " and the only requirement, per the statute, was that each Plaintiff files his consent in writing to become such a party and such consent was filed in the court in which such action was brought. *Id.* at *14. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action and tolled the statute of limitations for 90 days.

Editor's Note: The decision in *Turner* is unique, and represents a distinct minority approach to interpretation of 29 U.S.C. § 216(b).

(xi) Eleventh Circuit

***Bradford, et al. v. CVS Pharmacy, Inc.,* 2015 U.S. Dist. LEXIS 103616 (N.D. Ga. Aug. 7, 2015).** Plaintiff, a Regional Loss Prevention Manager ("RLPM"), brought a collective action alleging that Defendant improperly classified him and all other RLPMs as exempt under the FLSA and therefore failed to pay overtime. *Id.* at *1. Plaintiff moved for conditional certification of a collective action consisting of current and former RLPMs. Thirty-eight individuals opted-in to the action after the Court granted conditional certification. Defendant subsequently moved for decertification, arguing that multiple distinctions in the job duties performed by various opt-in Plaintiffs revealed after discovery would necessitate individual inquiries into Plaintiff's claims. *Id.* at *4. In support, Defendant introduced testimony of various opt-in Plaintiffs, which revealed a number of differences in the duties they each performed. The differences included varying degrees of responsibility, unique duties, different levels of discretion, and independent judgment exercised by the various Plaintiffs in conducting investigations and audits. *Id.* at *5-7. The Court granted Defendant's motion, finding that Plaintiffs were not similarly-situated. The Court held that the differences in the duties performed by the various Plaintiffs, as well as the varying degrees of discretion and independent judgment they each exercised, would make individualized inquiries inevitable when determining the applicability of a particular FLSA defense. *Id.* at *7. Plaintiff argued that the collective action members shared the same primary duty of performing audits and investigations, and the Court should only consider this relevant to the executive and administrative exemptions. *Id.* at *14-15. Defendant, however, submitted evidence to support its claim that Plaintiffs did not just perform audits and investigations. While the name Plaintiff testified that he only had auditing and investigating as primary responsibilities, an opt-in Plaintiff testified that his primary responsibilities included auditing, investigating, and training. *Id.* at *14. Given the various differences among the job duties, the Court found that it would have to conduct an individualized inquiry for each Plaintiff to determine his or her primary duties. *Id.* Plaintiff also argued that, because Defendant asserted only one defense against Plaintiffs, the issues could be heard together. The Court, however, rejected the argument, finding that Defendant had asserted two defenses; the executive and administrative exceptions, and even if Defendant had asserted only one defense, given the material distinctions between the respective job duties of Plaintiffs, it would still have to conduct a separate analysis for each Plaintiff to determine the applicability of that defense. *Id.* at *15. Accordingly, the Court granted Defendant's motion for decertification.

***Boston, et al. v. United Florala, Inc.,* 2015 U.S. Dist. LEXIS 28244 (M.D. Ala. Mar. 9, 2015).** In this action alleging denial of overtime compensation under the FLSA, Plaintiffs moved for conditional certification of a collective action comprised of hourly employees working at Florala Memorial Hospital's campus at any time in last three years period without receiving overtime pay for work in excess of 40 hours in any seven-day workweek. Plaintiffs presented declarations stating that Defendant did not pay its hourly employees overtime compensation if they worked in excess of 40 hours in a seven day workweek, unless the number of hours they worked exceeded 80 hours in a pay period. *Id*. at *6. Plaintiffs also stated that they did not enter into an agreement that Defendant would use a 14 consecutive day period to calculate overtime instead of a seven day period. Plaintiffs' declarants also averred that there were at least 50 employees subjected to Defendant's overtime practice, and that the number would likely exceed 100. *Id*. at *6-7. On this record, the Court found that Plaintiffs had met that stage one lenient standard for conditional certification under 29 U.S.C. § 216(b) by submitting declarations detailing that Defendant did not pay them overtime pay. *Id*. Defendant argued that Plaintiffs failed to identify a single practice that applied to the employees as the potential collective action members held different positions. *Id*. at *8-9. The Court, however, found that Plaintiffs' declarations established that Defendant did not pay its hourly employees overtime for hours over 40 in a workweek due to Defendant's practice of not paying overtime unless an employee's hours exceeded 80 within a two-week pay period. *Id*. at *9-10. Further, the Court determined that Defendant itself had identified that practice, asserting in its answer that it was entitled to pay overtime based on a period other than a seven-day workweek under 29 C.F.R. § 778.601(a). *Id*. at *10. Therefore, contrary to Defendant's characterization, the Court held that it was the application to hourly employees, regardless of their job duties, of a single employment practice which made the employees similarly-situated. *Id*. While Defendant argued that the number of individuals within the proposed collective action was not sufficiently numerous, Plaintiffs pointed out that the number of potential collective action members they had identified exceeded the minimum number referenced by the Eleventh Circuit under the higher

standard required for Rule 23 class certification. *Id*. at *10-11. Because Plaintiffs had estimated that the total number of potential collective action members would exceed 50, the Court found that under the more relaxed collective action standard of § 216(b), Plaintiffs had adequately demonstrated that sufficient potential collective action members existed. *Id*. Finally, the Court disagreed with Defendant that a different burden of proof should apply in the case because Plaintiffs had already informally notified some potential members of the collective action. As a result, the Court conditionally certified the collective action.

***Calderone, et al. v. Michael Scott*, 2015 U.S. Dist. LEXIS 92528 (M.D. Fla. July 16, 2015).** Plaintiffs, a group of former employees of the Lee County Sheriff's Office, brought an action alleging that Defendant failed to pay them overtime compensate in violation of the FLSA and the Florida Minimum Wage Act ("FMWA"). Plaintiffs moved for both conditional certification of their FLSA claims under 29 U.S.C. § 216(b) and Rule 23(b)(3) certification of their FMWA claims. The Court granted the motions in part. The Court first noted that over 30 others had opted-in to the lawsuit since the action was filed. *Id*. at *4. The Court found that under the lenient standard, Plaintiffs demonstrated that there were additional similarly-situated individuals who wished to opt-in. *Id*. at *5. Plaintiffs sought conditional certification of a collective action consisting of seven different categories of current and former deputies and sergeants. The Court observed that the second, third, and sixth categories did not describe the nature of the uncompensated work performed by the putative collective action members. The Court remarked that the descriptions of Plaintiffs' second, third, and sixth categories should be modified to more clearly specify the nature of the uncompensated work at issue, and thus, granted conditional certification subject to such modifications. Regarding Rule 23 certification, the Court opined that an FMWA class action was not a superior means of adjudication because the overlapping FLSA collective action and FMWA class action were mutually exclusive and irreconcilable. *Id.* at *14. The Court noted that while the FLSA requires putative collective action members who wish to join the action to affirmatively opt-in, Rule 23 class actions require putative class members who do not wish to join the class to affirmatively opt-out. *Id.* at *14-15. The Court reasoned that where the putative FLSA and FMWA classes are identical, the opt-in and opt-out procedures cannot be reconciled. *Id.* at *15. Thus, if a hypothetical Plaintiff – who was a member of Plaintiffs' putative class but did not wish to have her minimum wage claims adjudicated – would do nothing upon receiving notice of the FLSA action, the FLSA provides that she is not bound by the outcome of this case unless she opts-in. *Id.* However, upon receiving notice of the FMWA action, she would have to affirmatively opt-out, and if she did not opt-out, she would become a member of the FMWA action by default and her minimum wage claims would be adjudicated. Thus, the Court remarked that any putative class member who did not wish to be bound by the outcome in this case would have to affirmatively opt-out, despite the fact that the FLSA requires precisely the opposite. *Id.* Thus, the Court denied Rule 23 certification because Plaintiffs' overlapping FLSA and FMWA class actions were mutually exclusive and irreconcilable.

***Cordova, et al. v. R & A Oysters, Inc.*, 2015 U.S. Dist. LEXIS 24443 (S.D. Ala. Feb. 27, 2015).** Plaintiffs, a group of migrant agricultural workers who worked under temporary visas, brought an action alleging violations of the FLSA and the Migrant and Seasonal Agricultural Workers Protection Act. Plaintiffs sought conditional certification of a collective action under 29 U.S.C. § 216(b). The Court granted Plaintiffs' motion. Plaintiffs proposed a collective action consisting of all non-supervisory workers admitted at H-2B temporary foreign workers employed by Defendant during the "class" period. *Id*. at *4. Defendant did not oppose conditional certification, but they objected to Plaintiffs' request to the Court to direct them to produce names, addresses, and telephone numbers of potential collective action members. Plaintiffs suggested that Defendant should provide them the telephone numbers because many potential collective action members permanently resided in isolated rural regions of Mexico, where mail service was unreliable and slow. *Id*. at *6. Plaintiffs also pointed out that the majority of the workers frequently changed addresses and/or were absent from their permanent residences for months at a time due to the migrant labor they performed. *Id.* The Court observed that other case law authorities have taken a variety of approaches to the disclosure of the telephone numbers of the potential collective action members. *Id*. at *7. Because Plaintiffs did not addresses those approaches, and also because Defendant did not have the opportunity to respond, the Court declined to select any approaches to this issue. *Id.* However, the Court granted Plaintiffs' request to grant a five-month period for filing the opt-in notices, which provided Plaintiffs ample opportunity to contact potential collective action members by mail. *Id*. at *7.

***Daza, et al. v. Total Quality Logistics, LLC,* 2015 U.S. Dist. LEXIS 131411 (M.D. Fla. Sept. 29, 2015).** Plaintiff filed an action under the FLSA and Florida Minimum Wage Act, seeking overtime and unpaid minimum wages from Defendant. *Id.* at *1. Only one opt-in Plaintiff joined the action. Defendant filed a motion to deny certification of the class on the grounds that Plaintiffs failed to present any evidence to support a collective action or class action. Plaintiffs filed a reply stating that they no longer intended to pursue a collective action or class action and moved to convert the opt-in Plaintiff to a named Plaintiff. The Court granted Defendant's motion to deny certification of both a collective action and a class action and dismissed Plaintiff motion to convert the opt-in Plaintiff to a named Plaintiff. The Court found that Plaintiffs did not seek either collective action or class certification, but only sought to litigate the wage claims. *Id.* at *2. Because the original named Plaintiff never moved for certification of either a collective action or a class action, the Court concluded that Defendant's motion must be granted. *Id*. at *6. Further, the Court ruled that the appropriate remedy was to dismiss the opt-in Plaintiff without prejudice. Accordingly, the Court granted Defendant's motion to dismiss, and dismissed the opt-in Plaintiff without prejudice.

***Geter, et al. v. Galardi South Enterprise, Inc.,* 2015 U.S. Dist. LEXIS 65219 (S.D. Fla. May 19, 2015).** In this FLSA action brought by Plaintiffs, a group of adult entertainers, alleging that Defendant misclassified them as independent contractors, the Court declined to decertify an earlier certified collective action. Defendant argued that Plaintiffs were not similarly-situated to the collective action members as each Plaintiff would have to testify as to the number of hours and the dates each entertainer performed, and the amount of money earned and paid out by each entertainer during each workweek. Defendant also pointed out that some Plaintiffs did not work enough to earn overtime wages, and the house fees and tip-outs varied among Plaintiffs. The Court remarked that it was unlikely that any real-world collective action would involve opt-in Plaintiffs with the same, or even similar, schedules and earnings, and opined that the identified differences were irrelevant to the decertification decision. *Id.* at *11. Regarding Defendant's argument that different rules applied to Plaintiffs, such as the amount of the house fee and number of days Plaintiffs had to work, the Court observed that such distinctions did not favor decertification, because it impacted the amounts potentially owed for back wages. Further, because Plaintiffs had different job duties, Defendant argued that certain entertainers had greater opportunities for tips from high-end customers, and would frequently earn more money than other entertainers. The Court, however, found that the different job duties all involved performing at the club and did not concern the central dispute of whether Plaintiffs were independent contractors or were owed unpaid wages. *Id.* at *13. Further, some Plaintiffs signed written independent contractor agreements, and Defendant allowed them to keep certain service charges which Defendant charged customers. Plaintiffs kept as tips amounts paid in excess of these minimums. *Id.* at *14. Defendant asserted that Plaintiffs violated their agreements by bringing this action and could not retain the minimum service charges while demanding hourly compensation, and claimed that if Plaintiffs prevailed, Defendant was entitled to the difference between the service charge and the minimum wage. The Court remarked that Defendant provided no authority to show that a party's counterclaims – claims not based on the FLSA – should impact the decision on a motion to decertify an FLSA collective action. *Id.* at *14-15. Additionally, Defendant argued that Plaintiffs would be affected differently by the statute of limitations, depending on when they started performing, and whether they asserted willful violations of the FLSA. The Court, however, noted that different limitations periods, if any, related primarily to the amount of back wages recoverable by Plaintiffs, not any fundamental issue of liability of Defendant, which did not compel decertification. *Id.* at *15. The Court also opined that Plaintiffs were similarly-situated because they substantially performed the same job, worked in the same location, and the alleged violations took place during the entirety of Plaintiffs' time at the club. Moreover, Defendant subjected all Plaintiffs to similar policies and practices that their management apparently established in a similar manner. Thus, because there were no significant differences among Plaintiffs with regard to their independent contractor status, the Court denied Defendant's motion for decertification.

***Harris, et al. v. Performance Transportation, LLC,* 2015 U.S. Dist. LEXIS 33566 (M.D. Fla. Mar. 18, 2015).** Plaintiff brought an FLSA action alleging that Defendant failed to pay him proper overtime during any workweek of his employment. Plaintiff worked as a driver at Defendant's Dover, Florida warehouse facility, and his duties included delivering food products to local restaurants and unloading trucks, generally working a total of 50 hours per week. Plaintiff's compensation was based off of the number of cases of

product he hauled, the number of miles driven, each stop, safety pay, and start up pay. Plaintiff alleged that Defendant failed to pay him overtime compensation to which he was entitled. Plaintiff moved for conditional certification of a collective action comprised of all similarly-situated drivers working since October 27, 2011, and also for authorization of notice to members of the collective action. The Magistrate Judge recommended granting the motion in part, rejecting Defendant's contention that Plaintiffs were exempt from FLSA coverage under the motor carrier exemption. The Magistrate Judge remarked that although the motor carrier exemption may apply to Plaintiffs, that did not mean that Plaintiffs are not similarly-situated for the purpose of conditional certification. Defendant brought Rule 72 objections to the Magistrate Judge's ruling. The Court overruled Defendant's objection, adopted the report and recommendation of the Magistrate Judge, and granted in part Plaintiff's motion. The Court conditionally certified a collective action comprised of each driver that Defendant employed at its warehouse in Dover, Florida, and who drove for Defendant only within Florida. *Id*. at *2. The Court directed Defendant to produce the full name, the last known address, the telephone number, and the e-mail address for each member in the collective action who worked for Defendant at the Dover, Florida, warehouse from the last three years. *Id*. The Court also directed the parties to submit a revised notice and a revised consent form correcting the deficiencies addressed in the Magistrate Judge's report and recommendation.

***Isaacs, et al. v. One Touch Direct, LLC,* 2015 U.S. Dist. LEXIS 6211 (M.D. Fla. Jan. 20, 2015).** Plaintiff, a telephone service representative ("TSR"), brought a putative collective action alleging that Defendant failed to compensate her and others similarly-situated for overtime hours in violation of the FLSA. Plaintiff alleged that Defendant: (i) required employees to arrive at work early to perform tasks integral to their work before their shift began; (ii) failed to include commissions in employees' regular rate of pay; and (iii) failed to compensate employees for break time. *Id*. at *2. Plaintiff filed a motion for conditional certification under 29 U.S.C. § 216(b), and contended that the Court should permit notice of the action to all full-time TSRs who worked at Defendant's Florida call centers over the last three years, and who were subject to Defendant's illegal pay practices and policies. *Id*. at *2-3. The Court granted Plaintiff's motion. First, the Court found that Plaintiff had demonstrated that other employees desired to opt-in to this action because five other employees had filed opt-in notices. *Id*. at *5. While Plaintiff also demonstrated the similarly-situated element, and provided evidence that Defendant's allegedly unlawful pay practices applied to all TSRs company-wide, regardless of their specific location and program, Defendant argued that Plaintiff's proposed notice encompassed 5,600 TSRs and that TSRs' compensation differed depending on the specific program they worked on and their location. *Id*. at *5-6. The Court, however, reasoned that Defendant's attack on the merits of Plaintiff's claims was premature at the conditional certification stage, and accordingly granted Plaintiff's motion. *Id*. at *6. At the same time, the Court agreed with Defendant that the notice should include language to the recipient that he or she might be responsible for a share of Plaintiff's costs associated with the lawsuit if Plaintiff did not prevail on the claims. *Id*. The Court also agreed that it was unnecessary to post the notice at Defendant's locations or send a reminder notice postcard to potential collective action members. *Id*. at *6-7. The Court, however, overruled Defendant's objection to a 90-day opt-in period, because such opt-in periods are routinely granted, and any issue of willful violation of the FLSA would be better addressed on a motion for decertification. *Id*. at *7. *Id*.

***Lopez, et al. v. Hayes Robertson Group, Inc.,* 2015 U.S. Dist. LEXIS 132673 (S.D. Fla. Sept. 29, 2015).** Plaintiffs, a group of hourly-paid tipped servers and bartenders, brought an action seeking minimum wages under the FLSA and corresponding state law. Nearly 21 of the Plaintiffs in this action had filed a putative class action in *Bennett, et al. v. Hayes Robertson Group Inc.,* Case No. 11-CV-10105 (S.D. Fla.). Plaintiffs in *Bennett* moved to certify a Rule 23(b) class, which the Court had denied, and then dismissed the claims directing them to re-file those claims as individual actions. Plaintiffs from the *Bennett* action and several other individuals filed their own minimum wage actions including this action. The Magistrate Judge granted certification of a class action pursuant to Rule 23(b)(3), and the FLSA, finding that this action involved different named Plaintiffs, a different class action, and a significantly more developed factual record than was available in *Bennett*. Subsequently, the individual actions were consolidated into this action. After the Court had denied Defendant's motion for summary judgment, Defendant moved to decertify both the FLSA and Rule 23 classes, which the Magistrate Judge denied. At the outset, the Magistrate Judge rejected Defendant's arguments concerning decertifying the FLSA collective action as the parties had stipulated this

matter was being pursued solely as a Rule 23 class action. *Id*. at *7-8. Citing FLSA standards, Defendant argued that the class was not numerous as no one had opted-in. *Id*. at *14. The Magistrate Judge, however, ruled that as Rule 23 was not an opt-in procedure, Defendant's argument was meritless. *Id*. Moreover, as the Court had already found that there were 50 to 120 members of the class, Defendant presented no new facts concerning that finding. *Id*. As to commonality, the Magistrate Judge found two common questions, including: (i) did Defendant deduct $3 per shift; and (ii) whether Defendant's policies invalidated their reliance on the tip credit exemption, which resulted in denial of the required minimum wage. *Id*. at *15. The Magistrate Judge observed that Defendant selectively quoted one sentence from order on summary judgment, which referred to factual disputes that precluded summary judgment. *Id*. at *16. The Magistrate Judge reasoned that the order had also found that the parties had presented conflicting evidence regarding the validity of Defendant's tip credit, as there was an issue of appropriateness of the notice that Defendant gave Plaintiffs of the credit. *Id*. Moreover, the Magistrate Judge found that merely because summary judgment was denied, it did not automatically preclude a class action from proceeding. *Id*. Accordingly, the Magistrate Judge found Defendant's argument regarding commonality was unpersuasive. Defendant also argued that because Plaintiffs received return envelopes for approximately 30 class members and received letters from 3 class members indicating that they wished to opt-out, due process concerns for those class members who may not have been properly noticed should generate concern and cause the Court to refrain from continuing this case under Rule 23. The Magistrate Judge observed that there was no dispute that Plaintiffs attempted individual notice of all putative class members, or that certain putative class members did not receive that notice. The Magistrate Judge, however, ruled that due process did not require that class members actually receive notice. The Magistrate Judge, therefore, concluded that Defendant presented no challenge to the actual means of notice attempted here. Accordingly, the Magistrate Judge denied Defendant's motion for decertification.

***Miller, et al. v. Spence,* 2015 U.S. Dist. LEXIS 53187 (S.D. Ala. Mar. 25, 2015).** Plaintiff brought a collective action alleging that Defendant failed to pay their servers and bartenders the required minimum wage in violation of the FLSA. Plaintiff worked as a server/bartender at a Defendant's restaurant in Gulf Shores, Alabama, and Defendant paid her an hourly wage of $2.13 as a server and $5.00 as a bartender. Plaintiff alleged that Defendant required servers/bartenders to remit a portion of their tips to a tip pool and improperly distributed it to employees who did not customarily receive tips, such as food expeditors, oyster shuckers, and dishwashers. *Id.* at *3. Plaintiff further alleged that Defendant required servers to perform cleaning and other side work "off-the-clock" before and after their regularly scheduled shifts, and that the District Manager instructed managers to "roll back" or reduce the hours recorded if employees worked over 40 hours a week. *Id.* Seeking to represent all other similarly-situated employees, Plaintiff moved for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). In support, Plaintiff submitted declarations from five individuals who stated that Defendant employed each one of them at its restaurants, that Defendant required them to contribute to a tip pool with non-tipped employees, and that Defendant required them to perform work off-the-clock. *Id.* at *8. Four of the five also submitted consent forms indicating their desire to join the action. The consent form related solely to Defendant's policy or practice of requiring servers/bartenders to contribute to a tip pool, which included expeditors, dishwashers, or other kitchen staff. *Id.* at *7. Defendant opposed conditional certification, arguing that Plaintiff had failed to show that she was similarly-situated to the putative members of the collective action. Recommending that Plaintiff's motion be partly granted, the Magistrate Judge stated that the collective action could be conditionally certified as to individuals employed as servers at Defendant's Steamer restaurants in Gulf Shores ("Steamer"), Mikee's Seafood in Gulf Shores ("Mikee's"), and Shrimp Basket restaurants located in Gulf Shores and Foley and who contributed to a tip pool that included employees customarily not entitled to tips. *Id.* at *16. The Magistrate Judge found that Plaintiff had made a substantial showing that Defendant treated servers at these restaurants similarly and subjected them to same hourly wage and the same policy/practice regarding the tip pool. *Id.* at *20. Although Defendant alleged that Plaintiff was not similarly-situated to other collective action members because she also worked as bartender and assistant manager who did not contribute to a tip pool, her claims regarding off-the-clock work would require individualized treatment, and the collective action claim related solely to the tip pool policy. The Magistrate Judge ruled that the asserted differences were not sufficient to defeat conditional certification. *Id.* Because Plaintiff met the burden only with respect to servers and the tip pool policy utilized by Defendant at Mikee's,

Steamers, and the Shrimp Basket locations in Gulf Shores, Orange Beach, and Foley, the Magistrate Judge granted Plaintiff's motion only with respect to these restaurants, and denied it with respect to bartenders and non-server employees, as well as individuals who were employed at other Shrimp Basket locations. *Id.* Accordingly, the Magistrate Judge recommended the partial grant of Plaintiff's motion for conditional certification.

***Roman, et al. v. Burger King Corp.*, Case No. 15-CV-20455 (S.D. Fla. June 2, 2015).** Plaintiff brought an action alleging that Defendant willfully misclassified its trainees and sales, profit, and operation coaches ("coaches") as exempt employees and failed to pay them overtime compensation in violation of the FLSA. Plaintiff alleged that trainees spent the majority of their time performing menial, non-exempt job duties, and that they did not supervise other employees or use their discretion and independent judgment with respect to matters of significance. Further, the primary duty of coaches was to perform audits of Defendant's franchise restaurants using automated, routine, and standardized audit forms. *Id*. at 2. Plaintiff moved to conditionally certify a collective action of coaches, and trainees, including coach trainees or operations trainees who spent greater than two weeks working in Defendant's restaurants during their training. The Court found that Plaintiff was similarly-situated to the putative collective action members. *Id.* at 3-4. First, the Court noted that all of the opt-in Plaintiffs held the same job titles. Plaintiff presented the declarations of 25 former coaches, many of whom began their employment as trainees, along with declarations of five former employees who worked only as trainees. Plaintiff also provided the job posting for the coach position from an employment website showing one job description, indicating uniformity regardless of geographic location. *Id.* at 4. The opt-in Plaintiffs trained and/or worked in at least 21 states throughout the country. Because Plaintiff and a majority of the opt-in Plaintiffs were employed during the same time period, the Court observed that Plaintiff's claim for unpaid overtime wages for the three years prior to the filing of the complaint covered the same period of alleged violations of other collective action members. *Id.* at 4-5. Fourth, the Court found that the opt-in Plaintiffs' declarations showed a common practice or scheme that Defendant classified them as exempt employees, and did not pay wages for the overtime hours they worked. The Court remarked that at the conditional certification stage, Defendant's decision to classify all trainees and coaches as exempt from overtime under the same FLSA exemption supported a finding that they were similarly-situated. *Id*. at 5. Finally, the Court considered the degree to which the claimed violations were similar. Both Plaintiff and the trainee opt-in Plaintiffs alleged that they worked more than 40 hours a week without overtime pay; that they performed standardized duties and had the same job responsibilities; and they spent the majority of their time working in restaurants performing non-exempt jobs such as cooking and serving customers. *Id.* at 5. Similarly, Plaintiff and the coach opt-in Plaintiffs alleged that Defendant required them to follow standardized policies and procedures; paid them a quarterly non-discretionary bonus based on the performance and sales at the restaurants in their territories; required them to work at least seven to eight hours a day; and required them to follow a quarterly store visit schedule. *Id.* at 6. The Court found that the alleged violations were similar, and granted Plaintiff's motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b).

***Sterling, et al. v. Bridgewater & Associates, Inc.*, 2015 U.S. Dist. LEXIS 15307 (N.D. Ga. Feb. 9, 2015).** Plaintiff brought an FLSA action alleging that Defendant had a policy and practice of refusing to pay hourly employees overtime compensation for hours worked over 40 hours per week. Plaintiff moved to conditionally certify a collective action of employees working in support staff positions. The Court found that declarations submitted by Plaintiff and five opt-ins demonstrated that Plaintiff was similarly-situated to the proposed collective action members because they worked as hourly employees in support staff positions, and they performed administrative duties such as data entry, receiving and sending orders to and from clients, invoicing, and answering the telephone. *Id.* at *2. The Court opined that Plaintiff, the opt-in Plaintiffs, and other support staff were subject to a common plan or practice because they routinely worked off-the-clock hours, and Defendant knew they did, required them to falsify their timesheets, and pressured support staff to work over 40 hours per week to complete their assignments. *Id.* After discovery, Defendant moved to decertify the collective action, which the Court denied. Defendant argued that Plaintiff was not similarly-situated because Plaintiff was an exempt operations manager and the collective action members were hourly staff employees. *Id*. at *4. The Court reasoned that Plaintiff's title of operations manager was insufficient to support that Plaintiff was employed in a *bona fide* executive capacity and thus

exempt from the overtime provisions of the FLSA. Under the FLSA an "employee employed in a *bona fide* executive capacity" means any employee who customarily and regularly directs the work of two or more other employees and whose primary duty is management. *Id.* at *5. Plaintiff performed administrative tasks such as data entry and printing orders, which did not demonstrate that Plaintiff customarily and regularly directed the work of two or more other employees or that her primary duty was management. *Id.* Further, Defendant did not provide any evidence to support that they employed Plaintiff in a *bona fide* executive capacity and thus exempt from the overtime provisions of the FLSA. In her declaration, Plaintiff asserted that she worked as an hourly employee in various administrative positions, that she did not have the power to hire, fire, promote, or discipline any employee, or recommend such action, and that she did not choose or participate in choosing her daily duties. *Id*. at *6. The Court thus concluded that Plaintiff was similarly-situated to the hourly, non-exempt support staff she sought to represent, and denied Defendant's motion for decertification.

***Villoch, et al. v. Ultimate Fitness Group LLC*, 2015 U.S. Dist. LEXIS 101856 (M.D. Fla. July 16, 2015).** Plaintiff, a former employee, brought an action alleging a failure to pay for all hours worked in violation of the FLSA and Florida's unpaid wages law. Defendants operated a company called Orange Theory Fitness ("Orange Theory"), which comprised multiple franchised fitness studios in 35 different states and five foreign countries. *Id.* at *2. Ultimate Fitness Group ("UFG") franchised the Orange Theory studio locations and Orange Theory brand, and Tampa Fitness Partners, LLC ("TFP") and Tampa Fitness Partners IV, LLC ("TFP IV") were Orange Theory franchisees. *Id.* Plaintiff worked as a fitness coach at two different studio locations owned by TFP IV. Plaintiff alleged that Defendants only compensated fitness coaches for work during standard 60-minute workout sessions, and did not compensate for working time outside of those workout sessions, such as reviewing exercise templates, attending employee meetings, preparing and conducting special seasonal programming, attending webinars, and training. Plaintiff moved for both conditional certification of her FLSA claims and class certification of her state law claims, which the Court denied. Plaintiff asserted that she had personal knowledge of other fitness coaches who were subject to the same pay policies, and that she expected that many would like to participate in the collective action, especially given that over 1,000 personal trainers sought to participate in a similar, if not identical, collective action against L.A. Fitness. *Id.* at *8. Plaintiff, however, failed to identify any specific fitness coach or coaches who had expressed an interest in joining her lawsuit, and since the filing of this action no one had made any effort to join her action. The Court remarked that Plaintiff's statement that she expected other fitness coaches would opt-in was speculative, vague, and conclusory, and that she failed to demonstrate that other aggrieved individuals existed. Accordingly, the Court denied conditional certification of the FLSA claims under 29 U.S.C. § 216(b). As to Plaintiff's Rule 23 class claims, her proposed class was comprised of all fitness coach employees in Florida who were not paid their agreed upon hourly wage for all hours worked. Pointing to Orange Theory's website, which confirmed that more than 200 fitness coaches were employed by UFG in Florida in any given year, Plaintiff estimated that the class size could be as large as 400 individuals. Further, although Plaintiff contended that TFP employed about 20 fitness coaches and possibly additional fitness coaches formerly employed by Defendants during the class period, she failed to provide any evidence to confirm those numbers. Thus, the Court was unable to determine how many employees could potentially make up the class, and determined that Plaintiff failed to establish numerosity. The Court also found that Plaintiff failed to establish whether UFG or any of Orange Theory's 60 different franchised fitness studios in Florida implemented a common policy to not compensate their fitness coaches for activities performed outside the 60-minute training session. Furthermore, because franchisees directly hired, managed, and paid their fitness coaches, the Court reasoned that each studio was likely to also have their own policies regarding the pay practices, and different managers and supervisors could implement those policies uniquely and could also have different time-keeping systems to track their employees' time. Accordingly, the Court concluded that Plaintiff failed to establish commonality as well, and therefore denied class certification.

(xii) District Of Columbia Circuit

No reported decisions.

(xiii) Federal Court Of Claims

No reported decisions.

B. Other Federal Rulings Affecting The Defense Of FLSA Collective Actions

Throughout 2015, federal courts issued a wide variety of rulings on procedural and substantive matters in FLSA collective action litigation. Those rulings included procedural and notice issues In FLSA collective actions; mootness in FLSA collective actions; individual executive liability in FLSA collective actions; awards of attorneys' fees in FLSA collective actions; application of *Twombly* pleading standards in FLSA collective actions; FLSA collective actions for donning and doffing; exemption issues in FLSA collective actions; discovery in FLSA collective actions; public employee FLSA collective action litigation; preemption and immunity issues in FLSA collective actions; independent contractor issues in wage & hour class actions; communications with class members in FLSA collective actions; venue issues in FLSA collective actions; pay policies and bonuses in FLSA collective actions; arbitration of wage & hour class claims; settlement approval issues in wage & hour class actions and collective actions; DOL wage & hour enforcement actions; application of statute of limitations in FLSA collective actions; concurrent state law claims in wage & hour class actions; joint employer, employee status, and employer status issues in FLSA collective actions; litigation of tip pooling and tip credit claims under the FLSA; sanctions in wage & hour class actions; issues with opt-in rights in wage & hour class actions; trial issues in FLSA collective actions; issues with interns, volunteers, and students under the FLSA; tolling issues in wage & hour class actions; interlocutory appeals in wage & hour class actions; amendments in FLSA collective actions; foreign worker issues in wage & hour class actions; travel time issues in wage & hour class actions; retaliation issues in wage & hour class actions; the first to file doctrine in FLSA collective actions; the Motor Carrier Act exemption in FLSA collective actions; Davis-Bacon Act issues in wage & hour class action litigation; stays in wage & hour class actions; settlement bar and estoppel issues in wage & hour class actions; intervention issues in wage & hour class actions; Portal-to-Portal Act issues in FLSA collective actions; and liquidated damages in FLSA collective actions.

(i) Procedural And Notice Issues In FLSA Collective Actions

***Acosta, et al. v. Tyson Foods, Inc.,* 2015 U.S. App. LEXIS 15043 (8th Cir. Aug. 26, 2015).** Plaintiffs, a group of current or former unionized employees at one of Defendants' beef processing facilities, brought an action against Defendants seeking overtime and minimum wage payments for certain pre-shift and post-shift activities under the Nebraska Wage Payment and Collection Act and the FLSA. Previously, the District Court had granted summary judgment in favor of the class on all liability issues, and after a bench trial, the District Court awarded $19 million in damages to Plaintiffs. Defendant appealed the class certification and summary judgment rulings, and the Eighth Circuit reversed the judgment. Defendant argued that the District Court should have dismissed the named Plaintiff's FLSA claims for failing to file timely consents as required by 29 U.S.C. § 216(b). The named Plaintiff argued that he was not required to file a written consent, because the FLSA claim was an individual action brought for only himself, and not a collective action. The Eighth Circuit observed that the complaint was styled as a class action and collective action compliant, and asked the District Court to permit the action to go forward as a collective action pursuant to § 216(b). *Id*. at *7. Further, in a joint planning report filed with the District Court, the parties specified that any motion for conditional certification of a collective action would be filed by December 15, 2008. *Id*. Further, the named Plaintiff never moved for conditional certification, but filed 55 consents weeks after the deadline had passed. *Id*. In addition, the named Plaintiff never amended the complaint to allege an individual action. The named Plaintiff argued that his complaint was commenced as an individual action, and no collective action was ever commenced because the required consents were never filed. The Eighth Circuit, however, reasoned that this was a hollow argument, as the complaint continued to allege a collective action, and Plaintiff filed consents from other employees several weeks after the deadline for the certification motion. *Id*. at *8. Accordingly, the Eighth Circuit concluded that the named Plaintiff was required to file a § 216(b) consent. Defendant also challenged the judgment in favor of the class under the Nebraska Wage Payment and Collection Act ("NWPCA"), which provides a cause of action for employees to recover only those wages that an employer had previously agreed to pay. *Id*. The Eighth

Circuit found that the employees' claim under the NWPCA failed as a matter of law because Plaintiffs did not present sufficient evidence that Defendant previously agreed to pay the wages. *Id*. at *16. Accordingly, the Eighth Circuit concluded Defendant was entitled to judgment on the state law claims.

Editor's Note: The decision in *Acosta* overturned the largest wage & hour class action verdict of 2015.

***Armijo, et al. v. Star Farms, Inc.*, 2015 U.S. Dist. LEXIS 166947 (D. Colo. Dec. 14, 2015).** Plaintiffs, a group of migrant farm workers, brought a class action alleging that Defendants violated the FLSA and the Agricultural Workers' Protection Act ("AWPA"). The parties settled and moved for preliminary approval of the settlement agreement. The Court deferred ruling on the motion pending clarification and modification of the notice, claim, and objection procedures. Parties proposed giving notice by: (i) first class mail to each known class member; and (ii) placing an ad in the legal notices section of a Spanish language newspaper. *Id*. at *3-4. The Court noted that the class in this case was composed of migrant, seasonal, and often undocumented immigrant farm-workers, and the parties made no mention was made as to whether the potential class members could be found during the working season, much less in winter months when parties proposed to give the notice. *Id*. at *4. Similarly, the Court observed that the parties did not mention the form of the notice and whether it could be easily understood by class members. Consequently, the Court expressed doubts as to whether the proposed notice was meaningful and practical, and ordered the parties to consider efforts such as tolling the time until the next harvest season when a number of possible class members may return to the area, contacting agencies that recruit migrant farm workers, or other methods helpful for distributing notice to this potential class. *Id*. at *4-5. Accordingly, the Court deferred ruling on the motion until parties clarified and modified the notice.

***Brown, et al. v. Discrete Wireless, Inc.,* 2015 U.S. Dist. LEXIS 18774 (M.D. Fla. Feb. 17, 2015).** Plaintiffs brought a collective action alleging that Defendants improperly and willfully classified certain sales representatives as exempt employees and denied them overtime wages. Plaintiffs moved for enlargement of the notice period and for Defendant to provide the social security numbers of the proposed collective action members. The Court granted the motion in part. Previously, the Court had certified the collective action and directed Plaintiffs to issue an initial notice via certified mail to all individuals whose contact information was provided by Defendants within 25 days. *Id.* at *2-3. The order also specified that if notice to any individual was returned, Plaintiffs could make an additional attempt to notify such individual via certified mail, and provide notice to Defendants along with proof of return of service, and make one telephone call to the individual to confirm the individual's address. *Id.* at *3 Subsequently, the Court granted Plaintiffs' request for the full social security numbers of putative collective action members whom Plaintiffs' counsel had been unable to reach by both mail and telephone, and stated that Defendants' production of full social security numbers was limited to notices which have been returned as undeliverable due to incorrect or outdated addresses only. *Id.* at *4. Plaintiffs then requested a 21-day extension of the opt-in deadline, and additional social security numbers from Defendants. Defendants argued that they had fully complied with the terms of the Court's previous order regarding social security numbers. After examining the parties' respective positions, the Court determined that Defendants should not be required to furnish additional social security numbers. *Id*. at *6. The Court concluded that Plaintiffs did not demonstrate any failure by Defendants with respect to its previous order to warrant a complete disclosure and denied Plaintiffs' motion in this respect. *Id*. The Court, however, granted Plaintiff's motion to extend the opt-in deadline by 21 days.

***Brown, et al. v. American Airlines, Inc.,* 2015 U.S. Dist. LEXIS 150672 (C.D. Cal. Oct. 5, 2015).** Plaintiff, an employee, on behalf of herself and those similarly-situated, filed a putative wage & hour class action against Defendant alleging violation of California law. Plaintiff alleged that Defendant failed to pay overtime, failed to pay the correct overtime rate, failed to provide proper wage statements, and engaged in unlawful business practices. Plaintiff also asserted violations of the Private Attorney General Act ("PAGA"). *Id.* at *1-2. Plaintiff previously filed a motion for class certification, which the Court had denied. In denying the motion, the Court concluded that Plaintiff was not an adequate representative for one of the claims and that the predominance requirement was not met. Defendant subsequently filed a motion to dismiss Plaintiff's PAGA claim. Defendant first argued that the Court should grant the motion because it had

denied the motion for class certification. The Court, however, remarked that denial of a class certification motion does not entail judgment on pleadings, and it refused to strike the state law claims. Defendant also argued that Plaintiff cannot pursue a representative action under the PAGA without complying with Rule 23. The Court noted that the California Supreme Court in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), and the Ninth Circuit in *Baumann v. Chase Investment Services Corp.*, 747 F.3d 1117 (9th Cir. 2014), held that a PAGA claim is not governed by Rule 23. *Id*. at *8-9. Accordingly, the Court rejected Defendant's argument. Defendant further argued that Plaintiffs' PAGA claims were unmanageable and impracticable. The Court observed that in its order regarding class certification, it had found that individual issues predominated as to Plaintiff's overtime pay claims. *Id*. at *10. The Court, therefore, ruled that manageability issues existed as to the overtime claims. Plaintiffs also sought PAGA penalties regarding improper wage statements. Plaintiffs contended that under California law, employers are required to provide employees with accurate itemized statements for each pay period reflecting the correct number of wages earned during the pay period. *Id*. at *11. The Court noted that to the extent that Defendant failed to properly compute overtime compensation, Defendant necessarily provided them with inaccurate wage statements. *Id*. The Court found that Plaintiff's PAGA claims could go forward regarding the wage statement claims, but not on the overtime pay claims, due to management issues. *Id*. Accordingly, the Court granted Defendant's motion to strike PAGA penalties in part.

***Faust, et al. v. Comcast Cable Communications Management, LLC*, 2015 U.S. Dist. LEXIS 16563 (D. Md. Feb. 11, 2015).** Plaintiffs brought two separate actions alleging that Defendant required its customer account executives ("CAEs") to work off-the-clock without pay. In the first action – *Faust v. Comcast Cable Communications Management, LLC*, Case No. 10-CV-2336 – the Court conditionally certified a collective action of CAEs who worked at the call center at 8110 Corporate Drive in White Marsh, Maryland (the "8110 Call Center"), where both named Plaintiffs worked. *Id.* at *4. The Court, however, denied Plaintiffs' motion for class certification of their state law claims finding that Plaintiffs failed to demonstrate commonality. In the second action – *Andrews v. Comcast Cable Communications Management, LLC*, Case No. 12-CV-2909 – the Court denied class certification for the same reasons. *Id.* at *8. Plaintiffs in *Faust* then moved to add as named Plaintiffs nine of the 11 opt-ins deposed during pre-certification discovery, and Defendant the moved to sever the claims of the three *Andrews* Plaintiffs into three separate proceedings. Plaintiffs in both actions also moved for discovery sanctions. The Court granted the motion to sever, and denied the remaining motions. Regarding the motion to sever, the Court noted that its earlier decision finding most of the critical issues not susceptible to common proof aligned with a decision to grant the motion. *Id.* at *12-13. Although the three named Plaintiffs had the same job title, worked in the same department at the same time, and asserted claims that they worked off-the-clock without pay, their specific claims and the proof of those claims were highly individualized. Defendant maintained an official policy that prohibited any CAE from working off-the-clock and required all time that CAEs spent working to be recorded and compensated. *Id.* at *17. The Court observed that the relevant witnesses for each Plaintiff's claims would be different because each Plaintiff asserted that an unofficial instruction to work off-the-clock came from a different source. Further, the relevant data – including timesheets, pay records, log-in data, and badge-swipe data – would be entirely different for each Plaintiff. Thus, considering the highly individualized nature of the proof of each Plaintiff's claims, the Court opined that Plaintiffs' claims did not arise out of the same transaction or occurrence and that severance was appropriate. *Id*. Regarding the motion to add named Plaintiffs in *Faust*, the Court noted that the addition of the new Plaintiffs would result in a trial consisting of 11 mini-trials of marginally related claims. When it denied class certification, the Court determined that there was no common practice or policy requiring off-the-clock work at the 8110 Call Center and that the claims were based on the alleged instructions of various supervisors given at various times, as understood by various individual CAEs. *Id.* at *19-20. Thus, because the claims of the individual Plaintiffs would depend on the testimony and credibility of different witnesses and the individualized data related to each claim, the Court denied the motion to add named Plaintiffs. Finally, regarding the motion for discovery sanctions, Plaintiffs argued that Defendant failed to begin preserving "First NT Log-in data" at the point in time that Plaintiffs believed Defendant was obligated to begin preserving that data. *Id.* at *21. Defendant informed Plaintiffs in June 2012 that there was no NT Log-in data for the time period in question, but Plaintiffs took no action on that information until filing these motions more than two years later. The Court, therefore, denied Plaintiffs' motions for discovery sanctions as untimely.

***Flood, et al. v. Carlson Restaurants, Inc.,* 2015 U.S. Dist. LEXIS 149272 (S.D.N.Y. Nov. 3, 2015).** Plaintiffs, a group of current and former tipped employees, brought a collective and class action alleging that Defendants paid its tipped employees less than the minimum hourly wage by availing themselves of the federal tip credit in violation of the FLSA and the New York Labor Law. The Court conditionally certified a collective action and fixed a deadline for collective action members to opt-in to the action. The parties negotiated an agreed upon a notice process, and the Court entered the parties' stipulation as an order. Notice then issued to members of the collective action. On the eve of the expiration of the notice period, Plaintiffs requested a 45-day extension of that deadline, and leave to mail and e-mail a reminder notice to members who initially were sent notice under 29 U.S.C. § 216(b), but had not yet returned consent to join forms. *Id*. at *6. Plaintiffs contended that the FLSA should be construed in a broad fashion to effectuate the purposes of the law; therefore, since the number of opt-ins was low, the Court should extend the opt-in period to allow more workers to join the collective action. Defendants objected. Defendants argued that the stipulation that the parties negotiated and filed on February 9, 2015 provided that the collective action members could opt-in no later than 60 days from the date notice to opt-in was mailed. *Id*. Defendants contended that the extension Plaintiffs proposed would disturb the parties' stipulation as to the notice process in this action. Both parties cited case law supporting their respective positions on whether Courts routinely grant extensions of § 216(b) opt-in periods and the appropriate amount of time to allow the collective members to opt-in. *Id*. at *8. Defendants asserted that absent evidence of misconduct or efforts to coerce putative collective action members from opting-in to the action (of which there was no evidence), the Court had no basis to extend the opt-in period. The Court observed that the differing rulings in the case law authorities showed that the decision to extend the opt-in period was within the Court's broad discretion. *Id*. Additionally, the Court remarked that Defendants did not adequately explain why extending the opt-in period would prejudice them specifically, asserting only that an extension would delay discovery generally and would be contrary to the interests of efficiency and judicial economy. *Id*. Plaintiffs contended that the extension was fair because, as of October 8, 2015, only 6.7% of the potential collective action members had joined the case, and also because mailings to 7,186 potential collective action members were returned as undeliverable. *Id*. The Court remarked that although these numbers were not abnormally low and that the claim administrator had already attempted to re-deliver notice packages to those who had insufficient addresses, it did not dissuade the Court from giving Plaintiffs an additional opportunity to provide accurate and timely notice. Accordingly, the Court granted Plaintiffs' motion to extend the opt-in period by 45 days.

Editor's Note: The ruling in *Flood* is one of the first to ever extend a § 216(b) opt-in period absent evidence of misconduct of a Defendant in trying to coerce or dissuade employees from joining a collective action.

***Garcia, et al. v. TWC Administration, LLC*, 2015 U.S. Dist. LEXIS 50384 (W.D. Tex. April 16, 2015).** Plaintiffs, a group of inbound sales agents, brought a collective action alleging that Defendant failed to pay the required minimum wage and denied them overtime compensation in alleged violation of the FLSA. Plaintiffs alleged that because they were required to spend the entirety of their shifts on the phone taking customer calls, they spent a significant amount of time each day working off-the-clock and without pay. *Id.* at *3-4. Plaintiffs moved for conditional certification of a collective action and for issuance of § 216(b) notice. Defendant did not challenge conditional certification but objected to the Plaintiffs' proposals regarding the manner, timing, and content of notice to putative collective action members. The Court granted the motion in part. Plaintiffs requested that notice be prominently posted at Defendant's place of business and that a copy of the proposed notice be included with each putative collective action member's paycheck, and that a second notice be sent out 30 days before the opt-in deadline passed, but only to those individuals who did not opt-in. Because posting notice in a workplace is often used to inform employees of their rights in labor disputes, repeatedly had been approved as an appropriate form of notice in FLSA cases, and was not unduly burdensome, the Court approved the posting. *Id.* at *16. The Court, however, determined that sending notice forms along with employee paychecks was both redundant and unnecessary. The Court found that because Plaintiffs failed to identify any particular reason why a reminder notice was necessary to ensure sufficient notice, a reminder notice was inappropriate. Plaintiffs also argued that the proper limitations period runs from three years prior to the date on which the action was commenced to the present. The Court noted that a cause of action arising out of a willful violation of

the FLSA may be commenced within three years after the cause of action accrued, and that the limitations period is not tolled as to individual claimants until the claimant files a written opt-in consent form with the Court. *Id.* at *17-18. Thus, the Court opined that the limitations period here should confine collective action certification to inbound sales agents who worked for Defendant in the three years prior to the date on which conditional certification was granted, and that each potential Plaintiff should opt-in within three years of employment as an inbound sales agent. The Court directed that the notice should reflect both of these dates. Further, the Court observed that potential opt-in Plaintiffs may be required to pay taxable court costs if the judgment was not favorable to them, and that the proposed notice form is not completely accurate without such an advisory because it is necessary for potential Plaintiffs to make an informed decision about whether to opt-in to the lawsuit. *Id.* at *19. Here, the notice stated that if the inbound sales agents lost, they would receive nothing, but that they would not have to pay anything either. The Court remarked that such language was misleading and inaccurate, and that the notice should inform potential Plaintiffs that they could be liable for their proportional share of taxable court costs if they do not prevail. Finally, because including contact information for defense counsel in the § 216 (b) notice risks violation of ethical rules and inadvertent inquiries, thus engendering needless confusion, the Court stated that the inclusion of defense counsel's contact information in the notice was unwarranted. *Id.* at *20.

***Hill, et al. v. Johnny's Pizza House, Inc.,* 2015 U.S. Dist. LEXIS 125271 (W.D. La. Sept. 18, 2015).** Plaintiff, a pizza delivery driver, brought an FLSA collective action alleging that Defendant failed to reimburse drivers for the reasonable approximate costs of the business use of their vehicles, and that failure caused their wages to fall below the FLSA-mandated minimum wage. *Id*. at *2. Defendant moved to strike Plaintiff's class allegations because he failed to move for class certification within 90-days of filing his complaint as required by Local Rule 23.1, which the Court denied. Plaintiff contended that Local Rule 23.1 was inapplicable because he was not seeking class certification under Rule 23; rather he was seeking to prosecute a collective action under 29 U.S.C. § 216(b) of the FLSA. *Id*. at *3. The Court agreed, and extended the 90-day period for Plaintiff to seek conditional certification under § 216(b). *Id*. at *5. In addition, the Court found that Defendant did not demonstrate any material prejudice as a result of the delay, and remarked that in fact, a delay inured to Defendant's benefit because, ordinarily the statute of limitations is not tolled until a claimant files written consent with the Court. *Id*. The Court, however, remarked that the sole prejudice identified by Defendant was the Court's anticipated use of a two-step certification process identified in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). *Id*. at *6. The Court explained that it would not reach the second step of the *Lusardi* approach until discovery is completed, and Defendant could then re-visit the issue via appropriate motion. *Id*. at *7. The Court remarked that under the two-step *Lusardi* certification process, Plaintiff should require little discovery before filing an initial motion for conditional certification. *Id*. Accordingly, the Court imposed a 30-day deadline for Plaintiff to file his motion for conditional certification. *Id*. at *8.

***Hobson, et al. v. Murphy Oil USA, Inc.*, 2015 U.S. Dist. LEXIS 88241 (N.D. Ala. July 8, 2015).** Plaintiffs, a group of employees, brought a putative collective action against Defendants seeking unpaid overtime under the FLSA. Defendants moved to compel arbitration and to dismiss Plaintiffs' collective action allegations. The Court granted the motion and dismissed the collective action allegations with prejudice. *Id.* at *1. The Court then ordered Plaintiffs to submit their individual claims to arbitration. *Id.* at *1-2. After almost two and a half years, Plaintiffs moved for reconsideration of the order dismissing the collective action allegations. The Court denied the motion. Defendants argued that Plaintiffs failed to submit their claims to arbitration as required by the Court's order. *Id.* at *2. As a result, the Court ordered Plaintiffs to show cause why their complaint should not be dismissed for failing to adhere to the Court's order. In response, Plaintiffs asserted that they behaved reasonably in waiting to arbitrate, and therefore should not be subject to the harsh penalty of having their complaint dismissed. *Id*. at *3. Plaintiffs stated that one of the named Plaintiffs, Sheila Hobson, filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") against Defendants while the motion to compel arbitration remained pending. *Id*. The NLRB ruled in Hobson's favor, finding that Defendants violated § 8(a)(1) of the National Labor Relations Act by requiring employees to agree to resolve all employment-related claims through individual arbitration and by taking steps to enforce the unlawful agreements. The NLRB ordered Defendants to rescind the arbitration agreement or revise it in all of its forms to make clear to employees that the agreement did not

constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. *Id.* at *4. The Court found that Plaintiffs failed to cite any authority to support their suggestion that the Court's order was without effect because of a related proceeding before the NLRB, and that instead, Plaintiffs simply disregarded the Court's order. Thus, the Court held that, although Plaintiffs alleged that there was confusion or negligence for the delay in filing of their arbitration proceedings, the circumstances supported the inference that Plaintiffs acted willfully and knowingly. *Id.* at *7-9. Accordingly, the Court dismissed Plaintiffs' claims.

***Izzio, et al. v. Century Partners Golf Management, L.P.*, 2015 U.S. Dist. LEXIS 123182 (N.D. Tex. Sept. 15, 2015).** Plaintiffs, a group of banquet service workers, brought an action alleging that Defendant failed to pay straight and overtime wages, unlawfully retained gratuities, and failed to reimburse employees for the costs of uniforms, in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs sought to represent a class consisting of banquet service workers at four catering facilities, including Defendant's Harbor Links facility. *Id*. Three months prior to the filing of this action, another banquet server, Anthony Metzger ("Metzger"), brought a similar action seeking unpaid overtime under the FLSA and the NYLL on behalf of himself and similarly-situated workers at Defendant's Harbor Links facility. *Id*. at *3. Plaintiffs moved for preliminary approval of a settlement that resolved not only claims they asserted in this action, but also claims that six individuals brought in a stayed action pending in New York state court entitled *Law v. CGPM/WMC Operating, LLC*, Case No. 150883/2013, on behalf of servers and bartenders at the same four facilities. *Id*. at *4. Metzger's action was stayed pending the Court's determination of the proposed global settlement. Metzger sought to intervene in this action for the sole purpose of having a portion of the case dismissed or transferred to his stayed action. *Id*. Metzger moved to carve out the Harbor Links Plaintiffs and their claims to represent that portion of the class in his proceeding. The Court denied the motion. Metzger first argued that his motion to intervene was timely because he filed it within 15 days after learning of this action. The Court, however, noted that adequacy of representation was critical to the inquiry of the timeliness factor. *Id*. at *8. The Court observed that, if the proposed intervener's interests were adequately represented, the prejudice from keeping him out would be slight, and it found that, because the underlying action included a class action component, absent class members' interests should be adequately represented. *Id.* at *8. The Court reasoned that Metzger sought to intervene solely to have the Harbor Links claimants and causes of action dismissed, and he did not seek to participate substantively in this proceeding. The Court, therefore, ruled that allowing Metzger to intervene would prejudice the various parties in the consolidated action. *Id*. at *12. The Court explained that, because all of the related cases had been stayed pending the resolution of the global class action settlement, there were unusual circumstances militating against a finding that the motion to intervene was warranted as a matter of right. *Id*. at *14. The Court noted that, as a class member, Metzger could raise objections to the settlement without formal intervention and that it could permit absent class members to appear through counsel without going the full length of becoming parties through intervention. *Id.* at *15. Further, the Court opined that Metzger also could opt-out of the settlement entirely and pursue his independent action in New York. *Id*. at *15. Finally, the Court held that an excision of the Harbor Links members and claims at this juncture would lead to piece-meal litigation and a likely disruption of the global settlement. *Id*. at *17. Accordingly, the Court denied Metzger's motion to intervene.

***Mark, et al. v. Gawker Media LLC,* 2015 U.S. Dist. LEXIS 65881 (S.D.N.Y. April 10, 2015).** Plaintiffs brought an FLSA action alleging that Defendants improperly designated them as unpaid interns and refused to pay them wages. After granting Plaintiffs' motion for conditional certification of a collective action, the Court had permitted Plaintiffs to propose § 216(b) notice forms that would be disseminated to potential opt-in Plaintiffs by social media. The Court subsequently denied without prejudice Plaintiffs' application to disseminate notice through various forms of social media, finding that the proposals were substantially overbroad, and much of Plaintiffs' notice plan appeared calculated to punish Defendants rather than provide notice of opt-in rights. Plaintiffs renewed their application to disseminate notice through social media and also requested permission to disseminate notice to Defendants' internship applicants for whom there existed no further evidence that they ever became Defendants' interns. The Court granted in part Plaintiffs' requests. At the outset, the Court found that Plaintiffs' revised proposal no longer presented the danger of simply advertising a lawsuit against Defendants, but instead served the primary purpose of a

FLSA notice. *Id*. at *3. The Court adopted Plaintiffs' renewed proposal to disseminate notice through social media, subject to the two limitations Defendants requested. First, the Court determined that Plaintiffs should "unfollow" any interns on Twitter when the opt-in period closed, unless the individual had chosen to opt-in to the action. *Id.* Second, Plaintiffs should not be permitted to "friend" individuals on Facebook, as it could crete a misleading impression of the individual's relationship with Plaintiffs' counsel. *Id*. at *3-4. The Court reasoned that these two conditions were prudent limitations that would ensure that Plaintiffs' use of social media notice complied with the general principle governing FLSA opt-in notices. *Id*. at *4. In addition, the Court denied Plaintiffs' application to send notice to a list of applicants for internships with Defendants, because as a general principle, notice should be sent only to individuals who can assert a claim. *Id*. The Court found that there was no indication that any of the individuals on the list of applicants that Plaintiffs had obtained actually took internships with Defendants. *Id*. Moreover, the Court found that any individual names in the list who accepted an internship position with Defendants would likely be identifiable by Plaintiffs through other means. *Id*. at *5.

Editor's Note: The ruling in *Mark* is one of the first to recognize the utility of disseminating § 216(b) notice through social media.

***Palana, et al. v. Mission Bay Inc.,* 2015 U.S. Dist. LEXIS 161069 (N.D. Cal. Nov. 30, 2015).** Plaintiffs, a group of former employees, brought an action alleging that Defendants failed to pay overtime compensation and failed to provide meal and rest breaks in violation of the FLSA and the California Labor Code. Previously, Plaintiffs had moved to certify three classes consisting of hourly employees, including: (i) an overtime class; (ii) a meal period class; and (iii) a rest break class. The Court granted the motion for class certification. *Id*. at *3. Plaintiffs then filed a motion for to clarify that the certified class included all of Defendants' hourly employees, including non-exempt clerical workers who also had claims for unpaid overtime and meal and rest breaks. The Court denied the motion to clarify. *Id*. at *4. Defendants argued that this litigation only included claims from care-workers and asked that, if any clarification is made, the Court should add the word "care-worker" in front of the employees in the class definition. *Id*. The Court clarified that its previous decision certified a class of 163 care-workers to vindicate overtime and meal and rest break claims. *Id*. at *5. The Court remarked that at this time, it was unclear whether the non-care workers met Rule 23 (a) and (b) requirements. For example, the Court noted that Plaintiffs did not specify as to how many of the 163 class members were not care-workers, which made it difficult to ascertain the numerosity requirement. *Id*. at *6. The Court concluded that the previous order certifying the class pertained only to care-workers, and Plaintiffs failed to show any evidence as to the class eligibility of non-care workers in their motion. Accordingly, the Court denied Plaintiffs' motion for clarification.

***Pierce, et al. v. Wyndham Vacation Resorts, Inc.,* 2015 U.S. Dist. LEXIS 79592 (E.D. Tenn. June 1, 2015).** Plaintiffs, a group of sales representatives, brought a collective action alleging that Defendants denied them overtime compensation in violation of the FLSA. The Magistrate Judge had recommended that the Court certify a collective action. After the Court adopted the recommendation, the parties submitted competing § 216(b) notices for approval. The Magistrate Judge had rejected portions of both notices relating to attorneys' fees and substituted his own. Plaintiffs objected to two separate parts of the notice, and on Rule 72 review, the Court overruled the objections. First, Plaintiffs objected to the language informing potential opt-in Plaintiffs that they could be held responsible for Defendants' legal fees and costs. Considering how unlikely it would be for potential opt-in Plaintiffs to eventually find themselves liable for a portion of Defendants' attorneys' fees, Plaintiffs argued that the chilling effect of the attorneys' fees notice language outweighed the need to provide potential opt-in Plaintiffs with complete information. *Id*. at *5. Defendants contended that potential Plaintiffs should be given enough information about their rights and obligations to allow them to make informed decisions about whether to participate in the action. *Id*. at *5-6. The Court found that the language adopted by the Magistrate Judge was not overly harsh, confusing, or likely to have an *in terrorem* effect on potential opt-in Plaintiffs. *Id*. Second, Plaintiffs objected to the inclusion of the defense counsel's contact information in the notice. The Court noted that case law authorities were divided on the appropriateness of providing defense counsel contact information in a § 216(b) notice. Plaintiffs failed to offer any controlling authority holding that the inclusion of defense

counsel's contact information in a § 216(b) notice was clearly erroneous or contrary to law. *Id*. at *6-7. Accordingly, the Court overruled Plaintiffs' objections to the Magistrate Judge's ruling. *Id*. at *7.

***Pullen, et al. v. McDonald's Corp.,* 2015 U.S. Dist. LEXIS 107767 (E.D. Mich. Aug. 17, 2015).** In this consolidated action brought employees against different owner-operators of McDonald's restaurants alleging that Defendants deducted costs of uniforms from their paychecks, and compensated them at less than the minimum wages in violation of the FLSA, the Court denied Defendants' motion to strike Plaintiffs' class allegations without prejudice. Previously, the Court had denied Plaintiffs motions for conditional certification of their FLSA claim. *Id*. at *3. Subsequently, Defendants moved to strike the class allegations in Plaintiffs' complaint. The Court remarked that the Sixth Circuit had recognized that Plaintiffs' burden in establishing class certification under Rule 23 was higher and more stringent than establishing a collective action under the FLSA. *Id.* at *4. The Court reasoned that as it had already denied Plaintiffs' motion for conditional certification under the FLSA, it was unlikely that they would be able to establish grounds for class certification under Rule 23(a). *Id*. Rather than granting Defendants' motions to strike the class allegations in Plaintiffs' complaints, the Court decided to let the parties proceed with discovery. Thus, Defendants' motion to strike the class allegations in Plaintiffs' complaints was denied without prejudice. *Id*.

***Roe, et al. v. SFBSC Management, LLC*, 2015 U.S. Dist. LEXIS 4006 (N.D. Cal. Jan. 12, 2015).** Plaintiffs, a group of former exotic dancers, brought an FLSA action alleging that Defendants misclassified them as independent contractors and denied them minimum wages. Plaintiffs moved to proceed pseudonymously and to allow future Plaintiffs to join this suit by filing their FLSA consents under seal. The Court granted the motion to proceed pseudonymously, but denied the sealing motion. Plaintiffs contended that they needed to proceed anonymously because the action involved highly sensitive and personal details about them. Plaintiffs also asserted that exotic dancing carried a significant social stigma, and that there were risks inherent in working as an exotic dancer, including risk of injury by nightclub patrons if their names or addresses were publicly disclosed. *Id.* at *3. Further, Plaintiffs argued that disclosure could affect their future employment prospects outside the adult nightclub industry. First, the Court found that Plaintiffs identified an adequate threat of personal embarrassment and social stigmatization that favored allowing them to proceed under pseudonyms. *Id*. at *8. Second, the Court found that Plaintiffs expressed reasonable concerns that disclosing their identities would threaten them with both career and physical harm, and asserted that for privacy and personal safety reasons, it was customary for the exotic dancers to use stage names at Defendants' dance clubs. Defendants agreed that the public disclosure of an exotic dancer's true identity presented substantial risk of harm. *Id.* at *10-11. Third, Defendants argued that if Plaintiffs proceeded anonymously, Defendants would face the potential inability to assert a *res judicata* defense to later filed actions by the same individuals, and that they would be prohibited during discovery from communicating with third-party witnesses about Plaintiffs by name. *Id.* at *11. Although the Court acknowledged that these were significant concerns, the Court pointed that because the present Plaintiffs had given Defendants their real names, it eliminated Defendants' concerns. Further, the Court opined that if a Plaintiff bound by the eventual judgment in this case later sued Defendants, then Defendants, having Plaintiffs' names, would know this and be able to assert a *res judicata* defense. *Id.* at *12. The Court remarked that although it was possible that anonymity would raise problems for discovery, anonymity need not, and should not, impede either party's ability to develop its case. *Id.* at *12-13. The Court maintained that in case anonymity impedes discovery it would issue limited protective orders revealing the dancers names to pertinent third-parties, in a way that protects the dancers' interests sufficiently, without prejudicing the opposing party's ability to litigate the case. *Id.* at *13. Finally, the Court found that anonymity did not threaten "the principle of . . . open judicial records" because the result from this case would be open to the public. *Id*. at *14. Accordingly, the Court allowed Plaintiffs to use pseudonyms. Further, the Court opined that because Plaintiffs could proceed pseudonymously, sealing the consents was unnecessary, and that the request was too broad. The Court found that although allowing Plaintiffs' anonymity justified redacting their names and other identifying information from filings, requests to seal particular filings, or parts of filings, to remove them wholly from the public record, must relate to specific documents and must be made by a motion that satisfies the Court's local rule on sealing. *Id.* at *16. Accordingly, the Court denied Plaintiffs' motion to seal future Plaintiffs' FLSA consents to join the action.

***Smitherman, et al. v. Iguana Grill, Inc.*, 2015 U.S. Dist. LEXIS 87807 (N.D. Ala. June 12, 2015).** Plaintiffs, a group of servers, brought an FLSA action alleging that Defendant paid them an hourly wage of $2.13 per hour, plus tips, instead of the federal minimum wage of $7.25 per hour, and required them to contribute a portion of their tips to food expeditors. Defendant did not oppose Plaintiffs' motion for conditional certification, but objected to specific language in the proposed notice of collective action, consent form, and notice procedure. *Id.* at *3. Defendant objected to certain language in the notice describing the collective action and the lawsuit. After Plaintiffs offered proposed changes to some of Defendant's objections, the parties reached an agreement regarding the language of the notice, and requested a notice period of 75 days. *Id.* at *3. The Magistrate Judge recommended approving the notice. *Id.* Although Defendant raised four specific objections to Plaintiffs' proposed consent to join form, the parties eventually resolved the objections. *Id.* at *6. Finally, Defendant objected to two of Plaintiffs' proposals regarding the procedures for providing notice, including: (i) the proposed requirement to post the notice in the common areas or at the time clocks of each restaurant, and (ii) Plaintiffs' request for telephone numbers, e-mail addresses, and the last four digits of social security numbers for employees and former employees. At the hearing, the parties agreed that the notice would be posted by the time clock in the restaurant, and that Defendant would not challenge production of the requested employee information if a suitable protective order was entered. *Id*. Accordingly, the Magistrate Judge recommended granting Plaintiffs' motion for conditional certification.

(ii) Mootness In FLSA Collective Actions

***Ali, et al. v. Jerusalem Restaurant, Inc.*, 2015 U.S. Dist. LEXIS 36987 (D. Colo. Mar. 23, 2015).** Plaintiffs, a group of waitresses, brought an action seeking overtime compensation under the FLSA. Defendant moved for summary judgment against named Plaintiff Lena Derani and argued that its offer of judgment pursuant to Rule 68 rendered her claim moot. The Court denied the motion. The Court noted Derani's evidence showed that Defendant's owner was asked directly about overtime wages by at least two employees, permitting an inference that he knew or showed a reckless disregard for the FLSA requirement to pay overtime wages. The Court opined that despite Defendant's showing that it provided benefits it was not legally obligated to provide, Derani's evidence sufficiently permitted an inference that Defendant did not pay her or other employees overtime wages and that its failure to do so was done with knowledge of or in reckless disregard of the FLSA requirements. *Id.* at *8. Thus, the Court opined that there was an issue of material fact as to whether the three-year statute of limitations applied to Defendant's failure to pay overtime and summary judgment limiting the claim to a two-year time period was inappropriate. The Court observed that an offer of judgment tendering complete relief eliminates the case or controversy of an action and, thus, justifies dismissal. *Id.* at *14. Here, the offer of judgment applied a two-year statute of limitations, and the Court noted that Derani already overcame her burden at the summary judgment stage to permit a jury finding as to whether the three-year statute of limitations applied. Further, the offer would not make Derani whole because it failed to include attorneys' fees, and the Court noted that in an action brought to enforce the FLSA, a Court shall, in addition to any judgment awarded to Plaintiffs, allow a reasonable attorneys' fee to be paid by Defendant. *Id.* Although payment of attorneys' fees and costs to a prevailing party in an FLSA action is mandatory, Defendant's offer excluded attorneys' fees despite the mandatory requirement to pay such fees to a prevailing party in an FLSA action. *Id.* at *15. Thus, the Court held that the offer of judgment did not render moot Derani's overtime claim, and accordingly, denied Defendant's motion for summary judgment.

***Compressor Engineering Corp. v. Thomas, et al.,* 2015 U.S. Dist. LEXIS 20079 (E.D. Mich. Feb. 19, 2015).** Plaintiff brought a putative class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited advertisements to Plaintiff's fax machine. Defendant offered Plaintiff a judgment pursuant to Rule 68 for $1,500, together with the costs of the action and reasonable attorneys' fees. *Id.* at *7. When Plaintiff did not respond within 14 days, Defendant moved to dismiss the action for lack of subject-matter jurisdiction, asserting that Plaintiff's claims were moot in the face of the unaccepted offer of judgment. *Id.* at *8. The Court denied Defendant's motion. First, the Court distinguished the case from *Genesis Healthcare Corp. v. Symczyk, U.S.*, 133 S. Ct. 1523 (2013), which according to the Court, "assumed without deciding that a named Plaintiff's individuals claims in a collective action pursuant to the FLSA were mooted by an unaccepted offer of judgment pursuant to Rule 68." *Id.* In

Court's view, the limited holding in *Genesis Healthcare* applied to collective actions pursuant to the FLSA and explained that Rule 23 class actions were "fundamentally different from collective actions under the FLSA…" *Id*. Next, the Court noted that the offer of judgment must satisfy Plaintiffs' "entire" demand to moot a case or controversy. *Id.* at *10. The Court agreed with Plaintiff that Defendant's offer did not satisfy its entire demand because it did not offer injunctive relief against further violations of the TCPA as set forth in Plaintiff's complaint. *Id.* at *13. Although Defendant argued that Plaintiff's injunctive prayer lacked significance, the Court noted that the correct inquiry would be whether Plaintiff's injunctive claim was "so insubstantial" that it failed to present a federal controversy. *Id.* at *15. Further, to the extent Defendant argued the merits of Plaintiff's injunctive claim, the Court noted that that argument should be made in a motion to dismiss for failure to state a claim, and not in a motion to dismiss for lack of subject-matter jurisdiction. *Id.* at *17. Thus, the Court denied Defendant's motion to dismiss, finding that Defendant's offer failed to satisfy Plaintiff's entire demand.

***Hamilton, et al. v. Metropolitan Properties Of America, Inc.*, 2015 U.S. Dist. LEXIS 8738 (N.D. Ohio Jan. 26, 2015).** Plaintiff brought an action on behalf of herself and all other similarly-situated leasing consultants across seven states alleging that Defendant miscalculated her overtime rate in violation of FLSA. Plaintiff alleged that her overtime rate should have taken into account periodic commissions she earned, in addition to her regular hourly wage. *Id.* at *1-2. After Plaintiff moved for conditional certification, Defendant made offers of judgment under Rule 68 to Plaintiff and three opt-in Plaintiffs specifying that, if they did not accept the offers within 14 days of service, they "shall be deemed withdrawn." *Id.* at *2. Defendant argued that, because Plaintiff failed to accept the offer, the Court must dismiss her claim as moot. *Id.* The Court disagreed and ruled that Defendant's theory conflicted with the plain text of Rule 68(a) requiring entry of judgment where an opposing party accepts an offer of judgment in writing. *Id.* at *2-3. The Court further noted that, according to Rule 68(b), "an unaccepted offer is considered withdrawn, but does not preclude a later offer." *Id.* at *3. The Court found that Defendant's offer, both by its own terms and under Rule 68, had been withdrawn due to the lapse of time, and that Plaintiff had not accepted any offer, nor was any offer currently on the table. *Id.* The Court concluded, therefore, that the unaccepted Rule 68 offer did not render Plaintiff's claim moot and did not prevent her from proceeding as the representative of a proposed FLSA collective action. *Id.* at *4.

***Hepler, et al. v. Abercrombie & Fitch Co.*, 2015 U.S. App. LEXIS 10424 (2d Cir. June 22, 2015).** Plaintiffs brought a putative class action and collective action alleging that Defendants failed to comply with notice and record-keeping requirements of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). The District Court dismissed Plaintiffs' claims for lack of subject-matter jurisdiction, finding that Defendants' Rule 68 offers of judgment rendered Plaintiffs' claims moot. *Id.* at *1. On appeal, the Second Circuit vacated the judgment of the District Court and remanded for further proceedings. The Second Circuit found that the District Court erred by dismissing the case for lack of subject-matter jurisdiction based on Defendants' unaccepted offers of judgment to Plaintiffs. *Id.* at *3. The Second Circuit noted that, if Defendants tender Rule 68 offers that provide less than complete relief, Plaintiffs are free to accept or not accept. If Plaintiffs accept, the District Court must enter judgment accordingly and terminate the case. If Plaintiffs do not accept, the case proceeds. If, on the other hand, Defendants tendered Rule 68 offers that provide complete relief, the District Court should enter judgment pursuant to the terms of that offer, with or without Plaintiffs' consent. *Id.* at *2. The Second Circuit noted that, by making an offer of judgment for complete relief, a Defendant is, in essence, submitting to entry of a default judgment. Just as a Defendant may end the litigation by allowing default judgment, a Defendant may end the litigation by offering judgment for all of the relief sought. *Id.* The Second Circuit, however, held that the offer of judgment, by itself, does not moot anything because an offer cannot compel relief; it is the entry of the judgment pursuant to that offer that moots the case. *Id.* at *3. Accordingly, the Second Circuit found that the District Court erred by dismissing the case for lack of subject-matter jurisdiction based on Defendants' unaccepted offers of judgment, vacated the District Court's judgment, and remanded for further proceedings.

***Mays, et al. v. Grand Daddy's LLC,* 2015 U.S. Dist. LEXIS 733 (W.D. Wis. Jan. 6, 2015).** Plaintiff, an entertainer at Defendants' adult club, brought a hybrid collective action under the FLSA and state law class

action under Wisconsin's wage & hour laws, alleging claims for unpaid wages, unpaid overtime, and unlawful tip pooling and deductions. Before Plaintiff moved for class certification, Defendants tendered an offer of judgment under Rule 68, which Plaintiff rejected. *Id*. at *1. Defendants thereafter moved to dismiss the case, arguing that the Court lacked subject-matter jurisdiction because their offer of judgment had rendered Plaintiff's claims moot. Plaintiff moved to stay briefing and ruling on her Rule 23 motion for class certification until discovery could be completed. The Court granted Plaintiff's motion, and denied Defendants' motion. Plaintiff contended that her case was not moot because Defendants did not offer full relief on all of her claims, and even if they did, the existence of other opt-in Plaintiffs in the collective action would prevent a finding of mootness. *Id*. at *2. Specifically, Plaintiff argued that Defendants' Rule 68 offer was ambiguous because it did not identify which claims Defendants were offering to settle and was incomplete because it did not include damages plus interest for the value of her claim or twice the amount that Defendants deducted from her wages. *Id*. at *7. The Court agreed with Plaintiff and remarked that although Defendants claimed that their offer submitted to judgment for everything that Plaintiff had asserted, they failed to clarify this in their offer, stating only that judgment should be entered against them with respect to back wages, overtime pay, liquidated damages, improper deductions, punitive damages, and costs and attorneys' fees. *Id*. at *7-8. Defendants contended that they offered exactly what Plaintiff identified in her Rule 26 disclosures and asserted that they were entitled to rely on those disclosures in crafting an offer of judgment. *Id*. at *8. The Court found that Defendants failed to make clear what claims they were seeking to settle. *Id*. Defendants had not cited any legal authority in support of their argument that in determining whether an offer of judgment would moot their claims, the Court must limit Plaintiff to the calculations initially disclosed as damages under Rule 26, as opposed to the relief sought in the complaint. *Id*. at *8-9. The Court opined that Plaintiff had substantially complied with Rule 26 by identifying the amount of back wages and deductions that she was seeking and she did not exhibit willfulness or bad faith. *Id*. at *10. The Court remarked that neither the interest nor double deduction computation was so complex that Defendants were prejudiced by Plaintiff's lack of disclosure. *Id*. at *11. Thus, the Court concluded that Defendants failed to offer Plaintiff a complete and clear offer of judgment, and accordingly denied Defendants' motion to dismiss Plaintiff's complaint as moot. *Id*. Because Plaintiff had filed her motion for class certification at an early stage to avoid mooting her claims or avoid a buy-off problem, the Court granted Plaintiff's motion to stay briefing on the motion for class certification pending further discovery. *Id*. at *12.

(iii) Individual Executive Liability In FLSA Collective Actions

***Morales, et al. v. Rochdale Village, Inc.*, 2015 U.S. Dist. LEXIS 144382 (E.D.N.Y. Oct. 23, 2015).** Plaintiff, a former non-exempt hourly employee, brought a putative class action and collective action alleging that Defendants denied her and others overtime and earned wages in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiff sought to represent five sub-classes asserting claims for failure to pay overtime and straight time wages in violation of the FLSA and NYLL and failure to abide by record-keeping requirements of the NYLL. Defendants moved to dismiss the complaint. The Court denied Defendants' motion. At the outset, the Court noted that, in order to state a plausible FLSA overtime claim, a Plaintiff must sufficiently allege 40 hours of work in a given workweek as well as uncompensated time in excess of the 40 hours. *Id*. at *5. Here, Plaintiff provided examples of two improper wage & hour practices that operated together to deprive her of compensation for 52 minutes of work during the week of January 6, 2014. *Id*. at *7. The Court found that Plaintiff's specific examples, combined with her allegations regarding her regularly scheduled 40-hour workweek, were sufficient to defeat Defendants' motion as to Plaintiff's overtime claim. *Id*. Plaintiff also sought liability against several individual Defendants. The Court noted that, in determining whether individual liability is warranted under the FLSA, the overarching concern is whether the alleged employer possessed the power to control the workers in question. *Id*. at *8. The Court further observed that a person exercises operational control over employees if his or her role within the company, and the decisions the role entails, directly impact the nature or conditions of the employees' employment. *Id*. The Court observed that Plaintiff alleged that the individual Defendants both held managerial and directional positions at the company, through which they had control over the wage policies, employees' work schedules, rates of pay, record-keeping practices, and day-to-day labor operations. *Id*. at *10. The Court, therefore, found that Plaintiff sufficiently had alleged a basis for individual liability. Accordingly, the Court denied Defendants' motion to dismiss.

***Stevenson, et al. v. The Great American Dream, Inc.*, 2015 U.S. Dist. LEXIS 63646 (N.D. Ga. May 14, 2015).** Plaintiffs, a group of current and former adult entertainers at Pin Ups Nightclub, brought a collective action alleging that Defendants misclassified them as "independent contractors" and wrongfully deprived them of certain mandatory benefits under the FLSA. *Id*. at *1. Defendants moved for partial summary judgment, arguing that Defendant James W. Lee, Sr., President of The Great American Dream, Inc. ("GAD") and owner of Pin Ups, was not personally liable to Plaintiffs under the FLSA. Defendants maintained that Lee was not an employer within the meaning of the FLSA, and to be considered an "employer" under the FLSA, an officer should either be involved in the day-to-day operation or have some direct responsibility for the supervision of employees. *Id*. at *3. The undisputed facts established that Lee was not involved in the day-to-day operations of Pin Ups and did not have direct responsibility for the supervision of the entertainers. Further, Lee played no role in the hiring decisions nor did he play any role in forming the policies governing the entertainers' conduct during their shifts. Consequently, the Court found that Lee was not an "employer" under the FLSA. *Id*. at *4. Plaintiffs, however, argued that Lee, as the President, possessed supervisory authority. The Court remarked that mere possessing supervisory authority did not mean he exercised such authority, and that unexercised authority was insufficient to establish liability as an employer. *Id*. at *5. Plaintiffs also asserted that Lee admitted he made the decision to classify Plaintiffs as independent contractors. The Court, however, remarked that the evidence cited by the Plaintiffs did not support this assertion. Accordingly, the Court granted Defendants' motion for partial summary judgment, insofar as it applied to claims brought against Lee individually.

(iv) Awards Of Attorneys' Fees In FLSA Collective Actions

***Bodon, et al. v. Domino's Pizza, LLC*, 2015 U.S. Dist. LEXIS 82039 (E.D.N.Y. June 4, 2015).** Plaintiffs, a group of employees, brought a class action alleging that Defendant failed to provide services or allowances to employees for maintenance of work uniforms, deducted their wages by requiring them to make certain uniform-related purchases, and retained gratuities in violation of the New York Labor Law ("NYLL"). The parties ultimately settled, and the Court approved the settlement. The settlement called for monetary relief on a claims-wide basis, and a class consisting of all delivery driver or customer service employees. *Id*. at *5. The parties failed to settle their fee dispute, and Plaintiffs therefore filed a motion for an award of attorneys' fees and costs. The Court granted the motion with revision to the rate, hours, and total fees. At the outset, the Court noted that in a settlement that involves a common fund, such as this case, attorneys' fees should be calculated based on: (i) a percentage-of-the-recovery method; and (ii) the lodestar/presumptively reasonable fee method. *Id*. at *10. Plaintiffs contended that the Court should look at the amount of money Defendant would have paid out if 100% of the settlement class timely submitted the claims, *i.e.*, $4,705,145. Using this figure as a baseline, and adding in more than $1.9 million in fees, Plaintiffs calculated the entire fund at $6,626,964.79. *Id*. at *13. Defendant contended that the appropriate benchmark for Plaintiffs' fees was the benefit actually recovered by the class, or $1,536,872, which was significantly less than what Plaintiffs claimed, therefore bringing the fees down substantially. The Court noted that in *Masters v. Wilhelmia Model Agency*, 473 F.3d 423 (2d Cir. 2007), Plaintiffs settled for $21.8 million, and gave the Court discretion to determine the mode of disposal of the unclaimed or excess funds. *Id*. at *14. Plaintiffs' counsel requested 33.3% or $7.28 million of the fund as fees plus $1.5 million in expenses. The Court in *Masters* resolved the fee issue by awarding fees based on a percentage of only the claims made with a lodestar-check, and distributed the excess fund to various charities that benefited Plaintiffs. *Id*. at *15. The Second Circuit, however, reversed, finding that the entire fund, and not portion thereof, was created through the efforts of the counsel. *Id*. at *16. Here, the Court remarked that the Second Circuit's award of a percentage of the entire recovery in *Masters* did not mean that Plaintiffs' counsel were entitled to a percentage of a hypothetical recovery. *Id*. at *17. The Court observed that several cases post-dating *Masters* had expressly recognized that distinction. *Id*. Likewise, the Court remarked that while *Masters* was distinguishable from this case, at the same time *Masters* explicitly reaffirmed the lodestar approach as a viable method of assessing reasonable attorneys' fees in a common fund case. *Id*. at *20. Under the lodestar method, the Court noted that it must determine a reasonable hourly rate for the legal services performed, using factors such as the labor and skill required, the difficulty of the issues, and the attorney's customary hourly date. *Id*. at *23. The Court further opined that in assessing the hourly rate, case law precedents typically consider rates awarded in the district in which the reviewing Court sits, pursuant to what is known as the "forum rule." *Id*. at *23. The Court remarked that

once it determines the reasonable hourly rate, it must them multiply this rate by the reasonable number of hours expended, in order to determine the presumptively reasonable fee. Accordingly, using the lodestar method, the Court determined a reasonable hourly rate for each of the attorneys' roles in the case, and awarded a total fee of $551,627.50. *Id*. at *35.

***Gonzalez, et al. v. Scalinatella, Inc.,* 2015 U.S. Dist. LEXIS 78620 (S.D.N.Y. June 12, 2015).** Plaintiff brought an action alleging that Defendant violated the FLSA by refusing to pay tipped employees the minimum wage and overtime compensation and failing to apprise the employees of their rights, and violated the New York Labor Law ("NYLL") by refusing to pay overtime compensation and failing to provide various notices required under state law. *Id.* at *2. Although Plaintiff successfully obtained conditional certification of his FLSA claims, no additional Plaintiffs joined the action. *Id.* at *3. Plaintiff later moved for class certification of his NYLL claims, which the Court denied on the basis that the class was not sufficiently numerous. Subsequently, the parties reached a settlement agreement for $7,500, exclusive of fees. Unable to reach an agreement on the amount of fees, Plaintiff filed an application for $81,252.50 in attorneys' fees. Plaintiff asserted that the requested fee – a lodestar figure representing 249.1 attorney and paralegal hours multiplied by various hourly rates – was reasonable under the case law governing fee awards. *Id.* at *4. The Court awarded Plaintiff attorneys' fees in the amount of $48,366.50. Although the Court found that the fee award need not be proportionate to Plaintiff's recovery under the settlement agreement, it held that the award must be reduced in light of Plaintiff's unsuccessful motion for class certification. *Id.* at *6-9. The Court, however, found no reason to reduce Plaintiff's award by a measure related to the conditional certification motion under the FLSA, since the fact that no collective class members filed opt-in consent forms was beyond Plaintiff's control. *Id.* at *16. The Court similarly refused to reduce Plaintiff's award of fees to account for various unsuccessful discovery applications as alleged by Defendant. The Court summarized the history of discovery disputes in the case, and determined that each of the disputes reflected legitimate positions. *Id.* at *18-27. Thus, despite Plaintiff's partial failure on each application, the Court declined to disregard any hours Plaintiff spent in pursuit of the unsuccessful arguments regarding discovery disputes. Defendant also argued that the fee award should be reduced under Rule 26 as Plaintiff failed to provide a computation of damages. The Court, however, found no reason or supporting authority to limit or preclude an award of fees based on Plaintiff's allegedly inadequate initial disclosures. *Id.* at *30-31. The Court therefore identified only the line-items in counsel's records attributable to the unsuccessful motion to certify and reduced the fee award accordingly. The Court then accounted for the number of hours spent on the unsuccessful motion for class certification and the discovery extension request, and found that the total sought-after number of hours was 179.5, compared to the alleged 249.1 hours. *Id.* at *59. The Court thus determined that a 10% reduction in the hours of the lead counsel across-the-board would be appropriate. *Id.* Finding the remaining hours expended by the other attorneys and paralegals reasonable, the Court reached a lodestar of $48,366.50, and awarded that amount in attorneys' fees. *Id.*

***Gortat, et al. v. Capala Brothers, Inc.,* 2015 U.S. App. LEXIS 13160 (2d Cir. July 29, 2015).** Plaintiffs, a group of construction workers, brought an action alleging that Defendants violated the FLSA and New York Labor Law by failing to pay them for overtime hours. After six years of litigation, the case went to trial and the jury returned a verdict in Plaintiffs' favor. *Id.* at *3. The District Court ultimately awarded Plaintiffs damages totaling $293,212.41. Plaintiffs then sought attorneys' fees of $887,765.85 and costs of $80,324.11. *Id.* The Magistrate Judge recommended a substantial reduction in the amount requested and proposed a fee award of $514,284 and $68,294.50 in costs. *Id*. The Magistrate Judge recommended awarding no fees for the hours spent litigating Plaintiffs' defense to Defendants' counterclaims and denying the request of Plaintiffs' counsel for fees for a trial specialist who assisted Plaintiffs. *Id.* at *4. The Magistrate Judge also disagreed with Defendants' contention that Plaintiffs had engaged in unnecessary and inefficient discovery, reasoning that the delays in the case were due to Defendants' combative and extraordinary conduct that raised many unnecessary disputes regarding case management and discovery. *Id*. Despite Plaintiffs' concessions that their fee award should be reduced by $5,730 because Plaintiffs actually incurred that in defense of the counterclaims, the District Court adopted the Magistrate Judge's recommendation in its entirety. *Id.* at *5. Upon Defendants' appeal, the Second Circuit reversed the District Court's judgment insofar as it awarded Plaintiffs' counsel $5,730 in fees that counsel conceded

were erroneously billed. *Id.* at *10. Although Defendants argued that the District Court should have downwardly adjusted the fee award because Plaintiffs did not succeed in every individual motion they filed in pursuit of their claims, the Second Circuit pointed out that there is no rule that Plaintiffs need to achieve total victory on every motion in pursuit of a successful claim in order to be compensated for the full number of hours spent litigating that claim. *Id.* at *9. The Second Circuit therefore concluded that the District Court did not err in finding the remaining hours reasonably incurred in pursuit of Plaintiffs' affirmative claims. Accordingly, the Second Circuit reversed in part and affirmed in part the District Court's judgment.

***Teoba, et al. v. Trugreen Landcare LLC,* Case No. 10-CV-6132 (W.D.N.Y. July 28, 2015).** Plaintiff brought an action seeking unpaid wages from Defendant under the FLSA and the minimum wage laws of New York and New Hampshire. The parties settled the litigation, and the Court had found the settlement agreement terms relating to damages and compensation for class members were fair and reasonable, and approved those portions of the agreement. Plaintiffs' counsel then filed a motion seeking attorneys' fees and expenses, which the Court granted. Defendants did not dispute that the Plaintiffs' counsel was entitled to attorneys' fees under the FLSA. The Court, however, expressed concern about whether the dollar amount of the fund being created for the settlement should be used as the denominator in determining what percentage of the settlement was being assigned to attorneys' fees. *Id*. The Court remarked that by using the sum of money needed to fund all possible claims, as opposed to the sum of money needed to pay reasonably expected claims, Plaintiffs' counsel might artificially overstate the value of the settlement and thereby reduce the percentage of funds from the total portion of the settlement assigned to attorneys' fees. *Id*. at 4. Responding to the Court's concerns, Plaintiffs' counsel pointed to several relevant considerations, including: (i) the fee portion of the settlement amount represented 31% of the total settlement fund; (ii) 57% of the total claims that could have been filed were in fact filed; and (iii) there was a 92% approval rate. *Id*. at 4-5. The Court observed that the fees sought represented approximately 31% of the total settlement fund, and noted that a percentage approximating one third of the settlement – using the total settlement fund as the denominator – has been found to be reasonable in similar cases. *Id*. at 7. In addition, the Court noted that the affidavits of Plaintiffs' counsel indicated that they had expended a total of 1,180 hours in attorney time and 56.5 hours in paralegal time and had incurred $48,024 in expenses. *Id*. The Court found that this expenditure of time was not unreasonable in the light of the long and hard fought history of the case. *Id*. Finally, the Court found it significant that Plaintiffs' counsel had submitted an affidavit setting forth what the presumptively reasonable fee would be at normal billing rates (in excess of $800,000) and what the fee would be if the computed hourly rates were used from recently approved in a class action employment discrimination case involving out-of-district lawyers ($576,000). *Id*. at 8. The Court remarked that this was another indication that $565,000 for attorneys' fees and costs provided by the settlement was fair and reasonable. *Id*. Accordingly, the Court found that the requested $565,000 in attorneys' fees was reasonable, and granted the motion.

(v) Application Of *Twombly* Pleading Standards In FLSA Collective Actions

***Freeman, et al. v. Zillow, Inc.,* 2015 U.S. Dist. LEXIS 120501 (C.D. Cal. Mar. 19, 2015).** Plaintiff, on behalf of inside sales consultants, brought a putative class action alleging that Defendant violated the California Labor Code by failing to pay him overtime wages and failing to provide meal and rest breaks. Specifically, Plaintiff alleged that Defendant engaged in a systematic scheme of exploiting and intimidating its employees to miss meal breaks, rest breaks, and work overtime without compensation. *Id.* at *2. According to the complaint, Defendant required and demanded that employees work beyond the automatically recorded eight hour workday and/or 40-hour workweek without compensation and demanded that employees work through their meal and rest breaks while denying them compensation by automatically detracting this time from their previously auto-populated timesheets. *Id.* at *2-3. Defendant moved to dismiss the complaint based on *Bell Atlantic Corp v. Twombly*, 550 U.S. 555 (2007), arguing that Plaintiff did not provide any details about the nature of its policies or practices that resulted in the alleged un-compensation or under-compensation. *Id.* at *5. The Court granted Defendant's motion. The Court found that Plaintiff had failed to provide sufficient detail about the length and frequency of Plaintiff's unpaid work to support a reasonable inference that Plaintiff worked more than 40 hours in a given week. *Id.* at *13. Plaintiff had not alleged that Defendant failed to pay him overtime on any specific workday where he worked in excess of eight hours or any specific workweek where he worked excess of 40 hours. *Id.* The

Court further found that Plaintiff's claim for failure to provide meal and rest breaks also failed to satisfy the pleading requirements. Plaintiff had nowhere specified in his complaint any instance of one meal or rest break where he worked through the break and where Defendant failed to pay him for that time. *Id.* at *15. Thus, although Plaintiff's allegations raised the possibility of violations, the Court concluded that Plaintiff had failed to provide sufficient detail to support a reasonable inference that Defendant violated the California Labor Code. Accordingly, the Court dismissed the complaint without prejudice.

***Lico, et al. v. TD Bank,* 2015 U.S. Dist. LEXIS 70978 (E.D.N.Y. June 2, 2015).** Plaintiff, a former bank teller, brought a collective action under the FLSA on behalf of herself and others similarly-situated alleging that Defendant failed to provide her with an adequate space to express breast milk and to take necessary lactation breaks during her workday. Plaintiff's manager informed her that she could take only two daily breaks to express milk. Plaintiff also alleged that Defendants terminated her employment because she tried to exercise her rights as a nursing mother. *Id.* at *3. Defendants moved to dismiss claims under § 207(r) of the FLSA, which the Court denied. Section 207(r) provides, in relevant part that an employer shall provide: (i) a reasonable break time for an employee to express breast milk for her nursing child each time such employee has need to express the milk; and (ii) a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee for such purpose. *Id.* at *5. Although Defendants argued that § 207(r) was not privately enforceable, the Court noted that § 207(r) must be read in conjunction with the penalty provision of the FLSA, which explicitly provides a private right of action for all violations of § 7, which includes § 207(r). *Id.* at *6-7. Further, the Court observed that § 216(b) limits the remedies available for violations of § 207(r), and only permits recovery of lost wages and overtime, liquidated damages, attorneys' fees, and costs. *Id.* at *7. Likewise, the U.S. Department of Labor has indicated that § 207(r) does not specify any penalties if an employer is found to have violated the break time for nursing mother's requirement, and that in most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount of liquidated damages. *Id.* at *8. Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks. *Id.* The Court thus remarked that this interpretation highlighted a practical enforcement problem, and not a categorical bar to bringing suit. The Court reasoned that it did not mean that the statute is not privately enforceable as a matter of law, and instead a Plaintiff may bring suit individually for a violation of § 207(r), but that she may only recover lost wages that are attributable to the § 207(r) violation. *Id.* at *8-9. Alternatively, Defendants argued that Plaintiff failed to state a claim because she did not allege that she lost wages as a result of any violation of the requirements of § 207(r). Plaintiff alleged that she missed time at work because she needed to travel home in order to express milk, and had sought compensation for 40.35 hours of wages lost because of Defendants' failure to comply with 207(r) and discriminatory practices. The Court thus opined that Plaintiff plausibly alleged a claim of compensable damages consistent with the remedies permitted under § 216(b), and denied Defendants' motion to dismiss.

***Miranda, et al. v. Coach, Inc.,* 2015 U.S. Dist. LEXIS 18278 (N.D. Cal. Feb. 13, 2015).** Plaintiffs, a group of retail workers, brought a putative class action under California Labor Code alleging that Defendants required them to submit to a bag check when leaving the store which deprived them of time for breaks and meals, and kept them late without pay at the conclusion of their shifts. *Id.* at *1. Defendants moved to dismiss the complaint, and the Court partially granted the motion. Defendants contended that Plaintiffs had pleaded conclusory allegations about wage and overtime violations, and such was far short of the requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiffs alleged that Defendants failed to pay wages at the regular rate and for overtime in violation of §§ 510, 1194, and 1199 of the California Labor Code. *Id.* at *4. Plaintiffs alleged that Defendants forced them and other similarly-situated employees to work on a regular and consistent basis without receiving compensation for all hours worked at their regular rate or if more than eight hours a day and/or 40 hours per week, at the applicable overtime rate. Plaintiffs further alleged that Defendants had a consistent policy of failing to pay them regular rate and/or premium pay for those hours worked. *Id.* at *4-5. The Court found that those allegations merely restated the statute's obligations without alleging facts sufficient to make a plausible claim and did not specify which, if any, named Plaintiff actually failed to receive full regular wages. *Id.* at *5. In addition, the

Court observed that the overtime allegation used the conditional "if" rather than alleging concrete facts showing that the named Plaintiffs actually worked overtime hours without proper pay. *Id.* The Court concluded that the allegations were insufficient to state a claim. *Id.* Defendants also contended that Plaintiffs' allegations under §§ 226.7 and 512 of the California Labor Code and Wage Order No. 7-2001 were conclusory and that they had not alleged facts showing that Defendants denied them a timely and compliant meal or rest break. *Id.* at *6. The Court disagreed, and found that Plaintiffs alleged that Defendants subjected them to a uniform company policy that required all employees to undergo a bag check by a supervisor prior to leaving the store for all breaks. Plaintiffs further alleged that they often waited between 5 to 30 minutes in order to have their items checked, and due to this they often missed their break entirely, had their breaks cut short, or took their breaks late. *Id.* at *6-7. The Court determined that these factual allegations were enough to show that Defendants failed to provide Plaintiffs with compliant meal and rest periods. *Id.* at *7. The Court also rejected Defendants' contention that Plaintiffs failed to plead facts showing that they impeded, discouraged or prohibited Plaintiffs from taking a proper meal break as required by *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012). *Id.* The Court maintained that Defendant's uniform company-wide loss prevention policy impeded Plaintiffs' ability to take 30-minute meal breaks. *Id.* at *7-8. The Court ruled found that Plaintiffs, being former employees, had no standing to seek injunctive relief enjoining Defendants from violating wage & hour law. *Id*. at *9-10. The Court also declined to strike Plaintiffs' class allegations and found that the sufficiency of class allegations are better addressed through a class certification motion. *Id*. at *10.

***Nardiello, et al. v. Maureen's Kitchen, Inc.*, 2015 U.S. Dist. LEXIS 32574 (E.D.N.Y. Mar. 17, 2015).** Plaintiffs, a group of restaurant employees, brought an action alleging various violations under the FLSA and New York Labor Law ("NYLL"). Defendant moved to dismiss the complaint for failure to state a claim, which the Court granted in part. First, Defendant argued that Plaintiffs had not adequately pleaded their unpaid overtime claims based on recent Second Circuit decisions – such as *DeJesus v. HF Management Services, LLC,* 726 F.3d 85 (2d Cir. 2013), *Nakahata v. N.Y. Presbyterian Healthcare System, Inc*., 723 F.3d 192 (2d Cir. 2014), and *Lundy v. Catholic Health System*, 711 F.3d 106 (2d Cir. 2013) – applying the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to FLSA overtime claims. *Id.* at *5. Plaintiffs alleged that Defendant required them to work on one of four available shifts during their employment, which ran from 6 am to 3:30 pm, and that they therefore regularly worked more than 40 hours per week. *Id.* at *7. The Court pointed out, however, that the complaint lacked basic information regarding how many days per week, on any week, each Plaintiff worked and therefore failed to adequately allege that Plaintiffs worked in excess of 40 hours per week in any given week. *Id.* Accordingly, the Court dismissed Plaintiffs' unpaid overtime claims without prejudice. Second, Defendant contended that Plaintiffs' minimum wage claims should be dismissed because the complaint did not approximate the hours Plaintiffs worked or identify the time periods during which they allegedly did not receive the applicable minimum wage. *Id.* at *8. The Court observed that Plaintiffs alleged that Defendant never paid them a minimum wage, only allowed them to collect tips as compensation, and also issued fake paychecks to make it appear as though Plaintiffs were receiving the applicable minimum wage. *Id.* The Court found those allegations stated plausible minimum wage violations under the FLSA and the NYLL. *Id.* at *8-9. Third, Plaintiffs alleged that Defendant required them to arrive at least 30 minutes before their shift, and work between 20 and 30 minutes after the end of their shift to perform necessary side work without compensation. *Id*. at *9. Defendant argued that those claims should also be dismissed because they did not meet the Second Circuit's pleading standard for FLSA overtime claims. *Id.* at *10. The Court disagreed, stating that although those allegations lacked the degree of specificity to state an unpaid overtime claim, they did state plausible claims that Defendant failed to compensate Plaintiffs for off-shift work in violation of the FLSA and the NYLL. *Id.* Finally, Defendant argued that Plaintiffs had not pleaded with any degree of plausibility that Defendant denied them meal breaks, wage notices, or other statutory requirements. *Id.* at *10-11. The Court found that although the allegations were sparse, the complaint plausibly alleged violations of § 162 of the NYLL. *Id.* at *11. The Court also found that Plaintiffs had plausibly alleged violations of § 195 of the NYLL for their assertion that Defendant issued fake paychecks that contained false information regarding Plaintiffs' wages. *Id.* at *11-12.

***Nikmanesh, et al. v. Wal-Mart Stores, Inc.,* 2015 U.S. Dist. LEXIS 52464 (C.D. Cal. Mar. 16, 2015).** In this putative class action, Plaintiff, a former pharmacist, alleged that Wal-Mart failed to provide rest breaks and to compensate for off-the-clock time spent taking a job-related training course. Specifically, Plaintiff in her first amended complaint ("FAC") asserted that she took the home study and test portions of the APHA Immunization Certification Training Course (the "Course"), a course directly related to the job of pharmacist, without compensation. Wal-Mart moved to dismiss on the grounds that Plaintiffs' allegations were insufficient under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554 (2007). First, the Court found that Plaintiff's scant allegations were insufficient to permit an inference that the Course was work time. The Court opined that the only information Plaintiff provided about the Course was that it was an immunization certification course that was directly related to the job of pharmacist, which was not enough. *Id*. at *4. The Court observed that it would be absurd to say that an employer must pay for any and all activities "directly related" to its employees' jobs without considering the employer's conduct. *Id*. The Court noted that many employees undoubtedly spend hours of personal time educating themselves on things "directly related" to their jobs so they might be better, more marketable employees. *Id*. at *5. The Court remarked that Plaintiff, however, did not allege that Wal-Mart had given the course or required its pharmacists to take the course. Thus, the Court concluded that Plaintiff had not pled sufficient factual content to allow the Court to make a reasonable inference that Defendant was liable. *Id*. Regarding Plaintiff's rest-break claims, Plaintiff alleged only that Wal-Mart had a uniform policy prohibiting any pharmacist from leaving the pharmacy unattended thereby discouraging or preventing members of class from taking mandated rest breaks. *Id*. at 4. The Court found that the allegations were insufficient because the FAC alleged no specific incidents of missed rest breaks. Plaintiff asserted facts in her opposition brief that the inability to take rest breaks generally occurred when Plaintiff and putative class members were the only pharmacists scheduled to work and therefore they were discouraged and prevented from taking rest breaks because to do so would mean they would have to close down the pharmacy and not provide timely service to customers; however, Plaintiff did not allege these facts in the FAC. *Id*. at *6. Specifically, the Court noted that the FAC did not allege that Plaintiff worked alone in the pharmacy, that Wal-Mart failed to provide relief for breaks, or prevented or discouraged her from closing down the pharmacy for breaks. *Id*. Thus, the Court concluded that the absence of such allegations was fatal to those claims, and dismissed the complaint with leave to amend.

(vi) FLSA Collective Actions For Donning And Doffing

***Dekeyser, et al. v. Thyssenkrupp Waupaca, Inc.*, 2015 U.S. Dist. LEXIS 28471 (E.D. Wis. Mar. 9, 2015).** Plaintiffs brought a collective action alleging that Defendant violated the FLSA by failing to pay them overtime for time spent at the end of their shifts showering and changing clothes. Defendant moved to reconsider the Court's order of November 25, 2014, in which it ruled that in order for Plaintiffs to show changing clothes and showering was "required by the nature of the work" at Defendant's foundries, Plaintiffs must convince the finder of fact that changing clothes and showering at work would significantly reduce the risk to the health of the employee. *Id.* at *1. The Court denied the motion. Defendant contended that the standard used here, which was derived from the tripartite test utilized by the Ninth Circuit in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) – which in itself came from regulations promulgated after enactment of the Portal-to-Portal Act, 29 U.S.C. § 254 – was inconsistent with the U.S. Supreme Court's 2014 decision in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014). *Id* at *2-3. The Court found there was no question that the principles discussed in *Integrity Staffing* applied to this case because the Supreme Court interpreted the same statutory provisions, regulatory framework, and body of case law that the parties here had examined since this case started. *Id*. at *7. The Court noted that *Integrity Staffing* provided significant guidance to applying the integral and indispensable language first articulated in *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956); indeed, *Integrity Staffing* clarified that those words each meant different things, as "integral" was akin to "intrinsically related to" and "indispensable" was akin to "necessary." *Id.* Thus, the Court maintained that determining compensability solely on the basis of whether an employer required an activity was wrong because such an analysis ignored the requirement that the activity be integral or intrinsically related to what the employer hired the workers to do. *Id.* at *8. Likewise, the Court held a test that turned on whether the activity was for the benefit of the employer was similarly overbroad. *Id*. Further, the Court pointed out that *Integrity Staffing* did not relate to employee health and safety, yet the concurring opinion highlighted that extrapolating the

Supreme Court's reasoning to hold as non-compensable activities that were indispensable/necessary for employees to do their jobs safely would not be warranted. *Id.* Moreover, it would run contrary to *Steiner* and the applicable regulations that *Integrity Staffing* discussed. *Id.* The Court observed that what was conceded by the employer in *Steiner* was at issue in this case, *i.e.*, was changing and showering at work integral and indispensable to the employee's productive work? *Id.* The Court concluded that it had provided a narrower, more specific standard in an effort to assist the parties in determining, essentially, how indispensable a health and safety precaution must be to bring a case within the ambit of *Steiner* such that the time was compensable notwithstanding the Portal-to-Portal Act. *Id.* Accordingly, the standard was that the changing and showering was integral and indispensable if "required by the nature of the work," *i.e.*, in other words, if "changing clothes and showering at work would significantly reduce the risk to the health of the employee." *Id* at *9.

***Gomez, et al. v. Tyson Foods, Inc.,* 2015 U.S. App. LEXIS 15041 (8th Cir. Aug. 26, 2015).** Plaintiffs, a group of current and former unionized employees at one of Defendants' beef processing facilities, brought a class action and collective action against Defendants seeking overtime and minimum wage payments for certain pre-shift and post-shift activities under the Nebraska Wage Payment and Collection Act and the FLSA. Previously, the District Court had granted summary judgment in favor of the class on all liability issues, and after a jury trial, the District Court awarded nearly $5 million in damages. Defendant appealed the class certification order and the summary judgment rulings, and the Eighth Circuit reversed. Defendant argued that the District Court should have dismissed the named Plaintiffs' FLSA claims for failure to file timely consents as required by 29 U.S.C. § 216(b). The Eighth Circuit noted that in *Acosta v. Tyson Foods, Inc.*, 2015 U.S. App. LEXIS 15043 (8th Cir. Aug. 26, 2015), it had held that an employee must file a written consent within the statute of limitations to proceed as a Plaintiff in an FLSA action. *Id*. at *5. The Eighth Circuit, therefore, concluded the District Court should have dismissed the FLSA claims. Defendant also contended that Plaintiffs failed to make a submissible case on their claims under the Nebraska Collection Act, which creates a cause of action to recover only those wages that an employer previously agreed to pay, when all conditions stipulated were met. *Id*. at *6. Defendant acknowledged that it agreed to pay every employee for four minutes per shift to compensate for pre-shift and post-shift activities, but there was no dispute in the record that Defendant paid this amount of time. *Id*. at *7. The Eighth Circuit noted that there was no evidence of an agreement with Plaintiffs and other employees for additional time spent performing pre-shift and post-shift activities during the relevant period. Accordingly, the Eighth Circuit reversed and remanded the action for entry of judgment for Defendant.

(vii) Exemption Issues In FLSA Collective Actions

***Alvarado, et al. v. Corporate Cleaning Services*, 2015 U.S. App. LEXIS 5270 (7th Cir. April 1, 2015).** Plaintiffs, a group of current and former window washers, brought suit claiming that their employer improperly failed to pay them overtime compensation in violation of the FLSA and the Illinois Minimum Wage Law ("IMWL"). The District Court held that Plaintiffs fell within the exception from overtime requirements set forth in 29 U.S.C. § 207(i) and, therefore, granted summary judgment to Defendants. The exception has three elements, including: (i) the worker's regular pay exceeds one and half times the federal minimum wage; (ii) more than half of the worker's compensation over a representative period represents commissions on goods and services; and (iii) the worker is employed by a retail or service establishment. *Id*. at *2-3. On appeal, the Seventh Circuit affirmed. First, the Seventh Circuit found that Plaintiffs' annual pay throughout 2007 ranged from approximately $40,000 to $60,000. *Id*. at *4. Second, the Seventh Circuit concluded that Defendants paid the employees based on commission. Although Defendants called their compensation system a "piece-rate" system, rather than a "commission" system, the Seventh Circuit opined that nomenclature is not determinative. In a piece-rate system, an employer pays a worker by the item produced, even if the employer has not sold the item; in a commission system, an employer pays a worker only when there has been a sale. More importantly, a commission-compensated employee works irregular hours so that the ratio of his pay to his hours is not constant. The Seventh Circuit found that Defendants' employees could work only when a building owner hired Defendants to wash windows, and the peculiar conditions of the window-washing business necessarily made their hours irregular. Third, Defendants qualified as a retail service establishment because they sold their window-cleaning services to building owners and managers. *Id.* at *11. The U.S. Department of Labor ("DOL"), in an *amicus* brief,

embraced Plaintiffs' argument that the building managers who bought Defendants' cleaning services re-sold them to the building's occupants, as if the managers were buying mops that they planned to re-sell to the occupants, such that Defendants did not qualify as retailers. The Seventh Circuit, however, noted that the DOL failed to engage the primary reason for treating Defendants' window washers as commission workers – their irregular work hours – and failed to suggest that window washers would be better off if paid overtime. *Id*. at *15. The Seventh Circuit therefore, found no connection between the DOL's criteria and the reasons for excusing certain employers from the FLSA's overtime provision. The Seventh Circuit, accordingly, affirmed the District Court's order granting summary judgment in favor of Defendants.

***Barks, et al. v. Silver Bait, LLC,* 2015 U.S. App. LEXIS 17310 (6th Cir. Oct. 2, 2015).** Plaintiffs, a group of workers at a rural Tennessee worm farm, brought an action under the FLSA alleging that Defendant improperly classified them as exempt under the FLSA's agricultural exemption and thereby failed to pay them overtime compensation. Defendant engaged in housing, growing and packaging bait worms, and employed Plaintiffs to load worms onto empty trays and to feed them. *Id.* at *3-4. Plaintiffs also packaged the worms in Defendant's custom packaging, labelled them, and loaded them onto pallets for delivery to retailers. *Id.* Believing that its employees fell within the FLSA exemption for agricultural workers, Defendant did not pay them overtime. *Id.* at *4. In 2009, the U.S. Department of Labor ("DOL") opened an investigation and concluded that the exempt classification was appropriate because Plaintiffs worked on a farm, and Defendant employed them as seasonal workers to cultivate, grow, and harvest agricultural or horticultural commodities. *Id.* at *5. After a bench trial, the District Court found that the agricultural exemption applied, and issued a declaratory judgment in Defendant's favor. *Id.* at *6. On Plaintiffs' appeal, the Sixth Circuit affirmed, holding that the FLSA's agricultural exemption covered the growing and raising of bait worms on a worm farm even though that activity was not expressly listed in the statutory definition of agriculture. The Sixth Circuit found that the FLSA definition of agriculture was meant broadly to reach "farming in all its branches" and applied to Defendant. *Id.* at *13. Although worm farming was not agriculture in a traditional sense, the Sixth Circuit found that raising worms fell within the margins of the term's ordinary meaning as involving the production of animals useful to man and the preparation of products for man's use. *Id.* at *12. According to the Sixth Circuit, raising and growing bait worms was similar to traditional farming because both involved raising animals for sale as commodity, and bait worms have an agricultural character even though they were not used as food for human beings. *Id.* at *16-17. The Sixth Circuit reasoned that bait worms were similar to working with other types of animals that case law authorities and the DOL regulations had concluded were covered by the agricultural exemption, including race horses, cattle raised to obtain serum or virus, and animals raised on a farm used only for experimental purposes in connection with an employer's factory. *Id.* The Sixth Circuit thus rejected a rigid view of the exemption offered by Plaintiffs to limit the scope of the agricultural exemption to the production of only certain types of animals enumerated in the statute such as hogs or cattle. *Id.* at *17-18. The Sixth Circuit observed that, although not a specifically enumerated farming activity, there was little to distinguish Defendant from a traditional farm other than its focus on worm farming. *Id.* at *20-21. Accordingly, the Sixth concluded that FLSA's agricultural exemption covered Defendants' activities.

***Bucklin, et al. v. Zurich American Insurance Co.*, 2015 U.S. App. LEXIS 12497 (9th Cir. July 20, 2015).** Plaintiffs, a group of insurance claims adjusters, brought a putative class action alleging that Defendant misclassified them as administrative employees exempt from the overtime provisions of the California Labor Code. The District Court granted summary judgment to Defendant, and the Ninth Circuit affirmed. The Ninth Circuit applied California's administrative exemption test as articulated in *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 831 (9th Cir. 2011). To classify an employee under the administrative exemption, an employer must establish five elements, including that: (i) the employee performs work directly related to management policies or general business operations of either the employer or the employer's clients; (ii) the employee customarily and regularly exercises discretion and independent judgment; (iii) the employee works under only general supervision while performing work along specialized or technical lines requiring special training, experience, or knowledge; (iv) the employee is primarily engaged in exempt work meeting the above requirements; and (v) the employee meets a minimum salary requirement. *Id.* at *2. The Ninth Circuit found that Plaintiffs primarily performed work directly related to Defendant's management policies or general business operations to the extent that they

developed plans of action for resolving claims and represented Defendant while investigating claims, setting reserves, directing litigation, and negotiating settlements. *Id.* at *3. Plaintiffs also made recommendations to their supervisors when necessary, and supervisors frequently accepted those recommendations. *Id.* at *3-4. Further, the Ninth Circuit determined that Plaintiffs customarily and regularly exercised discretion and independent judgment because they had authority to set reserves and to settle claims up to specified amounts, after considering factors such as the nature and extent of the injury and the likelihood of the claimant's permanent disability, and, when litigation became necessary, they retained an attorney on behalf of Defendant, developed a litigation strategy, and, when appropriate, settled the case. *Id.* at *4-5. The Ninth Circuit reasoned that the mere fact that Plaintiffs performed some clerical duties and described their duties as routine did not create a triable issue on the quantitative component of the directly related requirement. Similarly, the fact that Plaintiffs' discretion was restricted by Defendant's best practices manual did not negate their regular exercise of discretion and independent judgment in setting reserves and directing litigation. *Id.* at *5. In addition, Plaintiffs acknowledged that they engaged in work along specialized or technical lines, rarely operated under direct supervision, and earned more than twice the state minimum wage. *Id.* at *6. Accordingly, the Ninth Circuit affirmed the District Court's order granting summary judgment to Defendant.

***Burke, et al. v. Alta Colleges, Inc.*, 2015 U.S. Dist. LEXIS 35789 (D. Colo. Mar. 23, 2015).** Plaintiffs, a group of former field admission representatives, brought an FLSA action alleging that Defendant misclassified them as exempt and sought unpaid overtime compensation and related penalties and damages. After a bench trial, the Court found that Plaintiffs were exempt from overtime requirements of the FLSA, and entered judgment against each named Plaintiff and in Defendant's favor. The Court noted that Plaintiffs were one of the three types of employees tasked with working with prospective students to inform and persuade them to enroll in Defendant's educational programs and services. *Id*. at *11. The primary role of the field admissions representatives was to selectively prospect, interview, recommend, and enroll individuals into one of Defendant's career-focused education programs and guide the prospects through the enrollment completion process. *Id*. at *12. The Court noted that after the field admissions representatives were trained, they were responsible for generating the majority of their own leads, and worked with minimal supervision. *Id*. at *20-21. Field admissions representatives were paid an annual salary, before October 2010, in addition to a base salary, and they also received a bonus. After 2011, based on the Department of Education's new regulations, Defendant stopped paying commissions and bonuses. *Id*. at *32. The new regulations defined commission, bonus, or other incentive payment to mean a sum of money or something of value, other than a fixed salary of wages, paid to or given to a person or entity for services rendered. *Id*. The Court remarked that the FLSA generally mandates that an employer pay an employee one-half times the regular rate of pay for hours worked in excess of 40 per week, but exempted from overtime any person employed in the capacity of an outside salesman. *Id*. at *103. The U.S. Department of Labor ("DOL") defines an outside salesman as one: (i) whose primary duty was making sales and obtaining orders for services for which he receives a consideration; and (ii) who customarily is engaged away from the employer's place of business in performing such primary duty. *Id*. at *103-104. The Court observed that an employee's primary duty for purposes of the FLSA is that which is of principal importance to the employer. *Id*. at *106. The Court remarked that the required analysis should be a functional inquiry that views an employee's responsibilities in the context of the particular industry in which the employee works and accommodates industry-by-industry variations in methods of selling. *Id*. at *107. Under this standard, the Court concluded that Plaintiffs were making sales. The Court explained that from the time each Plaintiff first contacted the high school until the time the student candidate actually started school at Defendant's College, Plaintiffs were engaging in various activities to finalize the sale, including getting students to complete the enrollment process, attending Defendant's classes, and paying tuition. *Id*. The Court remarked that all of Plaintiffs' other activities, including time spent calling high schools to schedule meetings or presentations, reviewing career interest cards, and completing weekly activity reports, whether performed in their home office of on the road, or anywhere else they chose to, fell within the outside sales exemption because they furthered their sales efforts. *Id*. at *108. Accordingly, the Court concluded that in the for-profit education industry, Plaintiffs who work as Defendant's field admissions representatives were generating sales. In addition, the Court concluded that Plaintiffs also bore external indicia of salesmen as Plaintiffs: (i) were hired as salespeople; (ii) received sales training; (iv) solicited new

businesses; (v) worked with minimal supervision; and (vi) their compensation and evaluations reflected their sales activities. *Id*. at *112-117. Accordingly, the Court concluded that Plaintiffs were exempt from overtime requirements under FLSA's outside sales exemption, and entered judgment in Defendant's favor.

***Calderon, et al. v. GEICO General Insurance Co.,* 2015 U.S. App. LEXIS 22546 (4th Cir. Dec. 23, 2015).** Plaintiffs, a group of security investigators, brought a collective action under the FLSA alleging that Defendant misclassified them as exempt and denied them overtime pay. Plaintiffs worked in Defendant's Special Investigations Unit ("SIU"), a part of Defendant's Claims Department, and their primary responsibility was to investigate fraudulent claims. *Id.* at *3-4. Defendant classified its investigators as exempt under the FLSA, and in 2007, Defendant undertook a review of various employee classification to conclude that it properly classified the investigators as exempt under the administrative exemption. *Id.* at *8. Alleging that the classification was improper, Plaintiffs requested damages in the amount of their unpaid overtime, liquidated damages, interest, and an award of attorneys' fees and costs. The District Court conditionally certified Plaintiffs' FLSA claim as a collective action, and approximately 48 investigators joined the action as opt-in Plaintiffs. *Id.* at 11. Plaintiffs subsequently added individual and class action claims for unpaid overtime pay under the New York Labor Law ("NYLL"), and the District Court certified the class. Following discovery, Plaintiffs moved for partial summary judgment, which the District Court granted. In doing so the District Court rejected Defendant's contention that the investigators fell within the FLSA's administrative exemption. *Id.* at *11-12. The District Court subsequently entered a stipulated order containing a complete formula for the computation of back pay to which each Plaintiff was entitled depending upon the total pay received and the total time worked for each two-week pay period within the applicable two years limitations period. *Id.* at *12-13. On Defendant's appeal, the Fourth Circuit remanded the action, and concluded that the District Court had not found all of the facts necessary to compute the amount of damages. The District Court subsequently determined the amount of damages for each Plaintiff and entered judgment in Plaintiffs' favor. Defendant again appealed, arguing that the District Court erred in granting partial summary judgement against it on the issue of liability. *Id.* at *14. The Fourth Circuit affirmed the District Court's findings on the issue of Defendant's liability. The Fourth Circuit found that the summary judgment record clearly showed that Plaintiffs' primary duty was investigating suspected fraud, including reporting their findings, and they had no supervisory responsibility. *Id.* at *19-24. The Fourth Circuit noted that Plaintiffs were in no way part of the management of Defendant and did not run or service the general business operations; rather, by assisting the claims adjusters in processing the claims of Defendant's insureds, Plaintiffs' duty simply consisted of the day-to-day carrying out of Defendant's affairs to the public. *Id.* at *24-25. The Fourth Circuit concluded that the primary duty of Plaintiffs – conducting factual investigations and reporting the results – was not analogous to the work in the "functional areas" that the regulations identify as exempt. *Id.* at *38. The Fourth Circuit therefore held that the District Court correctly granted partial summary judgment to Plaintiffs on the issue of whether Defendant improperly classified Plaintiffs as exempt. The Fourth Circuit also held that the District Court correctly granted partial summary judgment to Defendant on the issue of willfulness under the FLSA, finding no basis upon which a reasonable fact-finder could conclude that Defendant's decision to classify Plaintiffs as exempt was knowingly incorrect or reckless. *Id.* at *40. The Fourth Circuit noted that Defendant had acted in good faith by reviewing the classification issue multiple times, and that the District Court was within its discretion in refusing to award liquidated damages to Plaintiffs under either the FLSA or the NYLL. *Id.* at *45. The Fourth Circuit, however, found that an award of pre-judgment interest was mandatory on a NYLL wage claim, and the District Court did not have discretion to decline such an award. *Id.* at *48. Accordingly, the Fourth Circuit affirmed in part and reversed in part the District Court's decision.

***Freeman, et al. v. Kaplan, Inc.,* 2015 U.S. Dist. LEXIS 128948 (N.D. Ill. Sept. 25, 2015).** Plaintiff, a law school student, brought a putative class action alleging that Defendant violated the FLSA and the Illinois Minimum Wage Law ("IMWL") by failing to pay her a minimum wage in an acceptable medium and in a timely fashion. *Id.* at *1. Defendant hired law students to help sell its test-preparation products on their law school campuses; Defendant called them "student representatives." *Id.* at *3. Defendant hired Plaintiff as a student representative in March 2013, and paid her on a per-task basis in credits that could be used toward Defendant's course or third-party gift cards. When Plaintiff earned 25 credits, which was sufficient to qualify for one course, Defendant offered her the position as head representative. *Id.* at *5-6. Plaintiff

accepted that position, and worked for Defendant for just over one year, earning 47 credits. *Id.* at *7. During that time, she only sold one review course, as she mainly helped the regional director with set up and take-down of sales tables, provided promotional materials to students and answered customer e-mails. *Id.* While Plaintiff redeemed 25 of her earned credits for one of Defendant's review courses, she was unable to redeem her remaining credits because Defendant incorrectly credited her with only five credits. *Id.* at *8. Plaintiff contended that Defendant violated the FLSA and the IMWL by failing timely to pay her minimum wages in an acceptable medium. Defendant moved for summary judgment, arguing that Plaintiff was an outside sales employee and therefore exempt from the requirements of both the FLSA and the IMWL. Plaintiff had averred that she agreed to work as heap representative in exchange for 25 credits, which met the threshold for a bar preparation course, and after that she then stopped trying to make her own sales. *Id.* at *18. Plaintiff further stated that only five of her total credits stemmed from making sales, which constituted a single sale made, and thus the vast majority of her compensation came from completing non-sales tasks. *Id.* The Court found that since Plaintiff spent much of her time as head representative fulfilling various non-exempt promotional activities rather than doing sales, a jury could conclude that Plaintiff did not have a primary duty of sales. *Id.* The Court therefore denied Defendant's motion with regard to the period during which Plaintiff worked as a head representative. Defendant also argued that Plaintiff never worked at one of Defendant's places of business and thus she was "customarily and regularly engaged away from Defendant's place of business in performing such primary duty." *Id.* at *21. The Court concluded that the law school was a place of business for Defendant. The Court noted that Defendant regularly rented space from the school during the student's employment, it maintained sales employees on campus, and regularly directed them to make use of law school properly for meetings and announcements. *Id.* at *23-23. Defendant submitted that, because Plaintiff spent about 20% of her time working off-campus, she performed her primary duty of sales away from law school "customarily and regularly." *Id.* at *28. Defendant, however, made no showing as to the frequency or regularity of Plaintiff's work away from campus, and Plaintiff sated that she worked away from school only occasionally. As a dispute of material fact remained as to whether Plaintiff customarily and regularly engaged in the primary duty of making sales away from the law school, the Court concluded that summary judgment would be inappropriate.

***Garrison, et al. v. ConAgra Foods Packaged Foods, LLC*, 2015 U.S. Dist. LEXIS 891 (E.D. Ark. Jan. 6, 2015).** Plaintiffs, a group of current and former team leaders, brought an action seeking to recover unpaid overtime under the FLSA, the Arkansas Minimum Wage Act ("AMWA"), and a common law theory of unjust enrichment. Team leaders were salaried employees and their job duties required them to monitor the performance and behavior of hourly employees, and to identify poor performance and rules violations. *Id*. at *5. Team leaders were responsible for scheduling over 1,000 hourly employees every day, and were also responsible for determining at the start of every shift whether they had enough employees to run their production for that day. *Id*. at *9, 12. Defendant moved for summary judgment, arguing that: (i) Plaintiffs were exempt because they were employed in a *bona fide* executive capacity; (ii) they were exempt from the AMWA's overtime requirements for the same reason; and (iii) that their unjust enrichment claim failed as a matter of law. The Court granted the motion. At the outset, the Court noted that the U.S. Department of Labor ("DOL") defines an executive employee as one who: (i) is compensated on a salary basis with not less than $455 per week; (ii) whose primary duty is management of the enterprise; (iii) who regularly directs the work of two or more other employees; and (iv) who has authority to hire and fire other employees. *Id*. at *19. Plaintiffs contended that they did not possess the authority to unilaterally hire and fire any employee. *Id*. at *20. The Court noted that many different employee duties could satisfy the fourth element; for example, an employer could show that the purported executives' input had more influence than hourly employees' input, or that employee's recommendation are given particular weight. *Id*. at *21. In addition, the Court observed that, in *Burlington Industries, Inc., v. Ellerty*, 524 U.S. 742 (1998), the Supreme Court defined a tangible employment action as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Id*. at *22-23. The Court reasoned that although Plaintiffs may not have been responsible for selecting employees for promotion or advancement, their evaluations and recommendations determined whether an employee would retain such promotions. *Id*. at *30. In addition, the Court found that Plaintiffs initiated the progressive discipline process, and that Plaintiffs' job

descriptions included as part of their supervisory responsibilities rewarding and disciplining employees. *Id.* at *44. The Court particularly noted that initiating the disciplinary process that leads to an employee's suspension without pay or discharge was enough to comport with the DOL's regulatory requirement that Plaintiffs' disciplinary recommendations and suggestions were given particular weight. *Id*. at *49. Accordingly, the Court concluded that Defendant met its burden of establishing that Plaintiffs' recommendations for discipline were given particular weight and that the fourth element was satisfied. The Court thereby granted Defendant summary judgment on Plaintiffs' FLSA claim. For the same reasons, the Court granted Defendant summary judgment on Plaintiffs' AMWA claims.

***Greene, et al. v. Executive Coach & Carriage,* 2015 U.S. App. LEXIS 1257 (9th Cir. Jan. 27, 2015).** Plaintiff, a taxicab driver, brought an action alleging that Defendant failed to pay minimum wage and overtime in violation of Nevada wage & hour laws. The District Court granted Defendant's motion to dismiss Plaintiff's claim under the Nevada Minimum Wage Amendment, granted summary judgment on Plaintiff's claim under § 608.016 of the Nevada Revised Statute, and denied Plaintiff's request for leave to amend his complaint. On appeal, the Ninth Circuit reversed and remanded. At the outset, the Ninth Circuit found that the District Court erred in dismissing Plaintiff's claim under the Nevada Minimum Wage Amendment. *Id*. at *1-2. The Ninth Circuit noted that the Amendment, which contained no taxicab and limousine exception, superseded and supplanted the taxicab driver exception set out in § 608.250(2) of the Nevada Revised Statutes when it was ratified in 2006. The Ninth Circuit, therefore, rejected Defendant's retroactivity argument. *Id*. at *2. Plaintiff did not allege that Defendant owed him wages for hours worked prior to 2006, and therefore, the Ninth Circuit reversed the District Court's dismissal of the minimum wage claim. *Id*. The Ninth Circuit also found that the District Court erred in granting summary judgment on Plaintiff's claim under § 608.016. *Id*. First, the Ninth Circuit assumed, without deciding, that there was a private right of action to bring this claim because Defendant did not argue otherwise. *Id*. Second, the Ninth Circuit ruled that the District Court erred in finding that § 608.016 did not apply to commission-based pay arrangements because, regardless of how § 608.016 defines wages, employees still must be paid for each hour that they work. *Id*. On these grounds, the Ninth Circuit reversed the District Court's entry of judgment on this claim. *Id*. Finally, the Ninth Circuit determined that the District Court abused its discretion in denying Plaintiff's motion for leave to amend the complaint. *Id*. at *2-3. The District Court had previously found good cause and granted Plaintiff's motion for leave to amend but, on June 21, 2011, set the deadline for amendment on a date that already had passed on June 15, 2011. *Id*. at *3. When Plaintiff attempted to amend on June 21, 2011, the District Court denied his request. *Id.* The Ninth Circuit, therefore, reversed and remanded the action to permit Plaintiff to file an amended complaint. Finally, the Ninth Circuit reversed the District Court's imposition of sanctions on Plaintiff, which was predicated on the conclusion that Plaintiff's effort to amend his complaint was frivolous. Accordingly, the Ninth Circuit reversed the District Court's judgment and remanded.

***Marzuq, et al. v. Cadete Enterprises, Inc.,* 2015 U.S. App. LEXIS 21301 (1st Cir. Dec. 9, 2015).** Plaintiffs, a group of store managers, brought a collective action alleging that Defendant improperly classified them as exempt and denied them overtime pay in violation of the FLSA. Defendant owned and operated multiple Dunkin' Donuts franchises, and its store manager's responsibilities included calibrating the equipment to Dunkin' Donuts specifications, handling cash, keeping the store and grounds properly maintained, training and supervising employees, conducting periodic inventory, and completing substantial paperwork. *Id.* at *4. While Plaintiffs described themselves as being "in charge" and the "captains of the store," they also asserted that they worked more than 60 hours per week and spent a significant amount of doing non-exempt work, such as serving customers, covering other employees' shifts, and cleaning. *Id.* at *5. Plaintiffs brought this action seeking overtime compensation under the FLSA. Defendant moved for summary judgment, arguing that Plaintiffs fell within the FLSA's overtime pay exclusion for employees serving in a "*bona fide* executive" capacity. *Id.* at *6. The District Court granted Defendant's motion, holding that the facts were indistinguishable from a prior First Circuit decision in *Donovan v. Burger King Corp.,* 672 F.3d 221 (1st Cir. 1982), which ruled that the employer properly classified its managers as exempt even though they spent up to 40% of their time doing non-exempt work. *Id.* at *12-13. The District Court found that Plaintiffs had management as their primary duty, and even though they spent much of their time on non-exempt work and had little discretion to make significant decisions, the undisputed facts

showed that Plaintiffs were employed in a *bona fide* executive capacity. *Id.* at *15. On appeal, the First Circuit reversed. The First Circuit found disputes of fact regarding Plaintiffs' primary duty. While the First Circuit acknowledged that Plaintiffs were in charge of the store and that they could manage subordinates even when working side-by-side with them and performing non-exempt tasks, the evidence showed that Plaintiffs spent the great bulk of their working time on the floor performing non-exempt work, including serving customers and cleaning, and they were in charge only in title. *Id.* at *22. Specifically, the First Circuit noted that Plaintiff reported routinely substituting for hourly employees who were sick or absent, and contrary to their job description, a fact-finder could reasonably conclude that Plaintiffs' exempt and non-exempt duties were equally important to the operation of the restaurants. *Id.* at *23. The record contained evidence indicating that the named Plaintiffs' supervisory role was, at least at times, overwhelmed by non-managerial tasks, and Defendant required them to do various tasks that would take them away from the customer service areas of the store, and hence, appeared inconsistent with employee supervision. *Id.* at *26. The record also showed that corporate management closely supervised Plaintiffs' work and that they earned less than their non-exempt colleagues on an hourly basis. *Id.* at *32-35. The First Circuit therefore found that the evidence in the record did not lead inevitably to a conclusion that, in practice, Plaintiffs' primary duty was management. *Id.* at *35. In light of these factual disputes, the First Circuit concluded that Defendant failed to meet its burden of showing that Plaintiffs fell within the "*bona fide* executive" exception to the FLSA's overtime pay requirement. *Id.* Accordingly, the First Circuit vacated the summary judgment for Defendant and remanded the case to the District Court for further proceedings.

***Navarro, et al. v. Encino Motorcars, LLC,* 2015 U.S. App. LEXIS 4773 (9th Cir. Mar. 24, 2015).** Plaintiffs, a group of service advisors, brought a collective action alleging that Defendant violated the FLSA by failing to pay them overtime wages. Defendant, an automobile dealership, employed Plaintiffs to diagnose and recommend services and repairs required for vehicles based on the vehicle owner's requests/complaints. Defendant paid Plaintiffs on a commission basis and considered them exempt from the FLSA's overtime pay requirements. Plaintiffs asserted that they were misclassified as exempt employees. The District Court dismissed Plaintiffs' claim, finding that Plaintiffs fell within the salesman exemption. Plaintiffs appealed, and the Ninth Circuit reversed. In doing so, the Ninth Circuit relied on the regulatory definitions of salesman, partsmen, and mechanic of the U.S. Department of Labor ("DOL"), which limit the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. *Id.* at *6. Although the Ninth Circuit acknowledged that there were "good arguments supporting both interpretations of the exemption," it found it appropriate to defer to the DOL's interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, *Inc.*, 467 U.S. 837 (1984). *Id.* at *22-23. The *Chevron* test of reasonableness requires a two-step inquiry. Step one determines whether the precise question at issue was directly addressed by statute. *Id*. at *6. If it was not, step two considers an appropriate agency's interpretation of the statute. *Id.* at *6-7. If the interpretation is deemed reasonable, then the District Court must not substitute its own construction of the statutory provision. *Id.* at *7. The Ninth Circuit found that the exemption at issue in 29 U.S.C. § 213(b)(10)(A) was ambiguous. The Ninth Circuit noted that the statute could be read broadly by connecting the terms "salesman" and "servicing automobiles" so as to apply to "salesman…primarily engaged in…servicing automobiles," such as Plaintiffs, or to read narrowly to apply only to salesman – those employees who sell cars and partsmen – those employees who requisition, stock, and dispense parts, and to mechanics, *i.e.*, employees who perform mechanical work on cars. *Id.* at *8. Because both interpretations were reasonable, the Ninth Circuit evaluated whether the DOL's interpretation represented a reasonable reading of the exemption. According to the DOL's interpretation of the exemption, because service advisors did not personally sell cars, even if they were "salesmen" in a generic sense, and because they did not personally service vehicles, they fall outside the statutory definition. *Id.* at *15. The Ninth Circuit considered this to be a reasonable interpretation of the FLSA. The Ninth Circuit noted that DOL's interpretation was not unduly restrictive, and did not render any statutory term meaningless or superfluous. *Id.* at *18. The Ninth Circuit therefore concluded that Plaintiffs were non-exempt employees, and accordingly, reversed the District Court's dismissal of Plaintiffs' overtime claim.

***Siegel, et al. v. Bloomberg L.P.,* 2015 U.S. Dist. LEXIS 5602 (S.D.N.Y. Jan. 16, 2015).** Plaintiffs, a group of information technology ("IT") service desk representatives, brought an action under the FLSA and

the New York Labor Law alleging that Defendant unlawfully denied them overtime compensation by misclassifying them as exempt employees under the administrative exemption. Plaintiffs moved for summary judgment on the issues of administrative exemption, amount of overtime hours worked, and the applicable rate of pay to any overtime hours worked. The Court partly granted Plaintiffs' motion, determining that the administrative exemption did not apply to Plaintiffs. The Court found that Plaintiffs' duties did not fall within the administrative exemption because neither the level of importance nor consequence of the work Plaintiffs performed rose to the level of a "matter of significance." *Id.* at *10. The records showed that Plaintiffs provided technical support to employees. The Court noted that Plaintiffs did not carry out major assignments in conducting the operations of Defendant's business and did not perform work that affected Defendant's business operations to a substantial degree. *Id.* at *11. Further, Plaintiffs did not have authority to formulate, interpret, or implement management policies or operating practices of Defendant or to commit Defendant in matters that had significant financial impact. *Id.* at *11. The Court therefore found that the administrative exemption did not apply to Plaintiffs. The Court also determined that lack of any binding authority on the applicability of the administrative exemption to IT employees, whose primary duties included troubleshooting and fixing computer problems, confirmed its non-applicability to Plaintiffs. *Id.* at *12-13. Thus, according to the Court, Plaintiffs did not fall under the administrative exemption to the FLSA. *Id.* at *15. The Court, however, found that Plaintiffs were not entitled to summary judgment on the issue of overtime hours or applicable rate of pay to overtime hours because the issues involved a genuine dispute as to the amount of in-office and out-of-office hours worked by Plaintiffs and what the parties mutually understood regarding Plaintiffs' employment. *Id.* at *17-19. Accordingly, the Court partly granted and partly denied Plaintiffs' motion for summary judgment.

***Velazquez, et al. v. Costco Wholesale Corporation*, 2015 U.S. App. LEXIS 4859 (9th Cir. Mar. 25, 2015).** Plaintiffs, a group of employees, brought a class action against Defendants for violation of the California Labor Code, and sought overtime wages with interest. The District Court ordered Defendant to pay Plaintiffs unpaid overtime wages with interests and costs, and ordered Defendant to pay a continuing-wages penalty. Defendant appealed the District Court's judgment, and the Ninth Circuit affirmed in part. At the outset, the Ninth Circuit noted that the parties agreed that Plaintiffs established a *prima facie* case for failure to pay overtime under § 1194 of the California Labor Code. As an affirmative defense, Defendant argued that it properly designated Plaintiffs as exempt from overtime under the executive or administrative exemption. *Id*. at *3. In *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785 (1999), the California Supreme Court held that exemption status cannot be determined based solely on the number of hours that an employer claimed that an employee should be working. *Id*. at *3-4. *Ramirez* held one cannot rely on employee's hours because then an employee could evade a valid exemption through his own substandard performance. *Id*. at *4. To steer clear from these two pitfalls, *Ramirez* held that a trial court should consider the realistic requirements of the job, and first consider how the employee actually spent his or her time. *Id*. Here, the Ninth Circuit concluded that because the District Court did exactly that, and it did not err. The Ninth Circuit explained that the District Court correctly applied *Ramirez* and considered any expression of displeasure or lack thereof as one factor weighing against Defendant's executive exemption defense, and affirmed the judgment. *Id*. at *5. In addition to back pay award to named Plaintiff Steven Berry, the District Court ordered Defendant to pay continuing wages after termination as penalty under the Labor Code. The Ninth Circuit found that there was no evidence to support Defendant willfully failed to pay, and accordingly, vacated the judgment ordering Defendant to pay continuing wages. *Id*. at *6.

***Zannikos, et al. v. Oil Inspections (U.S.A.) Inc.,* 2015 U.S. App. LEXIS 4986 (5th Cir. Mar. 27, 2015).** Plaintiffs, a group of marine superintendents, brought a collective action under the FLSA alleging that Defendant wrongfully denied them overtime compensation. Defendant, which oversees and monitors oil transfers to ensure compliance with industry standards, employed Plaintiffs as marine superintendents, and charged them with observing oil transfers to ensure accurate, legal, and safe performance. *Id.* at *2. As part of their responsibilities, Plaintiffs monitored cargo loading and unloading, reported errors or losses, monitored compliance with safety standards, inspected equipment, and recommended policies, along with a number of other tasks. *Id.* Defendant contended that Plaintiffs interpreted and implemented management policies, carried out major assignments, and performed work affecting business operations, thereby qualifying for the administrative exemption of the FLSA. Upon both the parties' motions for

summary judgment, the District Court found that Plaintiffs did not fall under administrative exemption. *Id.* at *4. On Defendant's appeal, the Fifth Circuit affirmed. The Fifth Circuit found that the District Court correctly concluded that the work Plaintiffs performed did not extend beyond the application of skill in applying specified standards and thus did not satisfy the "independent judgment" element of the administrative exemption. *Id.* at *24. The Fifth Circuit noted that Plaintiffs' primary duties of observing and inspecting oil transfer to ensure compliance with relevant standards and specifications set forth by Defendant and its customers simply constituted the application of specific standards described in manuals or other sources and that it did not entail evaluating alternative courses of action after considering various possibilities. *Id.* at *14-17. Further, Plaintiffs' job descriptions, questionnaires, and depositions suggested that Defendant typically required them to confer with it before making recommendations in the event of non-compliance. *Id.* at *17. The Fifth Circuit thus found that, any advisory power Plaintiffs possessed was based solely on the development of the facts as to whether there was conformity with the prescribed standards, and thus, they did not formulate, affect, interpret, or implement management policies or operating practices. *Id.* Although Defendant argued that Plaintiffs' work was significant to customers and very important to their financial interests, the Fifth Circuit pointed out that the financial import of Plaintiffs' work was not sufficient to satisfy the independent judgment element of the administrative exemption. *Id.* at *17-19. The evidence showed that Plaintiffs' primary duties did not entail making any discretionary decisions based on guidelines, but rather strictly applying guideline and reporting noncompliance. *Id.* at *27. The Fifth Circuit therefore held that the District Court correctly concluded that Plaintiffs' primary duties did not include the exercise of discretion and independent judgment with respect to matters of significance, and accordingly, affirmed that Plaintiffs were non-exempt under the administrative exemption of the FLSA.

(viii) Discovery In FLSA Collective Actions

***Blair, et al. v. Professional Transportation, Inc.*, 2015 U.S. Dist. LEXIS 29202 (S.D. Ind. Mar. 9, 2015).** Plaintiffs brought a collective action alleging that Defendants had paid them less than the minimum wage and denied them overtime pay in violation of the FLSA. Defendants claimed that they had dealt with Plaintiffs in good faith and on a reasonable belief that they had complied with the FLSA; therefore, they were not liable to pay statutory liquidated damages. Plaintiffs moved to compel Defendants to produce communications involving the Crew Hauler's Trade Association ("CHTA"). Specifically, Plaintiffs sought 97 e-mails Defendants had withheld as privileged and unedited copies of documents they had produced in redacted form identified at Entries 60-157 of Defendants' privilege log. *Id*. at *3. Defendants argued that the CHTA (an association of companies engaged in the business of transporting rail crews to and from train stations throughout the country) was formed in May of 2008 – a period when the FLSA was in flux – for the purpose of advancing the common public policy and legislative positions of the Members. *Id*. Plaintiffs sought documents that were exchanged among the CHTA, its members, and attorney David Coburn. The Court granted Plaintiffs' motion in part. Defendants had asserted both relevance and the attorney-client privilege as bases for non-discoverability. *Id*. First, the Court stated that Defendants need not produce documents that dealt exclusively with administrative matters like billing or scheduling because they were not likely to lead to any evidence that bore on Plaintiffs' claims or Defendants' defenses. *Id*. at *4-5. Second, the Court found that the remaining documents included content relevant to the action, and many of the documents Defendants had withheld or redacted were not privileged because they did not include communications made for the purpose of giving or receiving legal advice. *Id*. at *5-6. For example, many documents dealt strictly with lobbying efforts. *Id*. at *6-7. Accordingly, the Court held that Defendants must produce those documents in unredacted form. *Id*. at *7. Third, the Court determined that the remaining documents were protected by the attorney-client privilege because they consisted of legal advice or information provided for the purpose of receiving legal advice. Further, they appeared to be confidential communications, as the addressees of those documents appeared to include only counsel for the CHTA, representatives of the CHTA's member companies, and counsel for the individual member companies. *Id*. Moreover, Plaintiffs acknowledged that David Coburn – the attorney whose communications were in question – represented the CHTA, and that the CHTA was an association of corporations united for the same purpose of advancing their collective legislative and public policy positions. *Id*. The Court observed that to whatever extent Plaintiffs argued that those documents exceeded the bounds of an attorney-client relationship, that privilege applied through the common interest exception. *Id*. at *8. Fourth, the Court remarked that the communications between Coburn and the

CHTA's personnel indicated that they shared common legal interests, including: (i) understanding their liabilities and obligations under proposed changes to the law; (ii) understanding and complying with the law as it stood; and (iii) complying with the law in forming the corporation and conducting their lobbying efforts. *Id*. at *10. The Court pointed out that each of the documents it examined would be privileged or redactable related to one of those interests and, therefore, the common interest exception resolved any threat to those documents' protection. *Id*. at *10-11. Fifth, the Court found Defendants had withheld many documents in which only segments of the communications related to the dissemination or receipt of legal advice. *Id*. at *11. The Court held that Defendants must produce certain documents but may redact privileged communications within those documents, subject to the common interest exception. *Id*. at *11-12.

***Cox, et al. v. Aero Automatic Sprinkler Co.,* 2014 U.S. Dist. LEXIS 184121 (N.D. Cal. June 12, 2015).** Plaintiffs, a group of sprinkler fitters, brought a putative class action alleging that Defendants failed them to pay overtime, provide rest breaks, and failed to provide accurate wage statements. After Plaintiffs served discovery related to class certification, they found that Defendants wrote to putative class members admitting the payroll errors, and provided checks to make compensate each impacted worker for those errors. *Id.* at *3. Defendants also advised the class members that depositing the check would constitute a waiver and release of claims against them. The paychecks did not include itemized statements showing how Defendants calculated wages or whether any amount was in dispute. *Id.* at *4. Eighty-six of the 102 class members cashed the checks, and Defendants thereafter asserted that the case as to those class members was settled. *Id*. Plaintiffs moved to require Defendants to disclose details such as the name, address, dates of service, and job title for each fire sprinkler fitter, including apprentices, employed by Defendants, pursuant to confidentiality considerations laid out in the stipulated protective order. Plaintiffs claimed they were incentivized by the federal government under FLSA and deputized under the Private Attorney General Act ("PAGA") to pursue California Labor Code violations in place of California's Labor Workforce Development Agency. The Court granted the motion. Defendants contended that Plaintiffs' motion was improper because they did not adequately meet and confer before filing their motion. The Court rejected this argument, finding that in the three meet and confer sessions with Plaintiffs, Defendants maintained their position, and refused to provide information relative to the 86 individuals who cashed the checks, making further meet and confer(s) redundant. The Court also observed that where class discovery is sought, Plaintiffs must show that the class action requirements are satisfied, or to show that discovery is likely to produce substantiation of the class allegations. *Id.* at *7. Here, Plaintiffs alleged numerosity, commonality, and typicality, and the Court found that the identities of the sprinkler fitter class members were required to address these key Rule 23(a) factors. *Id.* at *8. Further, the Court noted that the Labor Code requires approval of any penalties sought as part of a proposed settlement of PAGA claims, and PAGA claims are not waivable. *Id.* Further, the Court opined that an agreement by employees to waive their right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing the Labor Code, and because such an agreement has as its object, indirectly, to exempt the employer from responsibility for its own violation of law; as such, it is against public policy and may not be enforced. *Id.* at *9. In this case, no notices of settlement were filed and the Court had not approved any settlements. Additionally, the Court observed that FLSA claims cannot be settled without its approval, and Defendants had not filed any notices of settlement and had not sought the Court's approval or Department of Labor approval for settlement of the sprinkler fitters' FLSA claims. *Id.* Finally, the Court held that fairness required that Plaintiffs have equal access to individuals who potentially had an interest in, or relevant knowledge of, the subject of the action, but who were not yet parties. *Id.* at *13. The Court therefore granted Plaintiffs' motion to compel.

***Ellison, et al. v. Autozone, Inc.*, 2015 U.S. Dist. LEXIS 43877 (N.D. Cal. April 2, 2015).** Plaintiffs brought a putative class action alleging that Defendant failed to provide meal breaks and off-the-clock compensation in violation of the California Private Attorney General Act ("PAGA"). After the commencement of discovery, Plaintiffs sought an order compelling Defendant to designate a Rule 30(b)(6) witness on topics relating to changes in Defendant's policies and practices regarding meal breaks and off-the-clock work. *Id.* at *3. The Court noted that, although that information was relevant to claims arising under the PAGA, the gravamen of their dispute was whether Plaintiffs' PAGA claim was still at issue, which in turn depended on whether Plaintiffs alleged a class action or a representative claim. *Id.* Although a

representative PAGA claim is not subject to class certification requirements, the Court found that it need not decide the issue because the operative pleading was unclear as to whether Plaintiffs had alleged a representative PAGA claim in the first instance. *Id.* at *4-5. The Court noted that Plaintiffs labeled the entire pleading a class action and brought allegations pursuant to Rule 23. *Id.* at *5. Further, the Court observed that Plaintiffs specifically alleged a PAGA class with no separate PAGA cause of action and no reference to such a claim being brought in a representative capacity. *Id.* at *5-6. Thus, the Court denied Plaintiffs' motion to compel without prejudice to Plaintiffs' renewing their request after the Court determined the scope of Plaintiffs' PAGA claim. *Id.* at *6-7. Plaintiffs also requested an order compelling Defendant to designate a Rule 30(b)(6) witness to testify to the facts underlying 18 of the 22 affirmative defenses that Defendant asserted. *Id.* at *7. Defendant argued that information about the facts underlying its affirmative defenses was more appropriately discovered through interrogatories as opposed to a deposition. *Id.* The Court found that, while Rule 30(b)(6) questioning regarding the factual basis for affirmative defenses was not improper, interrogatories were the preferred approach. *Id.* at *7-8. Moreover, the Court noted that, contrary to Plaintiffs' contention that deposition testimony was required because Defendant had refused to provide any factual bases in its interrogatory responses, it appeared that Defendant expressed willingness to respond to interrogatories but Plaintiffs never propounded any interrogatories. Accordingly, the Court denied Plaintiffs' request for an order compelling Defendant to designate a Rule 30(b)(6) witness to testify about the factual bases of its affirmative defenses without prejudice to renewing the request after Defendant had the opportunity to respond to interrogatories. Accordingly, the Court denied Plaintiffs' motion to compel without prejudice.

***Ensor, et al. v. Chipotle Mexican Grill, Inc.,* 2015 U.S. Dist. LEXIS 60578 (S.D.N.Y. May 7, 2015).** Plaintiffs, a group of salaried apprentices, brought a nationwide class and collective action alleging that Defendant did not pay them overtime and spread-of-hours compensation under the FLSA and the New York Minimum Wage Act. On March 27, 2015, the Court had granted in part Plaintiffs' motion to compel production of certain documents from Defendant, finding that the report of consultant Cinda Daggett (the "Daggett Report") was not privileged because Daggett was not an agent of Messner Reeves LLC, Defendant's counsel at that time. Defendant sought relief under Rule 60(b). The Court denied Defendant's motion on the basis that Defendant's motion was procedurally improper, its new evidence was unpersuasive, and it had not shown that the Daggett Report was privileged. First, Plaintiffs argued that Rule 60(b) was inapplicable as Defendant had not presented newly discovered evidence within the meaning of the Rule, and even if it had, the March 27 order was still correct. *Id*. at *6. At the outset, the Court noted that a discovery order related to the attorney-client privilege is in no way a final judgment, and Defendant had not argued anything to the contrary. *Id*. at *7. The Court opined that Defendant could not bring a motion to challenge a discovery ruling under Rule 60(b). *Id*. Next, in support of its motion, Defendant offered two newly discovered documents in evidence, including Exhibit A, e-mails between Daggett and John Shunk, an attorney at Messner, and Exhibit B, an unsigned blank confidentiality agreement that Defendant allegedly gave to Daggett. *Id*. at *8. Defendant argued that these documents, which it received from Shunk, demonstrated that Daggett was, in fact, within the cone of privilege. The Court, however, found that the e-mails in Exhibit A did not demonstrate, as Defendant contended, that Messner used the Daggett Report to provide legal advice to Defendant. *Id*. Although Defendant argued that Shunk's e-mail indicated that the Report was privileged, the Court noted that a person's subjective belief that the conversation was privileged is not by itself sufficient to establish the privilege. *Id*. at *9. The Court observed that Daggett's e-mail supported the Court's previous reading of the situation, as it indicated that Daggett was providing services to Defendant to assist in a business decision, not merely to Messner. The Court relied on its previous finding that Messner offered no additional written legal advice after the receipt of the Daggett Report, suggesting that the Daggett Report was not, in fact, integral to Messner's legal advice. *Id*. at *10. Further, the Court found the confidentiality agreement in Exhibit B similarly unpersuasive because the agreement was not signed or dated, and nothing in the exhibit linked it to Daggett, making it unclear if the agreement was at all related to this issue. In addition, the Court determined that Defendant had not submitted anything that indicated that Messner revised its advice in light of the Daggett Report. The Court concluded that Defendant's newly offered arguments and evidence, alone, were not enough to show that the Daggett Report constituted part of Messner's legal advice to Defendant. *Id*. at *11. The Court thus concluded that Defendant's new evidence did not alter the Court's

previous analysis, as nothing Defendant had presented indicated that the Daggett Report was more necessary to Messner than previously believed. *Id*. at *12. Accordingly, the Court denied Defendant's motion to be relieved from the March 27 order.

***Figueroa, et al. v. Pioneer Hi-Bred International*, Case No. 12-CV-148 (S.D. Tex. Feb. 18, 2015).** Plaintiffs, a group of migrant agricultural workers, brought a collective action and class action alleging violations of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") and the FLSA, as well as state law claims for breach of contract, promissory estoppel, and *quantum meruit*. Defendant moved to dismiss named Plaintiff Gonzales from the action for failure to comply with discovery, and the Court denied the motion. Defendant asserted that it served its first set of interrogatories on Plaintiff Gonzales in June 2014, through his then attorney of record, but he had still not provided his responses. Defendant also contended that there was a lack of communication between Plaintiff Gonzales and his former attorneys. The Court noted that although Rule 37 permits it to dismiss an action if a party, after being properly served with interrogatories under Rule 33, fails to serve its answers, objections, or a written response, dismissal with prejudice is typically appropriate when there is a clear record of delay or contumacious conduct and the party's refusal to obey a discovery order is done willfully and in bad faith. *Id.* at 2. The Court found that Defendant did not make a sufficient showing that Plaintiff Gonzales acted in bad faith in failing to comply with the discovery requests, and that Defendant did not show that it would be substantially prejudiced without dismissal or that a different sanction would be ineffective. *Id.* at 2-3. Accordingly, the Court denied the motion.

***Garcia, et al. v. E.J. Amusements Of New Hampshire, Inc.,* 2015 U.S. Dist. LEXIS 26977 (D. Mass. Mar. 5, 2015).** Plaintiffs, a group of carnival ride operators, brought an action alleging that Defendants paid them a flat rate based on a 40-hour workweek even though they regularly worked up to 14 hours per day for seven days a week, and also failed to reimburse them for immigration-related expenses under Massachusetts and New Hampshire law. During discovery, Defendants issued a subpoena to a non-party, Centro de los Derechos del Migrante, Inc. ("CDM"), a non-profit legal services organization, seeking three categories of information, including: (i) research materials referring to named Plaintiff Garcia that were used to prepare a report on the abuse of migrant workers in the fair and carnival industry ("Category 1"); (ii) CDM's communications with Garcia regarding his employment by Defendants ("Category 2"); and (iii) CDM's correspondence relating to Garcia's attendance at a meeting with labor officials from the United States and Mexico ("Category 3"). *Id*. at *2. CDM moved to quash the subpoena and sought a protective order on the grounds of attorney-client privilege, academic researcher privilege, attorney work-product, and undue burden. The Magistrate Judge denied the motions without prejudice and ordered CDM to produce a privilege log for all the documents. CDM objected to producing privilege logs for Categories 1 and 3. On CDM's Rule 72 objections, the Court overruled CDM's objections. First, the Magistrate Judge's order required CDM to create a privilege log with respect to certain research materials referring to Garcia, which were allegedly used for a report on the abuse of migrant workers in the fair and carnival industry. *Id*. at *4. CDM contended that producing a privilege log would necessarily require it to disclose whether Garcia participated in the report. *Id*. The Court reasoned that the order only required CDM to briefly describe the nature of each document involving a Plaintiff so that the parties and the Court could assess the claims of privilege. *Id*. at *6. Although the Court recognized that creating a privilege log might necessarily require CDM to disclose whether Garcia was one of the anonymous contributors to its report, CDM's interest in protecting Garcia's identity was diminished because CDM had already agreed to create a privilege log for Category 2, which would functionally disclose Garcia as one of CDM's clients in the advocacy arm of the organization. *Id*. at *6-7. Further, the Court found that Garcia was unlike the other anonymous contributors in the report because he had filed a lawsuit. *Id*. at *7. CDM also objected to the Magistrate Judge's order on the grounds that creating a privilege log for Categories 1 and 3 would entail a time-consuming review of all the e-mails, files, and communications, and would yield little if any information relevant to the claims or defenses at issue in this matter. *Id*. at *7-8. The Court found that CDM failed to outline the number of hours it would take to comply with the Magistrate Judge's order, or to submit the transcript containing any information to support a claim of undue burden. *Id*. at *8. Thus, the Court concluded that the Magistrate Judge did not err by requiring CDM to produce privilege logs for Categories 1 and 3, and accordingly overruled CDM's objections to the Magistrate Judge's order.

***Makaneole, et al. v. Solarworld Industries America, Inc.*, Case No. 14-CV-1528 (D. Ore. June 26, 2015).** Plaintiff, a temporary worker, brought a putative class action alleging that Defendants engaged in a practice of programming an electronic time-keeping system to deduct minutes from hours worked prior to reporting them to payroll for purposes of computing his compensation in violation of Oregon state law. Plaintiff alleged that he was first employed with Defendant Kelly Services, Inc. ("Kelly"), and then by Defendant Randstad US, LP ("Randstad"), and then by Defendant Solarworld Industries America, Inc. and its affiliates ("Solarworld Defendants"). Defendant Kelly served Plaintiff with its first set of requests for production of documents seeking material acquired by Plaintiff's counsel in his capacity as the legal representative of Fred Bey, a Plaintiff in a currently on-going wage & hour class action that Bey filed against the Solarworld Defendants, to which Plaintiff was not a party. Plaintiff refused to produce the documents on the grounds that those documents were not his to produce, and that most of them were held by his counsel on Bey's behalf subject to a protective order forbidding their disclosure to third-parties to Bey's action. *Id.* at *6-7. Defendant Kelly filed a motion to compel, which the Court granted in part. At the outset, the Court found that all the requests within Defendant Kelly's motion sought relevant information reasonably calculated to lead to the discovery of admissible evidence. *Id*. at *10. The Court remarked that Plaintiff correctly noted that a case file maintained by an attorney on behalf of a client is the property of the client rather than of the attorney, and argued that that to the extent his counsel possessed documents responsive to the requests at issue, those documents were Bey's, materials and not his to produce in this litigation. *Id*. at *11. The Court remarked that the complication in applying this principle was that several allegations of Plaintiff's complaint expressly relied on information gained from the *Bey* lawsuit. *Id*. at *11-12. The Court opined that allegations in Plaintiff's complaint expressly relied on information gleaned from the *Bey* litigation. *Id*. at *12. The Court, therefore, observed that to the extent that Plaintiff's counsel, in drafting those or any other paragraphs of the complaint, specifically relief upon documents produced in the *Bey* litigation, counsel effectively disclosed their contents to Plaintiff. *Id*. As such, the Court ruled that Plaintiff's counsel effectively held all such documents not merely on Bey's behalf, but also on Plaintiff's behalf, rendering them discoverable in response to Defendant Kelly's request. Further, Defendant Kelly argued that it would be unfair to permit Plaintiff to select documents for production containing information tending to support the factual allegations made in express reliance on facts gleaned from the *Bey* litigation without also requiring him additionally to produce documents tending to exculpate the Solarworld Defendants, to mitigate against class treatment of Plaintiff's claims, or otherwise to undercut Plaintiff's position. *Id*. at *13. The Court disagreed and concluded that insofar as Defendant Kelly believed that Plaintiff was privy to such information, it could be addressed by issuing a third-party record subpoenas to the counsel as opposed to Plaintiff. Accordingly, the Court granted Defendant Kelly's motion in part.

***Melgar, et al. v. CSK Auto, Inc.*, 2015 U.S. Dist. LEXIS 1030 (N.D. Cal. Jan. 6, 2015).** Plaintiff, an assistant manager, brought a class action under the California Labor Code alleging that employees incurred fuel costs and vehicle wear and tear when they drove their personal vehicle to the bank to make deposits, and that Defendant failed to reimburse these incurred expenses. Plaintiff requested to take a survey of putative class members inquiring into whether they were required to use their personal vehicles to make bank deposits, the frequency with which they made such deposits, and whether they requested and received reimbursement. The Court granted the request. The Court observed that numerous courts have recognized the use of surveys in the pre-certification context. *Id.* at *2. Defendants contended that Plaintiff's proposed survey would not be probative as to any of the class certification elements or merits questions. The Court, however, noted that Plaintiff's survey was relevant to determining whether the numerosity requirement of Rule 23(a)(1) was satisfied, and that survey questions would shed light as to whether common questions of fact existed, including whether individuals were required to use their personal vehicle to make bank deposits. *Id.* at *3. Finally, Defendant argued that any responses to the survey could not be extrapolated on a class-wide basis. The Court, however, remarked that Defendant's argument essentially attacked the merits of Plaintiff's class certification motion before it had been drafted and before Plaintiffs had the opportunity to conduct necessary discovery. Further, the Court opined that allowing Plaintiff to conduct a survey did not constitute a ruling on any substantive class certification issue nor did it absolve Plaintiff from meeting Rule 23's requirements at the class certification stage. The Court reasoned that it was merely allowing Plaintiff the opportunity to conduct fact discovery that he reasonably contended was necessary for him to meet the class certification burden. *Id.* at *5-6. Accordingly, the Court

ordered that the survey should be issued and be distributed to those putative class members who received a notice and did not opt-out.

***Rosas, et al. v. Alice's Tea Cup, LLC,* 2015 U.S. Dist. LEXIS 87780 (S.D.N.Y. July 6, 2015).** Plaintiffs, a group of current and former restaurant employees, brought an action alleging that Defendants failed to pay them overtime wages and a "spread of hours" premium for days when they worked more than 10 hours in violations of the FLSA and the New York Labor Law ("NYLL"). *Id*. at *2. Defendants filed discovery requests demanding that Plaintiffs produce documents verifying their immigration status, work authorization documents, federal and state income tax returns, and documents sufficient to identify the current employer for each Plaintiff. Defendants also requested admissions related to Plaintiffs' immigration status and authorization to work. Plaintiffs moved for a protective order and for leave to amend the complaint, which the Court granted. Defendants claimed that the information sought was relevant to Plaintiffs' ability to recover under the FLSA and the NYLL as well as their credibility, and would explain the absence of some payroll records. *Id*. at *4-5. At the outset, the Court noted FLSA protections were available to citizens and undocumented workers alike. *Id*. at *7. Thus, in the context of wage & hour violations under both the FLSA and the NYLL, immigration status has generally been protected from discovery. *Id*. The Court opined that even if evidence regarding immigration status were relevant, the risk of injury to Plaintiffs if such information were disclosed outweighed the need for its disclosure because of the danger of intimidation and of undermining the purposes of the FLSA. *Id*. at *11. Because discovery into Plaintiffs' immigration status was irrelevant and impermissible, the Court precluded Defendants from seeking evidence regarding Plaintiffs' immigration status and work authorization. *Id*. Further, the Court found that Plaintiffs' income tax returns need not be disclosed because Defendants failed to demonstrate either their relevance or a compelling need. *Id*. at *12-13. Indeed, Plaintiffs' tax returns would only include total income and not details that would be relevant in an FLSA and NYLL suit, such as weekly wages and specific hours worked. *Id*. at *13. Rather, tax information from Plaintiffs would serve no obvious purpose other than intimidation. *Id*. Regarding identity of current employers, Defendants sought to prove that Plaintiffs were continuing to be paid on a cash basis precisely because they wanted to avoid scrutiny. *Id*. at *14. Whatever Plaintiffs' arrangement with their current employers might be, the Court found that the tax returns would say nothing about the hours that Plaintiffs worked for Defendants or what they were paid. *Id*. Thus, the Court granted Plaintiffs' motion for a protective order to the extent that Defendants sought discovery of Plaintiffs' immigration status, tax returns, or current employers. *Id*. at *19.

***Ross, et al. v. Jack Rabbit Services, LLC,* 2015 U.S. Dist. LEXIS 45603 (W.D. Ky. April 8, 2015).** Plaintiffs, a group of current and former roadside technicians, brought an action alleging that Defendants intentionally misclassified them as independent contractors in an effort to circumvent minimum wage and overtime provisions of the FLSA. The Court conditionally certified the collective action pursuant to 29 U.S.C. § 216(b), and 236 individuals from 29 states opted-in to the action. *Id*. at *3. Defendants sent discovery requests to named Plaintiff Ross and the 236 opt-in Plaintiffs. *Id.* While Plaintiff Ross answered the initial discovery requests, Plaintiffs sought a protective order against discovery on a collective action-wide basis, claiming that individualized discovery would be unduly burdensome, would drastically increase litigation costs, and served no valid purpose. *Id.* Plaintiffs proposed that a random representative sample of 10% of the opt-ins of the collective action answer the discovery requests. *Id.* Defendants proposed that all opt-in Plaintiffs answer a shortened form of discovery. *Id.* Plaintiffs objected on the basis that Defendants' proposal was still burdensome and would require the assistance of counsel. *Id.* at *4. Subsequently, Plaintiffs moved for a protective order against such discovery, which the Court granted in part. First, the Court considered the size of the collective action and stated that as the size increased, judges are generally less likely to require all Plaintiffs to respond to discovery. *Id.* at *6. The Court found that the 236 opt-in Plaintiffs represented a moderately-sized collective action and the geographic diversity of its members would significantly add to both the burden and cost of responding to individual discovery requests. *Id.* at *7. The Court also considered the type of discovery sought. Defendants proposed having all 236 opt-in Plaintiffs answer a shortened form of discovery consisting of five requests for admissions, two interrogatories, and one request for production of documents. *Id.* Plaintiffs objected, arguing that it would cause undue burden and would be improperly used by Defendants to dismiss non-responsive Plaintiffs. *Id.* Defendants claimed that the shortened discovery was written in plain language and required no assistance

from an attorney to complete. *Id.* at *8. However, the Court found that the shortened request contained several legal terms and several other terms which, while familiar to those in the legal profession, were rarely used in everyday speech. *Id.* The Court also noted that Defendants' shortened discovery requests asked for tax returns. *Id.* The Court held that while individual tax returns were not inherently privileged, it would order the disclosure of tax information only when necessary and with caution. *Id.* at *9. Consequently, the Court determined that based on the type of discovery sought, it would be difficult for all opt-in Plaintiffs to effectively interpret and respond to the shortened requests without the assistance of counsel and the resulting burden on collective action members and their counsel to facilitate and review responses to nearly 2,000 discovery requests would outweigh the potential benefit to Defendants. *Id.* The Court also noted that other case law precedents had sanctioned representative sampling even when a Defendant intended to move for decertification. *Id.* at *10. The Court found that limiting discovery to a significant representative sampling would both minimize the burden on Plaintiffs and their counsel while still affording Defendants a reasonable opportunity to explore and establish an evidentiary basis for their defenses, including any later decertification proceedings. *Id.* Consequently, the Court ruled that representative discovery was appropriate given the purported similarity among collective action members, the size of the collective action, and the burdensome nature of discovery upon 236 Plaintiffs in 29 different states. *Id.* Accordingly, the Court granted in part Plaintiffs' motion.

***Ruiz, et al. v. Mercer Canyons, Inc.,* Case No. 14-CV-3032 (E.D. Wash. Feb. 4, 2015).** Plaintiffs, a group of vineyard workers at Defendant's farm, brought a putative class action alleging that Defendant failed to inform local workers about the availability of higher-paying H-2 visa vineyard jobs. Defendant had obtained approval to employ 44 foreign workers at $12 per hour under the H-2A program from March 2013 through September 2013. The order had also required Defendant to notify vineyard workers who had worked in 2012 about employment availability. Defendant failed to inform local workers of the available positions and Defendant mostly paid them $9.88 per hour even for some work identified by the H-2A order as $12 per hour work. Plaintiffs thus alleged violations of the Migrant and Seasonal Agricultural Worker Protection Act, the Washington Consumer Protection Act, and Washington state wage laws. Defendant moved to stay discovery prior to class certification, which the Court denied. The Court stated that it had already delayed class certification at the behest of Defendant and thus would not delay the case further. *Id*. at 1. The Court found that the scheduled discovery was potentially relevant to the motion for class certification and the claims of the named Plaintiffs even if the motion for class certification was denied. *Id*. at 1-2. Seeking a protective order, Defendant argued that the information Plaintiffs sought about matters relating to Defendant's application for and use of the H-2A program was not reasonably calculated to lead to the discovery of admissible evidence under Rule 26. The Court, however, found that Defendant misconstrued both the breadth of Rule 26 and the narrow scope of the Court's earlier statement that there was no separate cause of action emanating directly from H-2A regulations. *Id*. at 2. The Court found that Defendant's actions and obligations under the H-2A program, and alleged recruiting trips to Mexico, could lead to the discovery of admissible evidence. *Id*. The Court opined that nothing indicated that Plaintiffs were conducting a fishing expedition or otherwise using the discovery process for inappropriate purposes. *Id*. Thus, the Court refused to enter a protective order limiting Plaintiffs' discovery.

***Scott, et al. v. Chipotle Mexican Grill, Inc.,* 2015 U.S. Dist. LEXIS 40176 (S.D.N.Y. Mar. 27, 2015).** Plaintiffs brought a nationwide collective action alleging that Defendant misclassified them as "apprentices" exempt from overtime requirements under the FLSA. Plaintiffs moved to compel the production of a consultative report prepared by Cinda Daggett, an attorney, and other allegedly non-privileged documents. The Court granted the motion in part. In the report, Daggett examined the activities of four employees holding positions as apprentices. Defendant asserted that the report was privileged because it had retained Daggett to help it with a legal issue. The Court disagreed and ordered Defendant to produce the report. The Court found that Defendant had engaged Daggett for factual research and to assist Defendant in making a business decision. *Id.* at *18-23. Daggett submitted the report only after Defendant received legal advice from two firms, and Defendant submitted no evidence that it used the report for anything beyond making a business decision. *Id.* at *24. Further, Defendant referred to the report as a "job function analysis," and it reflected a factual investigation pertaining to the responsibilities of an employee or position. *Id.* at *27. Neither Daggett nor any documents indicated that Defendant hired Daggett to provide

legal advice, and the report did not reflect any specialized knowledge that Defendant's attorneys could not have acquired or understood on their own or directly from their client. *Id.* at *28-29. According to the Court, Defendant's own HR team easily could have undertaken the same investigation as Daggett. *Id.* at *32. The Court, however, denied Plaintiffs' motion to compel the production of e-mails from Parcheta, an attorney at Mountain State Employers Counsel ("MSEC"), who provided advice to Defendant as part of its membership in MSEC. The Court found the e-mails privileged because Parcheta's advice was legal in nature. *Id.* at *35. Upon review of the documents, the Court noted that Parcheta wrote to Defendant as a lawyer and discussed and analyzed the law beyond bare recitation of regulations or the giving of non-legal business advice. *Id.* at *36. The Court then conducted *in camera* review of disputed privilege log entries and found that some portions of certain documents were privileged because they either contained or referred to legal advice and that some documents contained communications that discussed only business decisions and not legal advice. *Id.* at *42-43. Because Defendant's descriptions of the relevant documents were sufficiently detailed to give Plaintiffs adequate notice of the underlying claims of privilege, the Court declined to order Defendant to produce entries over which Defendant validly claimed attorney-client privilege. Accordingly, the Court granted in part and denied in part Plaintiffs' motion to compel discovery.

***Senne, et al. v. Baltimore Orioles, Inc.,* Case No. 15-CV-2940 (D. Md. Nov. 5, 2015).** Plaintiffs, a group of current and former minor league baseball players, brought a putative class action against Major League Baseball and its 30 member franchises alleging violations of the FLSA and state wage & hour laws. The Magistrate Judge dismissed the named Defendant Baltimore Orioles ("Orioles") was for lack of personal jurisdiction. *Id.* at 1. Subsequently, Plaintiffs moved to compel the Orioles to produce documents in response to their subpoena *duces tecum*, or to transfer the motion to the U.S. District Court for the Northern District of California pursuant to Rule 45(f). *Id*. The Court observed that Rule 45 allows for the transfer of subpoena-related motions to the issuing Court if the Court where the compliance is required finds exceptional circumstances. *Id*. Here, the Court observed that the Magistrate Judge was in a better position to rule on the motion to compel given his familiarity with the issues involved and his knowledge of how the motion could affect the underlying litigation. *Id*. at 2. The Court explained that the same issues were likely to arise in discovery in many districts, given that, at the time their motions were filed with this Court, Plaintiffs had filed similar motions to compel against several other baseball franchises in several other districts. *Id*. Accordingly, the Court concluded that transferring the motion to the Magistrate Judge would avoid potential inconsistent rulings. *Id*.

***Strauch, et al. v. Computer Sciences Corp.,* 2015 U.S. Dist. LEXIS 516 (D. Conn. Jan. 6, 2015).** Plaintiffs brought an action alleging that Defendant misclassified its system administrators ("SAs") as exempt employees in violation of the FLSA and corresponding state laws. Plaintiffs moved to compel production of documents that reflected various pieces of information regarding each prospective class member, including full name; job title; job level or salary grade; job location; social security number; date of hire, transfer to a new location or job position, or termination; all information regarding compensation that Defendant earned or paid to each individual, including the individual's hourly rate; all last known contact information, as well as current and former home address, telephone number, and e-mail address; information reflecting each individual's location within Defendant's organization, including team, group, division, organizational unit; and other detailed organizational information. *Id.* at *4. The Court granted Plaintiffs' motion in part. Plaintiffs contended that, at the early stage of discovery, it was unclear to Plaintiffs how SAs fit into the various job categories Defendant had established in its corporate records. *Id*. at *5-6. Plaintiffs cited multiple case law authorities for the proposition that pre-certification discovery of potential class members is appropriate within the context of Rule 23, the FLSA, or both. *Id*. at *6-7. Defendant objected to the pre-certification disclosure of confidential information regarding putative class members as irrelevant and immaterial to Plaintiffs' current claims and argued that Plaintiffs could not articulate any "good faith need" for the information when more than 70 SAs already had opted-in to the case. *Id*. at *7. The Court agreed with Plaintiffs that pre-certification discovery of some identifying information regarding putative class members was appropriate. *Id*. at *9-13. The Court, however, found that the information Plaintiffs sought was too excessive and intrusive. The Court noted that the more recent decisions did not permit initial disclosure of social security numbers. *Id*. at *14. The Court determined that the size of the putative class was significant (approximately 3,000), and there was

uncertainty as to the various categorizations that Defendant created. Thus, the Court held that a global breakdown of the number of putative class members who fell within each category and subcategory, including precise job titles or levels, and the location and state in which they worked, would enable the Court to make a more informed decision based upon the additional information. *Id*. Finally, given the uncertainty of the various categorizations, with respect to the 70 opt-in Plaintiffs, the Court concluded Plaintiffs were entitled to all requested information except the disclosure of their social security numbers. *Id*. at *14-15.

***Strauch, et al. v. Computer Sciences Corp.*, 2015 U.S. Dist. LEXIS 74917 (D. Conn. June 10, 2015).** Plaintiff, a system administrator ("SA"), brought an action alleging that Defendant misclassified SAs as exempt in violation of the FLSA and Connecticut's wage & hour statues. Previously, the Court had conditionally certified a collective action under 29 U.S.C. § 216(b), and also addressed the number of opt-in Plaintiffs from whom discovery responses were required, adopting the position that a large representative sample was sufficient in this case of 40% of opt-in Plaintiffs. *Id*. at *2. Counsel agreed to a three-tier approach for conducting depositions, with the first tier including any class representative identified by Plaintiffs in any pleading or amended pleading filed in this case. *Id*. at *3. The parties, however, disagreed about who should be identified in the second and third tiers. Defendant argued that the second tier should consist of anyone who submitted a declaration in support of Plaintiffs' motion, objections, or pleadings. According to Defendant, Plaintiffs submitted 24 opt-in Plaintiff declarations. As to the third tier, Defendant reserved the right to depose up to 100 additional opt-in Plaintiffs, not including those who fell in the first and the second tiers. *Id*. In contrast, Plaintiffs proposed a sliding scale approach, under which the second tier would be 15% of the current 86 opt-ins, or 13 deponents, and for the third tier, Plaintiffs suggested that Defendant be permitted to depose 10% of the next 100 opt-ins, and 5% of the next 300 opt-ins, with a cap of 38 depositions. Given the size of the putative class of approximately 4,000 people, the Magistrate Judge agreed that a sliding scale approach was appropriate, but one that was not as restrictive as suggested by Plaintiffs. *Id*. at *5. The Magistrate Judge determined that the second tier would consist, as suggested by Defendant, anyone who submitted a declaration in support of Plaintiffs' motions, objections, or pleadings, and of anyone Plaintiffs otherwise identified as a witness. *Id*. The Magistrate Judge ruled that the third tier would consist of and class representative identified by Plaintiffs in any pleading filed in the case, but did not put a cap on the total number of depositions. *Id*. at *6.

***Thompson, et al. v. Costco Wholesale Corp.,* Case No. 14-CV-2778 (S.D. Cal. Aug. 7, 2015).** In this wage & hours class action, Plaintiff served Defendants with 31 requests for production of documents ("RFPs") and 17 interrogatories ("ROGs"). During a discovery conference, the Court overruled all of Defendants' objections, and ordered them to respond to Plaintiff's requests in full. *Id.* at 2. Subsequently, the Court affirmed its tentative ruling from the discovery conference and waived Defendant's objections to Plaintiff's RFPs and ROGs. *Id.* Defendants then filed an *ex parte* application to stay the discovery order, which the Court granted. Defendants asserted that it would file an objection to the discovery order, seeking review by the Court, and also noted that although compliance with the discovery order was due soon, the briefing for its objection would not be complete at that time. *Id.* at 3. Thus, Defendants argued that, absent *ex parte* relief, it would be forced to comply with the discovery order before the Court reviewed its objection. Further, Defendants asserted that absent *ex parte* relief, it would be required to devote approximately 26,350 hours to assembling and producing a privilege log, private and premature putative class contact information, and thousands of irrelevant, premature, and private documents, which the Court might ultimately order need not be produced. *Id.* The Court remarked that it was granting Defendants' request because it believed that its analysis and ruling were correct, and that Defendant must make a good faith, concentrated effort to fully respond to the discovery requests if the Court order was deemed proper. Accordingly, the Court granted Defendants' application for stay the discovery order.

***Velasquez-Monterrosa, et al. v. Mi Casita Restaurants*, 2015 U.S. Dist. LEXIS 57385 (E.D.N.C. May 1, 2015).** Plaintiff, a cook, brought a putative class action and collective action alleging that Defendants denied employees straight time and overtime wages in violation of the FLSA and the North Carolina Wage & Hour Act. The Court issued a scheduling order and adopted a proposed discovery plan that provided for bifurcated discovery. *Id*. at *3. In Phase I, the Court directed the parties to focus discovery on whether the

case was appropriate for class action or collective action treatment. *Id*. Plaintiff served an initial set of 12 interrogatories and an initial set of 15 requests for production of documents. Defendants asserted objections to each interrogatory but with the exception of Interrogatory No. 3, provided some responsive information. Plaintiff filed a motion to compel seeking responses to interrogatories and document requests, production of a privilege log, and an award of expenses, including attorneys' fees. The Court denied the motion. At the outset, the Court noted that, although Plaintiff's counsel certified that he had conferred in good faith with defense counsel to resolve the instant dispute prior to filing the motion, the correspondence between counsel revealed otherwise. Although defense counsel advised that he was willing to discuss the issues raised by Plaintiff within two or three days of the deadline set by Plaintiff, Plaintiff proceeded with filing the motion and, therefore, deprived the parties of a meaningful opportunity to resolve their dispute without the Court's intervention. *Id*. at *11-12. Accordingly, the Court denied without prejudice the portions of Plaintiff's motion that addressed issues other than Interrogatory No. 3. *Id*. at *13. As to Interrogatory No. 3, Plaintiff sought contact information for current and former employees and contended that he needed such information to establish that the case should be certified as a collective action under the FLSA and as a class action under Rule 23. Plaintiff contended that the production of employees' identifying information was necessary for him adequately to pursue his contention that he, along with other employees, were subject to a single decision, policy, or plan. *Id*. at *21. The Court sustained Defendants' objection on timeliness grounds, and concluded that Plaintiff had not demonstrated that he needed the information prior to determination of his certification motion. *Id*. at *22. The Court observed that Defendants had produced information and documents responsive to a number of other discovery requests that presumably would aid Plaintiff with his motion for certification. At the same time, production of the requested contact information presented the risk of recruitment of class members outside the bounds of the Court's supervision and an unjustified intrusion on the employees' privacy. *Id*. Accordingly, the Court denied Plaintiff's motion to compel.

***Wilson, et al. v. McDonald's Corp.,* Case No. 14-CV-11082 (E.D. Mich. April 28, 2015).** Plaintiffs, a group of McDonald's employees, brought an action alleging that Defendants violated the FLSA and Michigan state law by failing to compensate them for time spent waiting to clock-in at the beginning of scheduled shifts and after returning from unpaid mid-shift breaks. Plaintiffs sought information in discovery to support their allegations that the compensation practices at issue were class-wide and susceptible to common proof. *Id.* at 2. Defendants contended that the Court's earlier denial of Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b) limited the permissible scope of discovery to Plaintiffs' claims. *Id.* In response, Plaintiffs asserted that they remained entitled to discovery to support both their class action allegations and the claims of those employees who opted-in under § 216(b) both before and after the Court denied conditional certification of an FLSA collective action. *Id.* Plaintiffs moved to compel discovery, and Defendants filed a motion to stay discovery pending a ruling on dispositive motions, including Defendants' motion to strike Plaintiffs' class claims. *Id.* The Court agreed with Defendants and stayed discovery. The Court noted that the resolution of the pending motions would determine the scope of permissible discovery in the action and, if successful, would dispose of Plaintiffs' class claims against Defendants. *Id.* at 8. Because Defendants agreed to toll the statute of limitations on the claims of the potential FLSA collective action members for the period from the date of the hearing on the motion to stay until the ruling on the pending dispositive motions, the Court also found that the stay on discovery would cause no prejudice to Plaintiffs. *Id.* Accordingly, the Court granted Defendants' motion to stay and denied Plaintiffs' motion to compel without prejudice.

(ix) Public Employee FLSA Collective Action Litigation

***Alamo, et al. v. United States*, 2015 U.S. Claims LEXIS 1054 (Fed. Cl. July 30, 2015).** Plaintiffs, a group of emergency medical technicians and/or Paramedics employed by the U.S. Department of the Army, brought an action alleging that the government improperly calculated their regularly scheduled overtime pay under the FLSA and the Federal Employee Pay Act ("Title V"). Plaintiffs received pay at pay grade GS-10 or below, and four of the non-exempt Plaintiffs also received stand-by duty premium pay at a rate of 10% of their annual salary. *Id.* at *3. The government calculated the non-exempt Plaintiffs' pay for regularly scheduled overtime by adding their weekly basic pay and weekly stand-by duty premium pay. *Id.* This total remuneration was then divided by the total number of hours worked during the week to derive

their hourly regular rate. *Id.* at *3-4. The government multiplied the hourly regular rate by 0.5 and then multiplied this figure by the total number of regularly scheduled overtime hours worked during the week to arrive at Plaintiffs' regularly scheduled overtime pay. *Id.* at *4. The parties cross-moved for summary judgement, and the Court of Federal Claims granted summary judgment to Defendant. The Court of Federal Claims observed the regulations of the Office of Personnel Management ("OPM"), which has the authority to administer the FLSA for federal employees, provide that FLSA covered employees are entitled to overtime wages. *Id.* at *12. The OPM's pay regulations also recognized that federal employees who receive stand-by duty premium pay, receive this pay as compensation for their regularly scheduled overtime hours. *Id.* at *13. Moreover, the regulations state that such employees remain entitled to additional compensation for overtime hours under the FLSA, which is provided by the payment of the FLSA half-time pay. *Id.* In this instance, Defendant calculated the non-exempt Plaintiffs' pay for regularly scheduled overtime by combining the straight time rate of pay with the FLSA half-time pay. The Court of Federal Claims opined that this method of calculating regularly scheduled overtime pay was fully consistent with OPM's pay regulations. The Court of Federal Claims acknowledged that the OPM's pay regulations appropriately recognize Congress' intent for stand-by duty premium pay to compensate for regularly scheduled overtime hours spent largely in stand-by duty status. *Id.* at *14. The Court of Federal Claims held that the government appropriately calculated the regularly scheduled overtime pay for the non-exempt Plaintiffs. In addition, the Court of Federal Claims noted that the FLSA requires that the hourly regular rate include all remuneration for employment paid to or on behalf of employees subject to certain enumerated exceptions that did not apply here. *Id.* at *16. Further, the OPM's pay regulations provide that the hourly regular rate is calculated by dividing the total remuneration paid to an employee in the workweek by the total number of hours of work in the workweek for which such compensation was paid. *Id.* The Court of Federal Claims opined that the method employed by the government for calculating the hourly regular rate was proper under the FLSA and OPM's pay regulations, and that the non-exempt Plaintiffs' hourly regular rate was properly calculated. Finally, the Court of Federal Claims ruled that Plaintiffs incorrectly maintained that the government must calculate their regularly scheduled overtime pay upon a bi-weekly basis, rather than a weekly basis, because the non-exempt Plaintiffs worked a compressed work schedule. The Court of Federal Claims observed that the government should calculate the pay for all employees who work on a compressed work schedule upon a weekly basis, unless those employees are specifically engaged in fire protection or law enforcement activities. *Id.* at *18-19. As the non-exempt Plaintiffs were not engaged in fire suppression or law enforcement activities, the Court of Federal Claims found that the government appropriately calculated the non-exempt Plaintiffs' pay upon a weekly basis under the FLSA and the relevant OPM regulations.

***Allen, et al. v. City Of Chicago,* 2015 U.S. Dist. LEXIS 165906 (N.D. Ill. Dec. 10, 2015).** Plaintiffs, a group of police officers, brought a collective action alleging that Defendant willfully violated the FLSA by not paying them overtime compensation for the time spent performing off-duty work on their Defendant-issued BlackBerry devices. *Id.* at *2. According to the complaint, Defendant required Plaintiffs to use their BlackBerry devices to be available to access work-related e-mails, phone calls, and messages while they were off-duty, and Plaintiffs in fact received many such communications and performed work using their BlackBerry devices while off-duty. *Id.* Plaintiffs alleged that Defendant maintained an unwritten policy to deny Plaintiffs compensation for this off-duty work they performed. *Id.* Over the course of more than five years of litigation, the Court conditionally certified a collective action, denied Defendant's motion to decertify the collective action, and denied Defendant's motion for summary judgment. *Id.* at *3-4. Ultimately, the Court held a bench trial on the threshold issue of whether Defendant maintained an unwritten policy to deny Plaintiffs compensation for off-duty BlackBerry work they performed, and after weighing all admissible evidence entered a judgment in Defendant's favor. Although Plaintiffs established that they performed off-duty work on their BlackBerrys, the Court found that Plaintiffs failed to meet their burden of showing that Defendant did not compensate them pursuant to any unlawful policy of Defendant or that Defendant suffered or permitted the work to be done without compensation. *Id.* at *62. Because it was undisputed that Defendant maintained a method by which officers could turn in "time due slips" to report off-duty, overtime work for payroll purposes, the Court held that it would need to turn to specific evidence regarding damages only if there was an unwritten policy that systematically dissuaded Plaintiffs from utilizing time due slips for off-duty BlackBerry work. *Id.* at *20. Although Plaintiffs contended that

Defendant maintained a uniform culture that it was not acceptable for officers to turn in time due slips for off-duty BlackBerry work, the evidence failed to establish such a culture or practice. The evidence showed that dozens of police officers had in fact submitted such slips, which Defendant approved and paid. *Id.* at *22. Plaintiffs submitted no evidence to show that supervisors knew if or when the police officers were working on their devices off-duty without submitting time due slips. *Id.* at *23-24. Plaintiffs also submitted no proof that the supervisors had created a culture or unwritten policy that discouraged the police officers from reporting any overtime work. *Id.* The Court noted, in particular, that the supervisors were often not aware when Plaintiffs were working off-duty, that their off-duty BlackBerry work occurred outside the physical presence of the supervisors and took place with individuals other than their direct supervisors, and that the supervisors did not necessarily know if and when particular officers failed to submit time due slips for off-duty BlackBerry work. *Id.* Plaintiffs further failed to establish a well-grounded fear of adverse consequence if they submitted time due slips for off-duty BlackBerry work. *Id.* at *40-42. In light of these findings, the Court concluded that Plaintiffs failed to show "a uniform culture or well-grounded understanding that off-duty BlackBerry work would not be compensated." *Id.* at *58. Accordingly, the Court ruled in Defendant's favor.

***Austin, et al. v. United States,* 2015 U.S. Claims LEXIS 1605 (Fed. Cl. Dec. 2, 2015).** Plaintiffs, a group of nurses and healthcare workers, brought an action alleging that Defendants' policies governing holiday pay violated federal statutes under 38 U.S.C. § 7453. Specifically, Plaintiffs alleged that Defendants' policies governing holiday pay for nurses set forth in its handbook did not provide additional pay to nurses who worked a tour of duty that began the day before a calendar holiday and that ended on such holiday. *Id.* at *5. Further, Defendants only provided additional pay for the first tour of duty when nurses worked two tours of duty that both began on a calendar holiday, and its policy did not provide nurses additional pay for overtime work performed on a holiday. *Id.* at *5-6. Plaintiffs contended that Defendants' policies were unlawful because a nurse should receive holiday pay for an entire tour of duty, including hours on the calendar holiday, regardless of whether the tour began or ended on the holiday. *Id.* at *8-10. Plaintiffs asserted claims for back pay and other relief based on alleged violations of 38 U.S.C. § 7453. Both parties moved for summary judgment on the claims, and the Court of Federal Claim granted in part and denied in part the motion. First, the Court of Federal Claims granted summary judgment to Defendants as to Plaintiffs' claim of not affording additional pay for tours of duty that begin the day before but extend into a calendar holiday, finding that it was consistent with 5 U.S.C. § 6103 and Executive Order No. 11582, the federal statute and executive order that govern the observance of holidays by federal agencies. *Id.* at *33. The Court of Federal Claims noted that, under § 5 of the Executive Order 11582, "[a]ny employee whose workday covers portions of two calendar days and who would, except for this section, ordinarily be excused from work scheduled for the hours of any calendar day on which a holiday falls, shall instead be excused from work on his entire workday which commences on any such calendar day," and § 6 of the Executive Order states that the "workdays referred to in sections 3, 4, and 5 shall be treated as holidays in lieu of the corresponding calendar holidays" for purposes of administering the provisions of law relating to pay. *Id.* at *26-28. Because Defendants' policy provided in pertinent part that "[w]hen the basic workweek of a nurse includes portions of 2 tours on a holiday, the tour that commences on the holiday shall be treated as the holiday for pay and leave purposes," the Court of Federal Claims concluded that Defendants' policy with respect to nurses who worked two tours of duty that straddle the same calendar holiday did not violate the requirements of 38 U.S.C. § 7453(d), which mandates additional pay for service only when it is performed on a holiday designated by federal statute or executive order. *Id.* Further, the Court of Federal Claims granted summary judgment to Defendants as to Plaintiffs' claim that Defendants maintained a policy of not paying nurses at holiday rates for overtime work performed on a holiday because Plaintiffs failed to show disputes of material fact. Defendants contended that its policy mandated that nurses receive additional pay for overtime worked on a holiday, and that its systems for time and attendance and payroll were programmed to ensure that when nurses work overtime on a holiday, they received double their regular rate. *Id.* at *37-42. The Court of Federal Claims, however, granted summary judgment to Plaintiffs on their claim that Defendants' policy restricting additional pay due to nurses who perform two tours of duty beginning on a holiday, finding that Defendants lacked any basis, in either statute or executive order, for such restriction. Because 38 U.S.C. § 7453(d) provides for additional pay for hours worked on holidays designated by federal statute or Executive Order, the Court of Federal Claims determined that it was

impermissible under § 7453(d) for Defendants to designate as "a matter of administrative regulation and determination" which hours of work would be considered to fall on a holiday. *Id*. at *35-36. Accordingly, the Court of Federal Claims granted in part and denied in part the parties' motions for summary judgment.

***Balestrieri, et al. v. Menlo Park Fire Protection District,* 2015 U.S. App. LEXIS 15785 (9th Cir. Sept. 4, 2015).** Plaintiffs, a group of firefighters, brought an action under the FLSA seeking overtime compensation for taking their gear to temporary duty stations. *Id.* at *2. Defendant required Plaintiffs to wear special gear that they have immediate access to while at work. Although Plaintiffs could take the gear home with them and bring it back at the beginning of their shift, most of them preferred to leave the gear in one of Defendant's seven fire stations because of the bulk and dirt, and the concerns about exposing their families to the materials on soiled gear. *Id.* at *3. Plaintiffs worked two consecutive 24-hour shifts, and the turnout gear issue arose from occasions when firefighters worked a shift in a fire station other than their home station. *Id.* at *3. While Defendant compensated Plaintiffs for the time spent picking up gear when they got a phone call at home, between shifts, to take an overtime shift immediately at a visiting station, it did not compensate them for the time it took to get their gear and report to the visiting stations, and to take their gear back to their home stations after the voluntary temporary assignments. *Id.* at *5-6. Plaintiffs alleged that they transported their firefighting gear from their home station to another fire station while voluntarily covering an extra shift, and thus the time spent moving their equipment from their home station to visiting stations was compensable under the FLSA. *Id.* at *6-7. Disagreeing with Plaintiffs, the District Court granted summary judgment to Defendant. On Plaintiffs' appeal, the Ninth Circuit affirmed the District Court's finding that the activity was not "integral and indispensable" to Plaintiffs' principal duties. *Id.* at *9. The Ninth Circuit found that because a firefighter was free to take his or her gear home and go straight to the visiting station for the overtime shift without having to return to the home station to retrieve the gear, the alleged activity was not integral and indispensable to the firefighter's duties. *Id.* at *15. The Ninth Circuit cited the U.S. Supreme Court decision in *Busk v. Integrity Staffing Solutions, Inc*., 135 S. Ct. 513 (2014), concerning the time that Amazon warehouse employees spent going through a security check at the end of their shift. *Id.* at *13. The Supreme Court had determined that, even though the security check was required and for the benefit of the employer, the time spent need not be paid because it was not integral and indispensable to the employees' duties as warehouse workers. *Id.* Applying the Supreme Court's analysis, the Ninth Circuit reasoned that moving equipment from a home fire station to a temporary duty was not "tied to the productive work that the employee is employed to perform*." Id.* at *14. The Ninth Circuit made it clear that "[w]hen the firefighter has put his name on the list for overtime calls, he is free to take his gear home, and if he gets a call, he can go to the visiting station for the assigned shift without even stopping by his home station." *Id.* at *15. The Ninth Circuit, therefore, concluded that driving to the home station first to retrieve gear was not 'indispensable' to Plaintiffs' principal activities. *Id*. Plaintiffs also alleged that Defendant's system of paying cash in lieu of unused leave time violated the FLSA. According to Plaintiffs, the pay they received for unused sick leave was a type of bonus that should be considered as part of their "regular rate" of pay for purposes of determining their overtime pay. *Id.* at *18. The Ninth Circuit noted that the FLSA defines regular rate to mean all "remuneration" for work subject to eight exclusions and various qualifications, including exclusion on payments made for occasional periods when no work is performed due to vacation, holiday, or illness. *Id.* at *16-17. Although the U.S. Department of Labor has interpreted sick leave buybacks as part of the regular rate of pay, the Ninth Circuit noted that Plaintiffs had an annual leave allowance that did not distinguish between sick and vacation leave. *Id.* at *19-21. The Ninth Circuit therefore held that Defendant need not include amounts paid for annual leave buyback within its calculation of Plaintiffs' regular rates of pay for purposes of determining their overtime rates of pay. *Id.* Accordingly, the Ninth Circuit affirmed the District Court's grant of summary judgment to Defendant.

***Gibbs, et al. v. City Of New York,* 2015 U.S. Dist. LEXIS 7960 (S.D.N.Y. Jan. 23, 2015).** Plaintiffs, two female NYPD employees, brought a collective action alleging that Defendants failed to compensate them for attending alcohol counselling and treatment sessions as a condition of continued employment in violation of the FLSA. Defendants identified both Plaintiffs as having a problem with alcohol use and, therefore, required them to attend mandatory alcohol treatment and counselling sessions or face disciplinary action, potentially including termination. *Id.* at *3. The sessions included: (i) inpatient

counselling at a residential treatment facility; (ii) outpatient counselling during regularly-scheduled work hours; and (iii) outpatient counselling after regularly-scheduled work hours. *Id.* at *3-4. Defendants compensated Plaintiffs for the time they spent attending the inpatient treatment sessions, excluding overtime, and attending the outpatient sessions during regular working hours. Plaintiffs claimed that they deserved overtime compensation for inpatient counselling and outpatient counselling after work hours. Defendants moved for summary judgment, asserting that attendance at the alcohol treatment and counselling sessions did not constitute "work" within the meaning of the FLSA. *Id.* at *2. The Court granted Defendants' motion. The Court noted that the FLSA requires employers to compensate employees for time spent engaging in activities that are "both controlled or required by the employer and pursued necessarily and primarily for the benefits of the employer and his business." *Id.* at *20. Although Defendants required Plaintiffs to attend the sessions, the Court determined that Defendants did not "predominantly benefit" from their attendance. *Id.* at *21. Whereas Plaintiffs' attendance potentially could have benefited Defendants by stopping terminations and, therefore, saving Defendants the costs of hiring and training replacements, the Court noted these are not the kind of benefits that have been recognized as decisive in this context, and something more is required. *Id.* at *24. Nothing in the record suggested that Plaintiffs were not replaceable or that Defendants' department was short-staffed such that Plaintiffs' continued employment was particularly valuable to Defendants. The Court further held that, even if attending the counselling could constitute work, the sessions were "non-compensable post-liminary activities" under the Portal-to-Portal Act because the sessions were neither indispensable nor integral to Plaintiffs' principal activities. *Id.* at *38-41. The Court, therefore, granted Defendants' motion for summary judgment.

***Lubow, et al. v. U.S. Department Of State,* 2015 U.S. App. LEXIS 6302 (D.C. Cir. April 17, 2015).** Plaintiffs, a group of diplomatic security special agents, brought a class action challenging Defendant's decision requiring them to repay excess overtime pay they received for work on assignment in Iraq. Each Plaintiff responded to a call for volunteers to serve one-year assignments in Iraq under the Coalition Provisional Authority, and was assigned a temporary duty status at Iraq in 2004. Plaintiffs received "locality pay" – pay in addition to base salary intended to equalize federal employees' compensation with that of non-federal workers in the same geographic area – as if they were working in Washington, D.C., and received a significant number of overtime hours while working in Iraq. *Id*. at *2. In early 2005, Plaintiffs completed their assignments in Iraq and returned to the United States. Later, Plaintiffs received e-mail messages from Defendant notifying them that it was conducting a review of premium pay earnings involving employees supporting the effort in Iraq, pursuant to federal law, 5 U.S.C. § 5547. *Id.* at *6. Section 5547 limits the amount of "premium pay" a federal employee may receive, and the premium pay includes overtime pay, holiday pay, Sunday pay, night pay differential, and availability pay. *Id.* at *3. The message informed each Plaintiff that their earnings to date had put them above the cap for the current pay years and that Defendant would be obligated to seek collection of any over-payments. *Id.* at *7. Subsequently, each Plaintiff received a letter from Defendant requiring repayment of premium pay received in excess of § 5547(b)(2)'s cap. Each Plaintiff requested Defendant to forgive the entirety of debt pursuant to 5 U.S.C. § 5584, which allows an employing agency to waive any claim against an employee arising out of an erroneous payment of pay if collection would be against equity and good conscience and not in the best interests of the United States. *Id.* at *8. Following Defendant's denial, Plaintiffs filed grievances with the State Department's Foreign Service Grievance Board ("FSGB"). The FSGB found no basis to overturn Defendant's decision that granting a waiver to Plaintiffs would create an unfair gain for them vis-à-vis all those similarly-situated employees who repaid their excess premium pay for 2004. *Id.* at *11. Plaintiffs sought judicial review in the District Court, and the District Court found that the FSGB had not acted arbitrarily in upholding Defendant's decision to deny Plaintiffs' requests for discretionary waivers under § 5584. *Id.* at *13. On further appeal, the D.C. Circuit affirmed the District Court's findings. First, the D.C. Circuit found that Defendant permissibly construed the statute capping premium pay when determining that Plaintiffs' overtime pay exceeded the statutory limit. *Id.* at *22. Although Plaintiffs disputed Defendant's understanding of § 5547(b)(2)'s cap on annual premium pay, the D.C. Circuit found that Defendant's reading of the text was reasonable, and more apparent when compared with the uncertainty of alternative approach offered by Plaintiffs. *Id.* at *15-20. The D.C. Circuit also found that Defendant and FSGB did not act arbitrarily in denying Plaintiffs a discretionary waiver of their obligation to repay the excess

compensation. The D.C. Circuit noted that, despite Defendant's explicit request for additional information, Plaintiffs chose not to supplement the record with evidence about whether collection of the claim would cause serious financial hardship to them or whether the employees had relinquished a valuable right or changed positions for the worse because of the erroneous payment. *Id.* at *25. The D.C. Circuit thus agreed with the District Court that, given the dearth of information, the FSGB had no choice but to conclude that financial hardship and detrimental reliance factors weighed against waiver, and the District Court could not substitute its judgment for that of the agency under the Administrative Procedure Act's standard of review. *Id.* Accordingly, the D.C. Circuit affirmed the District Court's ruling.

***Mercier, et al. v. United States*, 2015 U.S. App. LEXIS 8003 (Fed. Cir. May 15, 2015).** Plaintiffs, a group of nurses employed by the Department of Veterans Affairs (the "agency"), brought an action seeking overtime pay under 38 U.S.C. § 7453(e)(1), which requires the agency to compensate "officially ordered or approved" overtime work. The Court of Claims dismissed the nurses' claim because they did not allege that the agency officially ordered or approved by express direction to be non-compensable. On appeal, the Federal Circuit reversed and remanded. At the outset, the Federal Circuit remarked that the words "officially ordered or approved" in the Federal Employee Pay Act ("FEPA") was interpreted by the Court of Claims in several cases. In *Gaines v. U.S.*, 131 F. Supp. 925 (1955), the Court of Claims enforced the regulation's requirement that approval be in writing. *Id*. at *4. In *Anderson v. U.S.*, 136 Ct. Cl. 365 (1956), the Court of Claims held that overtime that is "induced," but not explicitly requirement, is nonetheless "ordered or approved," and that the writing regulation could not limit the scope of that substantive right to overtime pay. *Id*. at *5. The Federal Circuit observed that relying on *Schweiker v. Hansen*, 450 U.S. 785 (1981), and *Office of Personal Management v. Richmond*, 496 U.S. 414 (1990), it held that the rationale of these cases overruled *Anderson's* holding that the writing regulation was invalid. *Id*. at *8. The Federal Circuit noted that in *Doe v. U.S.*, 67 Fed. Appx. 596 (Fed. Cir. 2003), it held that the rationale of *Hansen* and *Richmond* overruled the holding in *Anderson* that the writing regulation could not limit the substantive scope of the statutory right to compensation for overtime that was officially ordered or approved. *Id*. at *12. The Federal Circuit then considered whether this interpretation was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and held that the writing regulation was a reasonable interpretation of FEPA's "officially ordered or approved" requirement. *Id*. at *13. The Federal Circuit therefore, concluded that Plaintiff bore the burden of showing that the writing regulation was arbitrary or otherwise unreasonable. *Id*. *Doe* held that Plaintiffs had not met their burden of proving the regulation was unreasonable because the writing requirement did not contradict the statute's plain text. *Doe* reasoned that the writing requirement served one of FEPA's purposes, namely, to control the government's liability for overtime and ensuring that employees received overtime compensation. *Id*. at *14. Here, Plaintiffs alleged that they were required to work overtime on a recurring and involuntary basis in order to perform tasks known as view alerts, which the nurses described as time-sensitive requests for information related to patient care. The Court of Claims had concluded that *Doe* overruled *Anderson* in its entirety and therefore, following *Doe*, entitlement to overtime pay is triggered only when an authorized official of the agency has, either verbally or in writing, expressly directed specified overtime work or approved pay for it after the fact. *Id*. at 16-17*. The Federal Circuit noted that the Court of Claims did not analyze whether *Hansen* or *Richmond* affected more than the writing regulation under the FEPA. The Federal Circuit remarked that the issue here was not whether the nurses were entitled to a payment from the public treasury without Congressional authorization, because the FEPA did authorize the payment of officially ordered or approved overtime work. *Id*. at *22. The Federal Circuit observed that the question *Anderson* decided when it interpreted the FEPA provision was whether Plaintiffs' overtime was within the scope of the statutory grant. *Id*. Here, the nurses alleged that the agency had knowledge that they worked overtime on a recurring and involuntary basis, and that the agency ordered or approved such work through expectation, requirement, and inducement. *Id*. at *27. Accordingly, the Federal Circuit reversed the dismissal of Plaintiffs' claim and remanded for further proceedings under the *Anderson* standard.

(x) Preemption And Immunity Issues In FLSA Collective Actions

***Beaulieu, et al. v. State Of Vermont,* 2015 U.S. App. LEXIS 16505 (2d Cir. Sept. 16, 2015).** Plaintiffs, a group of current and former employees of the State of Vermont, brought a collective action in the state court alleging Defendant violated the FLSA when it reduced their weekly pay for partial-day absences in

excess of their accrued leave, and failed to pay them on a salary basis, thus depriving them overtime pay. *Id.* Defendant removed the action, where it filed an unsuccessful motion to dismiss. Two years later, Defendant filed another motion to dismiss asserting sovereign immunity. The District Court granted the second motion. On appeal, the Second Circuit affirmed on the basis that, although Defendant's removal of Plaintiffs' private action from Vermont state court to the District Court resulted in a waiver of its Eleventh Amendment immunity from a federal suit, it had not waived its general sovereign immunity from private lawsuits within the meaning of Vermont state law. *Id.* at *27. Plaintiffs argued that the statutory provision at Vermont Statutes Title 21, § 384(b)(7), constituted an express waiver of the Vermont's immunity from private actions brought under the FLSA. *Id.* at *10. The Second Circuit disagreed, and noted that although Title 21 provides that "an employer shall not pay an employee less than one and one-half times the regular wage rate for any work done by the employee in excess of 40 hours during a workweek," the statute further provides that "this sub-section shall not apply to: . . . (7) State employees who are covered by the Federal Fair Labor Standards Act." *Id.* at *10. Thus, according to the Second Circuit, Plaintiffs' argument misunderstood the difference between the applicability of a federal statute to a state enacting lawful obligations upon the state, and the state's amenability to a private party's suit to enforce such an obligation. *Id.* at *10-11. While there was no doubt that the FLSA applied to Defendant, the Second Circuit held that Defendant's sovereign immunity – unless waived or forfeited – barred suit by a private party seeking to enforce the FLSA's terms. *Id.* The Second Circuit therefore held that the fact that Defendant's employees were covered by the FLSA did not mean that those employees were entitled to sue Defendant under the FLSA's private right of action. *Id.* at *11. As to Plaintiffs' argument that Defendant waived its sovereign immunity by removing the suit, the Second Circuit noted that the Eleventh Amendment relates to the relationship between the states and the federal government, and neither logic nor case law precedent supported the proposition that a state waives its general state sovereign immunity by removing an action from state court to federal court. *Id.* at *13-14. The Second Circuit therefore concluded that the District Court correctly dismissed the action on the basis of Defendant's general sovereign immunity, which it had not waived.

***Berera, et al. v. Mesa Medical Group, PLLC*, 2015 U.S. App. LEXIS 2581 (6th Cir. Feb. 19, 2015).** Plaintiff, a nurse, brought a putative class action in state court alleging that Defendant wrongfully collected both her share as well as Defendant's share of the Federal Insurance Contribution Act ("FICA") tax from her wages. As a result, Plaintiff sought unpaid wages under the state law. Defendant filed a motion for a more definitive statement, arguing that Plaintiff's claims were unclear. When Defendant realized that Plaintiff sought a refund of FICA taxes, it removed the action under the Class Action Fairness Act. *Id*. at *7. The District Court denied Plaintiff's motion to remand, but ordered her to show cause why it should not dismiss her claims for failure to state a claim. The District Court concluded that taxpayers seeking a refund of FICA taxes must file an administrative claim with the IRS before bringing an independent legal action. *Id*. at *9. Unconvinced by Plaintiff's response, the District Court dismissed the complaint with prejudice. On appeal, the Sixth Circuit modified the judgment, but affirmed it nevertheless. The Sixth Circuit addressed three questions, including: (i) whether Plaintiff's state claims for unpaid wages were a FICA refund claim in disguise; (ii) if Plaintiff did assert a FICA claim, should her claim be dismissed for not filing a claim with the IRS first pursuant to 26 U.S.C. § 7422(a); and (iii) did Defendant timely remove the action. At the outset, the Sixth Circuit noted that the complaint unequivocally stated that the putative class consisted of Defendant's employees who were forced to pay their share of payroll taxes and withholdings. *Id*. at *12. Although Plaintiff also alleged that this forced payment caused the underpayment to employees, the complaint stated that the underpayment of wages "resulted" from the forced payment of payroll taxes. *Id*. Therefore, the Sixth Circuit found that the allegation regarding the forced payment of payroll taxes was the factual foundation of Plaintiff's purported state law claims. Although Plaintiff did not expressly mention FICA taxes, the Sixth Circuit concluded that it was understood that the employer must calculate its share of the FICA tax by reference to wages paid by the employer. *Id*. Second, the Sixth Circuit noted that the exhaustion-of-remedies under § 7422(a) was mandatory, and that a taxpayer is barred from bringing any action for a refund of any tax until a claim for refund has been filed with the IRS. *Id*. at *14. Because Plaintiff asserted a FICA refund claim, the Sixth Circuit concluded that § 7422(a) required her to first file a claim with the IRC, and hence, the District Court did not err in dismissing her complaint. Finally, the Sixth Circuit found that the removal was timely. The Sixth Circuit explained that Plaintiff's complaint failed to

unambiguously inform Defendant that it could remove the case. The Sixth Circuit noted that it was only in the letter that Plaintiff's counsel sent on August 13, 2013, did Defendant realize that the complaint contained at least one FICA claim. *Id*. at *30. Accordingly, the Sixth Circuit concluded that Defendant's notice of removal filed on September 11, 2015 was timely. The Sixth Circuit, however, modified the judgment to dismiss the complaint without prejudice.

***Cole, et al. v. CRST Van Expedited, Inc.,* 2015 U.S. App. LEXIS 6054 (9th Cir. April 14, 2015).** Plaintiff brought a putative class action alleging that Defendant denied meal and rest breaks to employees in violation of California law. Defendant moved for judgment on the pleadings. Defendant argued that Plaintiff's claim was preempted by federal law. The District Court dismissed Plaintiff's claims, finding that the Federal Aviation Administration Act ("FAAA") preempted California's meal and rest break laws. On Plaintiff's appeal, the Ninth Circuit reversed and remanded. The Ninth Circuit noted that in *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), it had recently held that California's meal and rest break laws were not related to prices, routes, or services, and therefore, were not preempted by the FAAAA. *Id*. at *2. Based on *Dilts*, the Ninth Circuit concluded the District Court erred by granting Defendant's motion for judgment on the pleadings on the basis of FAAAA preemption. *Id*. Accordingly, the Ninth Circuit reversed and remanded.

***Hughes, et al. v. United Parcel Services, Inc.,* 2015 U.S. Dist. LEXIS 28219 (E.D. Pa. Mar. 6, 2015).** Plaintiffs brought an action in state court alleging that Defendants United Parcel Services ("UPS") and the International Brotherhood of Teamsters, Local 623 (the "Teamsters") failed to pay them wages earned in violation of the FLSA and the Pennsylvania Wage and Payment Collection Law ("WPCL"). In 2002, Plaintiffs became employed with UPS and joined the Teamsters' union. *Id.* at *2. Plaintiffs held part-time positions as air drivers, and were not able to secure full-time positions due to their seniority level within the Teamsters. As of January 2012, they remained in the same part-time positions earning wages at an hourly rate of $23.70. In January 2012, Plaintiffs became aware of full-time position openings and asked certain leadership members of the Teamsters whether the full-time positions would lead to a change in their rate of pay. The Teamsters informed Plaintiffs that their hourly rate of $23.70 would not change. *Id.* at *3. Based upon those representations, the collective bargaining agreement ("CBA") between the parties, and the job descriptions for the full-time positions, Plaintiffs applied for and were hired by UPS for full-time employment as air drivers. *Id.* Shortly after beginning their new full-time roles, UPS decreased Plaintiffs' hourly pay to $13.50 and eliminated their seniority. Plaintiffs then unsuccessfully contacted a representative of UPS and the National Labor Relations Board for assistance. Plaintiffs further alleged that they filed grievances with the Teamsters concerning the wage decrease. Defendants removed the action on the basis of federal question jurisdiction, and moved to dismiss Plaintiffs' first amended complaint on the basis that § 301 of the Labor-Management Relations Act ("LMRA") preempted Plaintiffs' claims. The Court granted the motion. First, the Court noted that in their response to Defendants' motions, Plaintiffs stated that they were dismissing without prejudice all of their federal claims pursuant to Rule 41 and that they were relying on their state law claims. Plaintiffs objected to Defendants' motions insofar as they relied on the CBA and Plaintiffs asserted that the CBA was inadmissible at that stage. *Id.* at *6. The Court ruled the CBA was integral to and explicitly relied upon by Plaintiffs in their first amended complaint and therefore Defendants attachment of the CBA to their motions to dismiss, and their reliance upon the CBA, was proper. *Id.* at *8. The Court found that § 301 preempted both Plaintiffs' state and federal claims. The Court reasoned that based upon the allegations in Plaintiffs' first amended complaint, their state law claims were squarely dependent upon the CBA. *Id.* at *10. The Court held that each of Plaintiffs' claims was based upon allegations that their employment relationship with UPS was governed by the CBA, that it was pursuant to the terms of the CBA, that Plaintiffs accepted the full-time positions that were the subject of the action, that Defendants breached the terms of the CBA, and that as a result of Defendants' breach of the CBA, Plaintiffs suffered damages. *Id*. at *10-11. The Court rejected Plaintiffs' argument that § 301 did not preempt all state law claims where the claims were not entirely dependent upon an analysis of the CBA, because Plaintiffs put the CBA squarely at issue by alleging that Defendants breached it and that they suffered injury as a result of that breach. *Id.* at *12. The Court concluded that the terms of the CBA was the basis of each of their claims. Finally, because Plaintiffs had failed to exhaust the administrative

remedies available to them under the terms of the CBA, the Court dismissed their claims for breach of contract, unjust enrichment, and violations of the WPCL. *Id.* at *14.

***Overka, et al. v. American Airlines, Inc.*, 2015 U.S. App. LEXIS 9870 (1st Cir. June 12, 2015).** Plaintiffs, a group of skycaps or airport porters, brought an action alleging that Defendant's charge of $2.00 per bag for customers using curbside check-in services at airports – without notifying customers that skycaps would not receive the proceeds from the new charge – decreased their compensation dramatically. The District Court opined that *DiFiore v. American Airlines, Inc*., 646 F.3d 81 (1st Cir. 2011), and *Brown v. United Airlines, Inc.*, 720 F.3d 60 (1st Cir. 2013), compelled the conclusion that the Airline Deregulation Act ("ADA"), preempted each of the skycaps' claims, and thus it granted Defendant's motion to dismiss. *Id*. at *3. On appeal, the First Circuit affirmed. The First Circuit noted that an express preemption clause in the ADA, 49 U.S.C. § 41713(b)(1), provides that a State, political sub-division of a State, or political authority of at least two States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this sub-part. *Id.* at *3-4. *DiFiore*, which had held that the ADA preempted skycaps' claims that Defendant's per-bag fees violated the Massachusetts Tips Law, had reasoned that the airline's conduct in arranging for transportation of bags at curbside was itself a part of the "service" referred to in the federal statute, and the airline's "price" includes charges for such ancillary services as well as the flight itself. *Id.* at *4. Thus, *DiFore* reasoned that the Tips Law directly regulated how an airline service is performed and how its price is displayed to customers, which was what the ADA sought to avoid. *Id.* at *5. In *Brown*, the First Circuit had explained that *DiFiore* conclusively resolved in the airlines' favor the issue of whether laws regulating the imposition of baggage-handling fees relate to a price, route, or service of an air carrier within the meaning of the ADA preemption clause. *Id.* at *5-6. Further, *Brown* had also held that the skycaps' claims did not fit within the exception to preemption under the ADA recognized in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). *Id.* at *6. *Wolens* had held that the ADA did not preempt breach of contract claims arising out of an airline's frequent flyer program because those claims had sought remedies for violations of self-imposed, not state-imposed, obligations. *Id.* Plaintiffs argued that *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014), undermined the holding in *Brown* that skycaps' unjust enrichment and tortious interference claims fall outside the confines of the *Wolens* exception. *Ginsberg* had held that the ADA preempted a customer's claim alleging that an airline had breached the implied covenant of good faith and fair dealing. *Id.* at *7. Further, *Ginsberg* held that the *Wolens* exception did not apply to the customer's claim because Minnesota law prohibited parties from contracting out of the implied covenant of good faith and fair dealing, and thus the covenant was a state-imposed obligation rather than a self-imposed one under *Wolens*. *Id.* at *8. The First Circuit, however, observed that *Ginsberg* did not conclude that the implied covenant of good faith and fair dealing was not an obligation to which the parties had agreed, that the covenant instead constituted a state-imposed obligation under the applicable law, and thus that the reasoning of *Wolens* meant that the ADA preempted the customer's implied covenant claim. *Id.* at *9. The First Circuit also remarked that *Ginsberg* did not undermine the reasoning in *Brown* about the application of the *Wolens* exception to the common law claims Plaintiffs pressed here, as those claims sought to enforce a similarly state-imposed obligation. *Id.* Thus, the First Circuit opined that the ADA preempted Plaintiffs' common law claims. Regarding claims under the Massachusetts Tips Law, Plaintiffs contended that the District Court's decision with respect to their Tips Law claims should be reversed in light of *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014). *Id.* at *10. The First Circuit, however, observed that in deciding the preemption question, *Massachusetts Delivery Association* explicitly reaffirmed its previous holding that the proper analysis looks to the logical effect that a particular scheme has on the delivery of services or the setting of rates. *Id.* at *12. Thus, because *Massachusetts Delivery Association* supplied no basis for declining to follow *DiFiore*, the First Circuit affirmed that ADA preempted Plaintiffs' claims under the Massachusetts Tips Law.

***Rueli, et al. v. Baystate Health Inc.,* 2015 U.S. Dist. LEXIS 2548 (D. Mass. Jan. 9, 2015).** Plaintiffs, a group of visiting nurses, brought a class action in state court alleging that Defendants failed to pay them unpaid wages and overtime compensation in violation of Ch. 149 and Ch. 151 of Massachusetts General Laws. The parties' employment contract was memorialized in a collective bargaining agreement ("CBA"), which required employees to request permission from Defendants prior to working hours that would entitle

them to overtime compensation. *Id*. at *1. Plaintiffs did not allege that they followed the CBA protocol for requesting overtime. Defendants removed the case on the grounds that federal law preempted Plaintiffs' claims because the resolution of the claims depended, at least in part, upon the meaning of the CBA. *Id*. at *5. Plaintiffs moved to remand the case, arguing that removal was improper because interpretation of the CBA was not necessary to resolve their claims. *Id*. at *6. The Court denied Plaintiffs' motion. The Court relied on *Cavallaro v. UMass Memorial Health Care, Inc.* 678 F.3d (1st Cir. 2012), wherein the First Circuit had ultimately found that an interpretation of the CBA would be required to construe and apply the various peculiarities of industry-specific wage and benefit structures embodied in the CBA. *Id*. at *8-9. Although Plaintiffs attempted to distinguish *Cavallaro*, the Court found that *Cavallaro* governed this case because in both situations, determining whether there were wages owed, would, at least arguably, require construing and applying a portion of the CBA. *Id*. at *9-10. Plaintiffs contended that because they were not seeking to enforce the threshold under the CBA, it need not be interpreted because Plaintiffs were seeking only to enforce their state statutory right to collect overtime pay. The Court, however, found that interrelationship of the state claims and a CBA could not be avoided merely by refusing to identify the CBA in the complaint. *Id*. at *10. Thus, the Court found Plaintiffs' contention unavailing insofar as they asserted that interpretation of the CBA could be avoided. Accordingly, given the controlling nature of *Cavallaro*, the Court denied Plaintiffs' motion to remand.

(xi) Independent Contractor Issues In Wage & Hour Class Actions

***Carlson, et al. v. Fedex Ground Package Systems*, 2015 U.S. App. LEXIS 8810 (11th Cir. May 28, 2015).** Plaintiffs, a group of FedEx drivers in Florida, brought an action alleging that FedEx improperly classified them as exempt and asserted several statutory and common law claims. Between 2003 and 2009, drivers in approximately 40 other states filed similar actions that were consolidated in a multi-district proceeding ("MDL Court"). In the consolidated actions, the drivers alleged that, under their respective state laws, they were employees of FedEx and sought, among other things, reimbursement of business expenses, back pay, and overtime. *Id*. at *3. The Florida drivers sought class certification, and the MDL Court granted their motion. The parties filed cross-motions for summary judgment, and the MDL Court granted FedEx's motion, finding that the drivers were independent contractors under Florida law because, under the Operating Agreement and FedEx's standard practices and procedures, FedEx did not have the right to control the manner in which the drivers performed their jobs. *Id*. at *7. The MDL Court then remanded the case to the U.S. District Court for the Middle District of Florida for resolution of the individual common law claims. FedEx prevailed on the individual claims and obtained a final judgment in its favor. On Plaintiffs' appeal, the Eleventh Circuit affirmed the District Court's order granting summary judgment on the individual claims, but reversed the MDL Court's order granting summary judgment in favor of FedEx on the Florida drivers' employment status. At the outset, the Eleventh Circuit noted that the Florida drivers' claims depended on the common question of whether FedEx properly classified them as independent contractors. The Eleventh Circuit reasoned that the facts in the record supported each party's theory as to the degree of control that FedEx exercised over the drivers. Accordingly, the Eleventh Circuit affirmed in part, reversed in part, and remanded.

***Cotter, et al. v. LYFT, Inc.*, 2015 U.S. Dist. LEXIS 30026 (N.D. Cal. Mar. 11, 2015).** Plaintiffs, a group of drivers, brought a class action alleging that Defendant misclassified them as independent contractors and thereby owed them money they would have otherwise received as employees. Defendant operated a smartphone application through which passengers/riders were matched to nearby available drivers to transport people in their personal automobiles. *Id*. at *4. The drivers worked on a donation system, where, at the end of the ride, a passenger could pay the driver a donation that Defendant recommended, or pay a different amount, or pay nothing at all. *Id*. at *6. Defendant tracked a driver's acceptance rate, and a driver with a low acceptance rate was deactivated after three warnings. *Id*. at *8. The parties' relationship was governed by Defendant's terms of service, which limited Defendant's liability for a driver's action with a rider. *Id*. at *9-10. The terms of service also reserved Defendant the right to investigate and terminate a driver's participation. *Id*. at *10. The parties cross-moved for summary judgment, and the Court denied both motions. At the outset, the Court observed that under California law, if reasonable people could differ on whether a worker is an employee or an independent contractor based on the evidence in the case, then a jury must decide the question. *Id*. at *21. Defendant first argued that because drivers did not perform

any services for it, instead performed service for the riders, there was no need to decide how to classify the drivers. The Court noted that Defendant not only connected a driver to a rider, they also marketed to customers as an on-demand service and gave drivers detailed instructions about how to conduct themselves. *Id*. at *25. The Court, therefore, rejected Defendant's argument the drivers did not perform any service to Defendant. Further, the Court observed that although drivers enjoyed great flexibility in when and how often to work, once they did accept ride requests, Defendant retained a good deal of control over how they proceeded. *Id*. at *26-27. The Court remarked that it was difficult to rule as a matter of law whether Plaintiffs were independent contractors when the most important factor for discerning the relationship – the right to control – went the other way. *Id*. at *29. The Court found that the record also suggested the parties believed that they were entering into an independent contractor relationship, as evidenced by the statements in the terms of service, which supported Defendant's position. At the same time, the Court reasoned that Plaintiffs' position was strengthened by the argument that work performed by the drivers was wholly integral to Defendant's business. *Id*. The Court therefore denied both motions.

***Craig, et al. v. FedEx Ground Package System, Inc.*, 2015 U.S. App. LEXIS 11770 (7th Cir. July 8, 2015).** Plaintiffs, a group of current and former delivery drivers, brought a wage & hour class action alleging that Defendant misclassified them as independent contractors pursuant to the parties' operating agreement ("OA"). The MDL Court granted summary judgment to Defendant. *Id.* at *1. On appeal, the Seventh Circuit reversed the MDL Court's order. Following an oral argument, the Seventh Circuit certified two questions to the Kansas Supreme Court, including: (i) if drivers were employees as a matter of law under the Kansas Wage Payment Act ("KWPA"); and (ii) if drivers can acquire more than one service area from Defendant, was the answer to the preceding question different for drivers who have more than one service area. *Id.* at *1-2. The Kansas Supreme Court answered the first question in the affirmative and the second question in the negative. *Id*. at *2. The Seventh Circuit noted that, although the MDL Court primarily focused on the OA's statements of Defendant's right to control the drivers, the actual control that Defendant exercised over drivers was not the question. *Id*. at *3. Defendant argued that, because certified questions involved a purely legal analysis and the Kansas Supreme Court drew adverse inferences from the record, the Seventh Circuit should not follow the Kansas Supreme Court's answers to the certified questions. *Id.* at *5. The Seventh Circuit found that the application of Kansas law to Defendant's relationship with its drivers had been authoritatively decided by the Kansas Supreme Court under the undisputed facts presented and that the FedEx delivery drivers were employees for purposes of the KWPA. Thus, the Seventh Circuit held that the Kansas Supreme Court's decision necessitated the reversal of the MDL Court's order granting summary judgment in favor of FedEx and denying summary judgment in favor of Plaintiffs. *Id.* at *6. Accordingly, the Seventh Circuit reversed the MDL Court's denial of Plaintiffs' motion for summary judgment and its order granting Defendant's motion for summary judgment. Further, the Seventh Circuit remanded the case to the MDL Court with instructions to enter judgment for Plaintiffs that they were employees of Defendant for purposes of the KWPA.

***Dang, et al. v. Inspection Depot, Inc.,* 2015 U.S. Dist. LEXIS 141083 (S.D. Fla. Oct. 16, 2015).** Plaintiffs, a group of inspectors, brought a putative collective action alleging that Defendants misclassified them as independent contractors in violation of the FLSA. Defendants moved for summary judgment, which the Court denied. Plaintiffs contended that they entered into a contract with Defendants to provide wind mitigation inspection services under Defendants' contract with Citizens Property Insurance Corp. ("Citizen"). *Id.* at *2-3. Plaintiffs asserted that after every inspection, they were required to upload the results of their inspection to Citizen using bridge software developed by Defendants, and failure to comply with the inspection standards resulted in charge backs to the inspectors as outlined in Citizen's contract with Defendants and Defendants' contract with each inspector. *Id.* at *3. Further, Plaintiffs contended that all inspectors were paid "by the job" in the amount of $85.00 per inspection. *Id.* Defendants argued that Plaintiffs' claims under the FLSA should be dismissed because Plaintiffs were independent contractors. In support of its argument Defendants contended that: (i) Plaintiffs had absolute and total discretion over their work schedules and the amount of work they wished to take on; and (ii) Plaintiffs had ample opportunity to control their own profits and losses by taking on as many inspections as they wished. *Id*. at *5-6. Plaintiffs contended that they did not have a specified termination date when they would stop performing property inspections for Defendants, and they exclusively performed inspections for Defendants and no other

company during their respective tenures. Consequently, Plaintiffs argued that they were economically dependent on Defendants and could not work for other companies because Defendants held their adjusting licenses during their tenure. *Id.* at *7. Considering the varying disputes of material facts between the parties as to independent contractor status, the Court concluded summary judgment was not appropriate, and denied Defendants' motion.

***Gray, et al. v. FedEx Ground Package System,* 2015 U.S. App. LEXIS 14693 (8th Cir. Aug. 21, 2015).** Plaintiffs, a group of delivery operators, brought a class action alleging that Defendant misclassified them as independent contractors. *Id.* at *1-2. Defendant contracted with operators to take packages from its terminals and deliver the packages to homes and businesses. Operators received a proprietary interest in servicing their territories, an interest that they could sell to others subject to Defendant's approval. *Id.* at *3. Plaintiffs asserted a host of allegations to show that they were employees, including that Defendant required that operators' vehicles meet certain specifications, that the vehicles bear Defendant's logo, operators use the vehicles for personal use only after covering up Defendant's logo, and provide proof of inspection and maintenance. *Id.* at *4. Defendant also required drivers to wear uniforms and conducted background checks on drivers. *Id.* The District Court granted partial summary judgment to Plaintiffs and found that they were employees as a matter of Missouri law. On appeal, the Eighth Circuit reversed and found that the issue should have been submitted to the jury. The Eighth Circuit found that some aspect of the contracts could suggest that Plaintiffs were either employees or independent contractors. *Id.* at *11. While Defendant's ability to supervise its operators by sending managers to ride in the operator's vehicles up to four times a year could be seen as evidence of Defendant's control, the Eighth Circuit noted that a reasonable jury could also find that being subject to supervision only four times a year was an evidence of independence. *Id.* at *12. Similarly, while there was evidence that Defendant controlled the order and timing of deliveries and demanded compliance with a host of details, there was also evidence that Defendant exercised different levels of control over each Plaintiff and paid them distinctively, suggesting that they were independent contractors. *Id.* The Eighth Circuit further noted that employment duration – the shortest time period operated by a Plaintiff being a year and nine months – and the fact that Defendant would not have business without Plaintiffs undisputedly supported a finding that Plaintiffs were employees. *Id.* at *13-16. Thus, given the mixed evidence in the record and facts supporting each party's position, the Eighth Circuit held that the District Court erred in granting summary judgment to Plaintiffs. Accordingly, the Eighth Circuit reversed the District Court's grant of summary judgment, and remanded the action for further proceedings.

***Hargrove, et al. v. Sleepy's LLC,* 2015 U.S. App. LEXIS 7832 (3d Cir. May 12, 2015).** Plaintiffs, a group of deliverers, brought an action alleging that Defendants misclassified them as exempt and denied them protections and benefits under the ERISA and the New Jersey Wage Payment Law. Plaintiffs also alleged that Defendants denied them overtime wages. Defendant Sleepy's, LLC, a mattress and bedding company, contracted with individuals and delivery companies to provide delivery services to its customers. Each deliverer entered into a contract known as an independent driver agreement ("IDAs"), which stated that the deliverers were independent contractors and not employees of Sleepy's. *Id*. at *2. The District Court applied the "right to control" test set forth in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), and held that Plaintiffs were independent contractors. On this basis, it granted Sleepy's motion for summary judgment. *Id*. at *3. On appeal, the Third Circuit reversed and remanded. The Third Circuit petitioned the New Jersey Supreme Court to accept certification of the issue to determine which employment test applied to claims that arose under the New Jersey law. *Id*. at *3-4. The New Jersey Supreme Court held that "ABC" test was appropriate to make employment status determinations in New Jersey. *Id*. at *5. The Third Circuit noted that "ABC" test presumed an individual was an employee unless the employer can make certain showings regarding the individual, including: (i) the individual was and continued to be free from control; (ii) such a service was outside the usual course of business for which the service was provided; and (iii) such an individual was customarily engaged in an independently established trade or business. *Id*. Because the District Court's rationale for denying Plaintiffs' motion for summary judgment was based on *Darden*, and did not consider the possible application of the "ABC" test, the Third Circuit vacated the order and remanded the case for further proceedings. *Id*. at *6.

***Meyer, et al. v. United States Tennis Association*, 2015 U.S. App. LEXIS 11037 (2d Cir. June 29, 2015).** Plaintiffs, a putative class of tennis umpires who worked at the U.S. Open, brought an action against Defendant seeking unpaid overtime under the FLSA and the New York Labor Law. The District Court granted summary judgment in favor of Defendant, finding that Plaintiffs were independent contractors and not employees. On appeal, the Second Circuit affirmed. The Second Circuit remarked that Plaintiffs, highly skilled workers who exercised a high degree of independent initiative and control in officiating tennis matches; thus, they were free to decide independently each year whether to apply to officiate at the U.S. Open that lasts for only a few weeks each year, and for the number of days they wished to officiate. *Id.* at *3. Plaintiffs also remained free to serve as umpires for other tennis associations and to maintain other non-umpiring jobs throughout the year. *Id.* In addition, the Second Circuit found that Plaintiffs did not receive fringe benefits, were not on Defendant's payroll, and claimed their independent contractor status on their income tax returns. *Id.* at *4. Accordingly, in view of the totality of circumstances, the Second Circuit concluded that the District Court did not err in determining that Plaintiffs were independent contractors, and not employees.

***O'Connor, et al. v. Uber Technologies, Inc.,* 2015 U.S. Dist. LEXIS 30684 (N.D. Cal. Mar. 11, 2015).** Plaintiffs, a group of drivers, brought a putative class action alleging that Defendant misclassified them as independent contractors and thereby deprived them of employee benefits. Defendant moved for summary judgment, and the Court denied the motion. The Court found a number of disputed facts material to the employee/independent contractor determination that precluded summary judgment. Defendant argued that it had no employment relationship with Plaintiffs because it only generated "leads" for its transportation providers through novel software and network systems that connected drivers with passengers. The Court found that Plaintiffs "performed services" for Defendant, and thus they were Defendant's presumptive employees under California law. *Id.* at *20-21. The Court noted that Defendant's revenues did not depend on the distribution of its software, but on the generation of rides by its drivers, and Defendant exercised significant control over the amount of any revenue it earned. *Id.* at *23. Further, the record showed that Defendant claimed a proprietary interest in its riders, which demonstrated that it acted as more than a passive intermediary between riders and drivers. Moreover, Defendant exercised substantial control over the qualification and selection of its drivers and prohibited its drivers from answering riders' queries about booking future rides outside its application. *Id.* at *24-25. Although Defendant contended that it was a pure "technology company," the Court noted that because Defendant collected fees from drivers and was involved in both ensuring drivers were qualified and that they provided quality services, Defendant engaged in the transportation business and that Plaintiffs rendered services to Defendant. *Id.* at *32. The Court, however, found that the critical fact of right to control appeared to be in dispute. While Defendant contended that it allowed drivers to make themselves available for work whenever they wanted and allowed them to accept or reject rides once they have been selected, Plaintiffs provided evidence from Defendant's handbook that expressly stated that rejecting too many trips might raise a performance issue that could lead to possible termination. *Id.* at *43-44. The handbook also provided instructions for drives on dress codes, communication with clients, use of a car radio, and availability of an umbrella in their cars. Defendant responded that it merely provided suggestions and had no ability to ensure that any driver actually complied with any such suggestions. The Court determined that the evidence established that Defendant monitored its drivers to ensure compliance and requested riders to give drivers a star rating, and Defendant's contract with drivers provided that it might terminate any drivers whose star rating "falls below the applicable minimum star-rating." *Id.* at *47. While the fact that Defendant had little control over its drivers' hours of work heavily weighed in favor of a finding of independent contractor status, the Court noted this did not, by itself, preclude a finding of an employment relationship because a reasonable jury could find numerous other factors, including those pertaining to Defendant's level of control over the manner and means of Plaintiffs' performance, that favored a finding of an employment relationship. *Id.* at *50-53. Given the material dispute, the Court concluded that summary judgment was inappropriate, and denied Defendant's motion for summary judgment.

***Schwann, et al. v. FedEx Ground Package System, Inc.,* 2015 U.S. Dist. LEXIS 13826 (D. Mass. Feb. 5, 2015).** Plaintiffs, a group of former FedEx drivers, brought a class action alleging that FedEx improperly classified them as independent contractors in violation of Massachusetts labor law. In light of

the First Circuit's recent decision in *Massachusetts Delivery Association v. Coakley,* 769 F.3d 11 (1st Cir. 2014) ("*MDA*"), the District Court withdrew its previous order granting Plaintiffs summary judgment on Count I – for wrongful classification of pick-up and delivery drivers as independent contractors in violation of Massachusetts General Laws Ch. 149, § 148B) – and granted FedEx's motion for summary judgment. Section 148B provides that a worker is properly classified as an independent contractor if the employer can show that: (i) the individual is free from control and direction in connection with the performance of their service, both under his contract for the performance of service and in fact; (ii) the service is performed outside the usual course of the business of the employer; and (iii) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. *Id*. at *2-3. In *MDA*, a case virtually identical to this case in its relevant respects, the First Circuit held that the Federal Aviation Administration Authorization Act ("FAAAA") preempted the second prong of § 148B. *Id*. at *3. The FAAAA expressly preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Id*. The First Circuit stated that § 148B did not directly implicate the transportation of property, and thus any indirect impact on FedEx's price, routes, and services was too attenuated to trigger preemption. *Id*. Regarding transportation of property, the First Circuit held that because "§ 148B governs the classification of the couriers for delivery services, it potentially impacts the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery. The law clearly concerns a motor carrier's transportation of property." *Id*. at *3-4. The District Court observed that the application of § 148B to FedEx and other similar motor carriers would unquestionably have an impact on "price, routes, and services" by proscribing the carrier's preferred business model. *Id*. at *4. Further, the District Court found that the preempted prong was not severable from the statute as a whole. *Id*. at *5. The District Court observed that § 148B was a conjunctive test, *i.e.*, an employer must meet its burden as to each prong to properly classify a worker as an independent contractor. *Id*. at *6. Thus, the District Court concluded that the entire statute must be treated as preempted. *Id*. Moreover, the District Court found that enforcing prongs one and three of § 148B against motor carriers would result in the "price, routes, and services" offered by motor carriers being impacted by forbidding the preferred business model. *Id*. Since the FAAAA preempts § 148B as applied to motor carriers like FedEx, the Court granted FedEx summary judgment on Count I. *Id*. at *7.

Thomas, et al. v. TXX Services, Inc., **2015 U.S. Dist. LEXIS 134829 (E.D.N.Y. Sept. 30, 2015).**
Plaintiffs, a group of delivery drivers, brought an action alleging that Defendant failed to pay them overtime wages in violation of the FLSA and the New York Labor Law ("NYLL"). Previously, the Magistrate Judge recommended dismissal of the claims, finding that Plaintiffs were independent contractors and not employees. On Plaintiffs' Rule 72 objections, the Court adopted the findings in its entirety. Plaintiffs claimed that the Magistrate Judge erred because he: (i) resolved factual disputes in Defendants' favor; (ii) failed to make all reasonable inferences in their favor; and (iii) misapplied the summary judgment standard. *Id*. at *5. Plaintiffs pointed to evidence, which according to them showed that they were employees within the meaning of the FLSA under the five factor test set forth in *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988). *Id*. Plaintiffs also cited declarations of other drivers to show that Defendants exercised control over them by setting routes and assigning available routes to drivers. *Id*. The Court remarked that although the economic reality test analysis was a factual question, the ultimate question of whether a worker is an employee or an independent contractor was a legal question under *Superior Care*. *Id*. at *6. The Court observed that the Magistrate Judge correctly found that the parties did not dispute the underlying facts, but instead characterized the facts differently according to their respective legal positions, which did not defeat the validity of the summary judgment order. *Id*. The Court explained that the Magistrate Judge correctly observed that many of Plaintiffs' asserted factual disputes were semantical, such as whether Defendants terminated a driver, or "no longer engaged" his services. The Court also found that although Defendant set the drivers' routes and schedules, this did not raise a factual issue over control because Defendants' clients and the nature of its business dictated those requirements. *Id*. at *6-7. Accordingly, the Court held that there was no error in the Magistrate Judge's recommendation and adopted it in its entirety.

(xii) Communications With Class Members In FLSA Collective Actions

***Agerbrink, et al. v. Model Service LLC,* 2015 U.S. Dist. LEXIS 145563 (S.D.N.Y. Oct. 27, 2015).** Plaintiff brought a collective action alleging that Defendant violated her FLSA rights and those of other "fit models" by misclassifying them as independent contractors. *Id.* at *2. At a pre-trial conference, Plaintiff raised concerns about an e-mail sent by Defendant's Chief Operating Officer ("COO") to putative collection action members, which contained statements that were misleading and coercive to potential opt-in Plaintiffs. *Id.* at *2-5. Particularly, Plaintiff contended that the e-mail contained misrepresentations about Plaintiff's counsel, the legal test for determining employee status under the FLSA, the lawsuit's potential impact on putative Plaintiffs' tax status and economic interest, and the consequences of speaking with Plaintiff's counsel. *Id.* at *10-11. Plaintiff requested the Court to order Defendant to disseminate a corrective notice. The Court determined that a corrective notice was required and placed limited restrictions on future communications to address any harm caused by the e-mail. The Court noted that while communications with putative Plaintiffs prior to class certification was not prohibited, a judicial intervention was warranted when the communications threatened the fairness of the process, adequacy of representation, and the administration of justice. *Id.* at *6. The Court observed that potential opt-in Plaintiffs might be inclined to defer to Defendant because of the nature of their relationship. Models were not only economically dependent on Defendant, but also looked to it for guidance. The Court found that the fact that models relied on Defendant for advice made it less likely that they would question the information they received and more likely that they would be misled by misrepresentations or omissions in the e-mail. *Id.* at *13-14. The Court found the e-mail's discussion of tax status misleading in its one-sided presentation of the tax benefits and responsibilities of independent contractors and employees. *Id.* at *21-22. The e-mail suggested that independent contractors paid fewer taxes because they might deduct "substantial legitimate business expenses" and have "no income withholding for taxes," whereas employees "are limited in what employment business expenses they can deduct" and "have federal, state and city taxes and social security withheld from their pay." *Id.* at *22. The e-mail, however, did not mention that independent contractors were still liable for income tax, but pay taxes directly rather than having them withheld from earnings. *Id.* Because the e-mail cataloged specific differences between tax liabilities of employees and independent contractors, the Court reasoned that the putative class members would have no reason to question its accuracy. The Court therefore held that given the parties' relationship, this aspect of the e-mail was both coercive and misleading. *Id.* at *23. The Court also found that the e-mail's failure to explicitly acknowledge Defendant's specific adverse interests had the potential to mislead by omission. *Id.* at *28. The Court concluded that the e-mail had the potential to mislead, and determined that its task was to tailor the narrowest possible relief that would protect the respective parties. *Id.* at *30. Accordingly, the Court ordered a corrective notice and a limited restriction on Defendant's future communications, but declined to enjoin the COO or Defendant from discussing the litigation with the putative collective action members.

***Jackson, et al. v. Bloomberg, L.P.,* 2015 U.S. Dist. LEXIS 23338 (S.D.N.Y. Feb. 25, 2015).** Plaintiff, a global customer support representative ("GCSR"), brought an action against Defendant, a multi-national mass media corporation, alleging that Defendant failed to pay overtime in violation of the FLSA and the New York Labor Law. After class certification, Defendant sought an order permitting it to contact 10 out of approximately 482 class members, notwithstanding the existence of New York's ethical rule Rule 4.2(a) barring contact with represented parties. The Court granted Defendant's request. Defendant made that application because those 10 individuals, who were direct supervisors of GCSRs during the class period, were also class members themselves based on their earlier jobs as GCSRs. *Id*. at *3. Defendant contended that it wished to discuss with those direct supervisors their roles as managers and supervisors, and stated that it would not talk to them about anything that occurred while they were GCSRs. *Id*. First, Plaintiff asserted that there was harm in allowing employers to speak with employees engaged in suing it, particularly when those employees were still employed by the employer. *Id*. at *7. The Court observed that although the potential for harm existed, there were situations where employers regularly speak with employees engaged in suing it on topics other than the representation. Further, the Court noted that Rule 4.2(a) does not bar all contact with a represented party, but only contact on the subject of the representation. *Id*. Second, Plaintiff argued that a class member who had contact with Defendant about his or her activities as a GCSR would be coerced into opting- out as a class member. The Court, however,

found the potential for coercion minimal because there were only a small number of class members whom Defendant sought to contact, and as Plaintiff's attorney would have every opportunity to counsel those individuals prior to the contact. *Id*. at *7-8. Third, while Plaintiff characterized the knowledge of those individuals as being of minimal relevance, the Court accepted Defendant's contention that it only needed to speak with those individuals to determine the information they had about the individuals they managed and supervised, to investigate specific allegations about certain team leaders and managers that Plaintiff made, and to satisfy its discovery obligations to produce responsive documents and to prepare a Rule 30(b)(6) witness for deposition. *Id*. at *9. The Court rejected Plaintiff's argument that Defendant's interests could be satisfied by gathering all the information it required from a class member in a deposition with Plaintiff's counsel present. *Id*. at *11. Finally, although Plaintiff asserted that approval of Defendant's proposed contact would be unprecedented, the Court observed that its denial would be equally unprecedented. *Id*. Thus, the Court concluded that Defendant had good reason and had a genuine need to consult with current employees to prepare its defense to the lawsuit because of the 12 current team leads, 10 were class members, and one of those 10 also served as a regional manager and another as a trainer. *Id*. at *13. Accordingly, the Court permitted Defendant to contact seven of the tem class members who spent more than a year as team leaders. *Id*. at *14. The Court, however, placed restrictions on this contact to minimize the potential that the contacts could be perceived as coercive to the individual or harmful to the class as a whole. *Id*.

***Jackson, et al. v. Bloomberg, L.P.*, 2015 U.S. Dist. LEXIS 52581 (S.D.N.Y. April 22, 2015).** Plaintiffs brought an action alleging that Defendant failed to compensate its global customer support ("GCS") representatives for overtime work in violation of the FLSA and the New York Labor Law ("NYLL"). After the Court conditionally certified a FLSA collective action and an NYLL class action, Defendant sought an order that would permit contact with 10 members of the certified class outside the presence of Plaintiffs' counsel. *Id.* at *2. The Magistrate Judge permitted Defendant such contact under certain conditions with seven of the class member employees. *Id.* Plaintiffs objected to the contact order via a Rule 72 objection, which the Court sustained. First, the Court stated that Rule 4.2 of the New York Rules of Professional Conduct bars lawyers from communicating directly with an opposing party represented by counsel regarding the "subject of the representation," unless the lawyer has the prior consent of the other lawyer or "is authorized to do so by law." *Id.* at *3-4. The Court noted that Defendant sought to speak with 10 individuals who were direct supervisors of GCS representatives during the class period in a job title called "team leader," who were also class members themselves based on their earlier jobs as GCS representatives. *Id.* at *5. Further, some of these individuals also held other positions that involved either indirect management or other interaction with GCS representatives. *Id.* at *6-7. The Court concluded that the contact sought by Defendant would concern the "subject of the representation" because the only reason that Defendant wished to speak with the class member employees at issue was because they possessed information relevant to the action. *Id.* at *7. The Court remarked that Defendant apparently planned to elicit information by asking those class members about their experience of supervising GCS representatives. The Court found that those questions would nonetheless concern the subject of the employees' representation because the central issues in this case focused on the employment and supervision of GCS representatives. Accordingly, the Court held that Rule 4.2 applied. *Id.* at *7-8. Next, the Court observed that the only remaining question was whether the contact was "authorized by law," and that there was some uncertainty surrounding the issue of what kinds of contact were included. *Id.* at *8. The Court found that the Magistrate Judge's order balanced the need asserted by Defendant against the possible harm outlined by Plaintiffs, and ultimately authorized Defendant to contact seven members of a 482-member class under restrictions designed to limit the potential for such harm. *Id.* at *13. The Court remarked that the ethical rules did not permit the type of contact at issue in this case because Defendant's assertion of a genuine need to speak with class members to prepare its defense was simply inadequate to permit an exception from Rule 4.2. *Id.* at *13-14. The Court pointed out that only in "exceptional circumstances" may parties engage in contact with represented persons that would otherwise violate that Rule. *Id.* at *14. The Court found that the situation in this case – where a party sought to speak with class members to aid in the preparation of its defense – did not constitute "exceptional circumstances." *Id.* In addition, the Court expressed a concern that the requested contact with class members who were currently employed by Defendant could be coercive. *Id.* at *14-15. The Court concluded that the exception to the no-contact rule

for communications authorized by a Court's order could not be extended to encompass Defendant's request, and if Defendant wished to elicit information from class members it must do so through depositions or other discovery. *Id.* at *17. Accordingly, the Court sustained Plaintiffs' objections.

***Mark, et al. v. Gawker Media LLC,* 2015 U.S. Dist. LEXIS 66013 (S.D.N.Y. Mar. 5, 2015).** Plaintiffs brought an FLSA action alleging that Defendants improperly designated them as interns and refused to pay them wages. After conditionally certifying the FLSA action, the Court permitted Plaintiffs to propose forms of notice that would be disseminated to potential opt-in Plaintiffs by social media ("November 2014 order"). *Id*. at *1. Plaintiffs requested that the Court adopt their plan for social media notice, which the Court denied in all respects. The Court found that the proposals were substantially overbroad for the purposes of providing notice to potential opt-in Plaintiffs, and much of Plaintiffs' plan appeared calculated to punish Defendants rather than provide notice of opt-in rights. *Id*. at *3. The Court determined that Plaintiffs' proposal to post notices on websites such as Reddit and Tumblr, and on pages such as "r/OccupyWallStreet" and "r/Progressive," lacked any realistic notion of specifically targeting the notice to individuals with opt-in rights. *Id*. The Court remarked that the purpose of FLSA notice is to inform those eligible to opt-in to the collective action, and not to advertise a Defendant's alleged violations. *Id*. The Court also found that Plaintiffs' proposed use of Twitter, LinkedIn, and Facebook was also overbroad. *Id*. The Court noted that it had approved use of social media notice on the understanding that such notice would effectively mirror the more traditional forms of notice being used in the case, and that it would contain private, personalized notifications sent to identified potential Plaintiffs who might not be reachable by other means. *Id*. The Court further observed that Plaintiffs' plan attempted to re-raise issues that could or should have been raised earlier. As the Court had indicated in its November 2014 order, its invitation of a social media notice proposal was not to be construed as an opportunity to re-litigate issues already decided or that had never been raised before. *Id*. at *4. Accordingly, the Court denied without prejudice Plaintiffs' request to provide notice pursuant to their plan.

***O'Connor, et al. v. Uber Technologies, Inc.*, 2015 U.S. Dist. LEXIS 171570 (N.D. Cal. Dec. 23, 2015).** In a consolidated class actions brought by drivers of ridesharing service Uber, Plaintiffs filed a motion seeking to enjoin Defendant's new December 2015 arbitration agreement promulgated by Uber in light of the Court's prior certification of certain sub-classes following a ruling that earlier arbitration agreements were unenforceable. *Id.* at *6. Plaintiffs claimed that the agreement, in effect, was an unauthorized communication to class members designed to undermine or discourage lawsuit participation. The Court granted the motion in part and denied it in part. *Id.* at *8, 13. As to the already certified sub-classes in O'Connor, the Court held that the December 2015 arbitration agreement was unenforceable as to claims through the date of class certification and it ordered Uber to not have any further communications with the class that would likely affect the case or engender confusion (except with permission of class counsel or the Court). *Id.* at *10. As to the other consolidated cases, the Court refused to bar all future arbitration agreements as Plaintiffs requested, but instead ordered Uber to revise the notice provision in the December 2015 agreement to reflect the litigation and the progress that had already been made. *Id.* at *15. The Court also ordered Uber not to enforce the December 2015 arbitration provision until it provided the drivers who received it a new cover letter describing it and a new opportunity to opt-out of the agreement. The Court placed very tight specifications on the cover letter, providing that it could not be in a link or attachment, was limited to approximately 1 page, had to inform recipients of the new arbitration clause and new 30-day opt-out period, and had to have an easily accessible opt-out function. *Id.* at *17. The Court reasoned that given the complexity of the case, the arbitration provision had been misleading and threatened to interfere with the rights of the certified class and of the putative class members, thus justifying its use of discretion to control class communications. *Id.*

(xiii) Venue Issues In FLSA Collective Actions

***Flood, et al. v. Carlson Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 40170 (S.D.N.Y. Mar. 27, 2015).** Plaintiffs, a group of restaurant employees, brought an action alleging that Defendants violated the FLSA by paying tipped workers less than minimum wage, despite requiring them to spend more than 20% of their shifts performing "side work" not directed toward producing tips. *Id*. at *5. Plaintiffs worked and resided in New York, New Jersey, Massachusetts, Virginia, and Florida. Defendants' principal executive offices were

located in Texas. Defendants moved to transfer venue to the U.S. District Court for the Northern District of Texas, which the Court denied. To determine whether a transfer is warranted, the Court noted that it must consider six factors laid out in *In Re Collins & Aikman Corp. Securities Litigation*, 438 F. Supp. 2d 392 (S.D.N.Y. 2006). The Court noted that the first factor – Plaintiffs' choice of forum – weighed against transfer. The Court explained that a majority of the named Plaintiffs lived in the New York metropolitan area, making the Southern District of New York a convenient forum. *Id*. at *8. The Court noted that second factor – convenience of witnesses – is accorded more weight than the other factors. The Court observed that on one hand, testimony concerning Defendants' corporate policies and practices were germane to resolving Plaintiffs' claims, and supported transfer. *Id*. at *9. On the other hand, the Court found that Defendants offered evidence showing that witnesses familiar with these policies and practices would be particularly inconvenienced if this action remained in the Southern District of New York. *Id*. at *10. Accordingly, the Court concluded that the second factor also weighed against transfer. Similarly, the Court found that the third and fourth factors – location of relevant documents and ease of access to sources of proof, and convenience of the parties – also weighed against transfer. *Id*. at *11-12. Defendants argued that the fifth factor – locus of operative facts – supported transfer. The Court observed that to determine where the locus of operative factor lies, it must look to the site of events from which the claim arose. The Court, however, remarked that in a nationwide FLSA collective action, it is often difficult to fix a single locus of operative facts, because each employee's claim typically arises not only from the objectionable policy's development, but also from its on-site implementation. *Id*. at *14. Moreover, the Court observed that named Plaintiffs asserted that their claims arose from their employment at Defendants' restaurants in New York, which were in Southern and the Eastern District of New York. *Id*. at *14-15. Accordingly, the Court ruled that this factor too weighed against transfer. The Court also found that the sixth factor – availability of process –counseled against transfer. For these reasons, the Court denied Defendants' motion to transfer the collective action to the Northern District of Texas.

(xiv) Pay Policies And Bonuses In FLSA Collective Actions

***Babcock, et al. v. Butler County*, 2015 U.S. App. LEXIS 20393 (3d Cir. Nov. 24, 2015).** Plaintiffs, a group of corrections officers, brought an FLSA collective action seeking overtime wages for a portion of their meal breaks. A collective bargaining agreement ("CBA") provided that the officers work eight and one-quarter hour shifts that included a one hour meal period, of which only 45 minutes were paid. During the meal period, the officers could not leave the prison without permission, and they had to remain in uniform in close proximity to emergency response equipment, and they were on-call to respond to emergencies. *Id.* at *3. Defendant moved to dismiss, arguing that the meal periods were not compensable work because they received the predominant benefit of the meal period. The District Court granted the motion. On Plaintiffs' appeal, the Third Circuit affirmed. The Third Circuit observed that the essential consideration in determining whether a meal period is a *bona fide* meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal. *Id.* at *6-7. Although Plaintiffs faced a number of restrictions during their meal period, the Third Circuit agreed with the District Court that these restrictions did not predominantly benefit the employer. Corrections officers were able to request authorization to leave the prison for their meal period and could eat lunch away from their desks. Further, although the CBA was silent on the compensability of the 15-minute period, it provided corrections officers with the benefit of a partially-compensated meal time and mandatory overtime pay if their meal period was interrupted by work. *Id.* at *8. The Third Circuit noted that the FLSA does not require more. *Id.* The CBA also assumed that generally an officer is not working during a meal period, but provided for appropriate compensation when an officer worked during the meal. *Id.* Accordingly, the Third Circuit found that the officers were not primarily engaged in work-related duties during the daily, agreed-upon 15 minutes of the uninterrupted meal period, and that they received the predominant benefit of the time in question. Accordingly, the Third Circuit held that Plaintiffs were not entitled to compensation under the FLSA.

***Jones-Turner, et al. v. Yellow Enterprise Systems, LLC,* 2015 U.S. App. LEXIS 326 (6th Cir. Jan. 5, 2015).** Plaintiffs, a group of emergency medical technicians ("EMTs"), brought an action alleging failure to compensate them for lunch breaks, and failure to guarantee that they received rest and lunch breaks in violation of the FLSA and Kentucky state law. Plaintiffs contended that Defendants automatically

designated a 30-minute break slot during each 8.5-hour shift as an unpaid lunch break. *Id*. at *2. If an employee was unable to take a lunch break due to call volume, the employee was required to submit a missed lunch slip to the administrative director, who would then determine whether there was indeed a 30-minute period between calls at any point during the employee's shift. *Id.* at *2-3. If there was such a period, it would be considered the employee's unpaid lunch break, and if there was no such period, the employee would be paid for the missed lunch. *Id.* at *3. The District Court conditionally certified a collective action, but later decertified the collective action and also denied class certification of the state law claims under Rule 23. The District Court then granted summary judgment to Defendant on all of Plaintiffs' claims. On appeal, the Sixth Circuit affirmed. The Sixth Circuit noted that it would apply "predominant benefit" test from *Hill v. United States*, 751 F.2d 810 (6th Cir. 1984), where it held that a meal period is not compensable as long as the employee can pursue his or her meal time adequately and comfortably; is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit. *Id.* at *8. Here, although employees were required to radio the dispatcher to request a lunch break and EMTs had to eat within one mile of an assigned stand-by location, there was no policy that employees remain in the truck for lunch. The Sixth Circuit noted that Plaintiffs failed to produce evidence that they were ever told they had to eat in the truck, and cited no evidence that while on a lunch break they were required to perform duties beyond responding to a call, or that once approved for a lunch break they were frequently interrupted by radio contact. Thus, the Sixth Circuit reasoned that Defendant's policies did not indicate that the Plaintiffs were engaged in substantial duties during their lunch break, and that the meal breaks were not compensable under the FLSA. Additionally, the Sixth Circuit noted that there was no evidence that Defendant had any actual knowledge that its employees were not receiving their meal breaks and not being compensated for that time. *Id*. at *12. The Sixth Circuit, therefore, ruled that without a viable claim, Plaintiffs could not represent others whom they allege to be similarly-situated. *Id*. Accordingly, the Sixth Circuit affirmed the District Court's grant of summary judgment, and the denial of class certification.

***Perrin, et al. v. Papa Johns International, Inc.,* 2015 U.S. Dist. LEXIS 88383 (E.D. Mo. July 8, 2015).** Plaintiffs, a group of delivery drivers, brought an action under the FLSA and the minimum wage laws of five states alleging that Defendant failed to pay them the minimum wages. Defendant required Plaintiffs to maintain safe, legally operable, and insured vehicles for making deliveries, and reimbursed a flat rate for vehicle expenses to compensate Plaintiffs for costs associated with the use of their personal vehicles for deliveries. *Id.* at *5. Defendant's reimbursement rate for vehicle expenses included amount for both "fixed costs" and "operating costs." *Id.* at *7. While the fixed costs included items such as automotive insurance, registration, state taxes, and depreciation, the operating costs included fuel costs and vehicle maintenance. *Id.* Defendant based reimbursement on a formula that approximated drivers' costs rather than on the actual expenses. *Id.* Plaintiffs moved for partial summary judgment, claiming that Defendant's vehicle expenses reimbursement was an unreasonable approximation that reduced their wages below the minimum wage. *Id.* at *9. Plaintiffs also moved for summary judgment regarding Defendant's use of tip credit to calculate Plaintiffs' wages for purposed of determining minimum wage compliance. *Id.* at *23. Defendant paid Plaintiffs $4.25 per hour – more than the minimum cash wage for tipped employees – for their on-the-road work. Defendant asserted that they were entitled to pay a higher cash wage and take the maximum tip credit of $5.12 in order to off-set any deductions for unreimbursed or under-reimbursed expenses. *Id.* at *24. Defendant thus argued that, given the maximum tip credit, Plaintiffs would have no minimum wage claims because the tip credit would exceed any alleged under-reimbursement of Plaintiffs' vehicle expenses. *Id*. Plaintiffs asserted that Defendant could only claim a tip credit equal to the difference between their cash wage of $4.25 and the minimum wage of $7.25 and thus had no off-set against the alleged minimum wage violations, and even otherwise, Defendant failed to notify Plaintiffs in advance of the amount of the cash wage paid to tipped employees and the amount of tip credit taken by Defendant, as required by the U.S. Department of Labor ("DOL") and the FLSA. *Id*. The Court denied Plaintiffs' motion on the issue of Plaintiffs' vehicle expenses and granted it on the issue of the tip credit. The Court found material disputes of fact on the issue of whether Defendant's reimbursement rate was a reasonable approximation of Plaintiffs' vehicle expenses. *Id.* at *34. Although the FLSA and accompanying regulations do not specify what constitutes a reasonable approximation, Plaintiffs argued that, the DOL Handbook provides that, if employers do not track and reimburse actual vehicle expenses, they must reimburse employees at the IRS standard business mileage rate. *Id.* The Court remarked that none of the

pertinent case law suggested the the IRS rate "is the only" reasonable approximation of such expenses or that Defendant's failure to use the IRS in approximating expenses "is *per se* unreasonable." *Id.* at *36. The Court, therefore, denied Plaintiffs' motion on the issue of reasonable approximation of vehicle expenses. The Court, however, granted Plaintiffs' motion for summary judgment on the issue of tip credit, finding that Defendant failed to notify Plaintiffs in advance about the tip credit. *Id.* at *51. Because Defendant could not take the maximum tip credit without notifying Plaintiffs in advance, and because nothing in the DOL guidance documents, regulations, or the FLSA permit Defendant to claim a higher tip credit retroactively, in order to gain the benefit of an off-set, without having notified Plaintiffs of the higher tip credit, the Court precluded Defendant from relying, *post hoc*, on a tip credit greater than the difference between Plaintiffs' cash wage and the applicable minimum wage. *Id.* at *57-58. The Court also denied Defendant's motion for summary judgment regarding the exclusion of fixed costs from the calculation of minimum wage liability on the basis of the substantial overlap between the parties' arguments over fixed costs and the reasonableness of Defendant's overall reimbursement methodology. *Id.* at *59.

***Ridgeway, et al. v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 69982 (N.D. Cal. May 28, 2015).** Plaintiffs, a group of drivers, brought a class action alleging that Defendant failed to pay them minimum wage for completing pre-trip and post-trip inspections, rest breaks, time spent completing paperwork, time spent fueling their tractors, time spent washing their tractors and trailers, time spent at weigh scales, wait time and/or unscheduled time, and lay-over time in violation of the California Labor Code. Plaintiffs moved for partial summary judgment, which the Court granted. First, Defendant argued that its pay plan compensated drivers for inspections, washing and cleaning, wait time, and fueling because they were subsumed into other activities for which they earned activity pay. The Court noted that Defendant's argument was analogous to the argument brought by the employer in *Quezada v. Con-Way Freight, Inc.*, 2012 U.S. Dist. LEXIS 98639 (N.D. Cal. July 11, 2012). *Id.* at *18-19. In *Quezada*, the employer calculated a driver's compensation by multiplying a pre-set mileage rate by the number of miles in a trip, and drivers also received a separate hourly rate for work performed at the company facilities, like loading and unloading. *Id.* at *19. Further, in *Quezada*, employees had not received at their hourly rate for the non-driving activities, and the employer argued the time spent on these activities was built into the per-mile rate. *Id.* In this case, the driver manuals explained that Defendant paid drivers by a mileage rate and for activity pay, unscheduled time, and scheduled time, and specified that activity pay was for duties like arrive, hook, lay-over, live load pay, and chain pay. *Id.* The manuals also specified activities for which drivers were not entitled to pay, and Defendant argued that the time drivers spent on these activities were subsumed into activity pay. The Court noted that *Quezada* held that California law requires that an employer compensate employees directly for all time worked, and therefore did not allow an employer to "build in" time spent on non-driving tasks into a piece-rate compensation system. *Id.* at *19-20. Further, the Court observed that California minimum wage standards apply to each hour worked by an employee, and thus an employer may not refuse to pay for time spent on tasks like completing paperwork. *Id.* Although Defendant contended that its pay method should not be characterized as a piece-rate compensation plan, the Court opined that the differences in pay structure were non-dispositive of whether Defendant must pay Plaintiffs for all hours worked. The Court indicated that a piece-rate formula that does not compensate directly for all time worked does not comply with the California Labor Code, even if, averaged out, it would pay at least minimum wage for all hours worked. *Id.* at *20. Thus, the Court found that activities that were not separately compensated and were explicitly listed and recognized as unpaid activities may not be built in or subsumed into the activity pay component of Defendant's pay policies. *Id.* Plaintiffs also argued that Defendant must pay them for all of the time it subjected them to control, and that Defendant subjected them to control during lay-over periods. The Court observed that an employee who is subject to an employer's control does not have to be working during that time to be compensated. *Id.* at *22-23. Further, the Court noted the reasoning in *Bono Enterprises v. Bradshaw*, 32 Cal. App. 4th 968 (1995), that when an employer requires employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, the employees are subject to the control of an employer and the time spent traveling on the buses is compensable as hours worked. *Id.* at *23-24. In this case, while drivers could leave their trucks to eat a meal, shop, or exercise, the physical location of the lay-over was specified and controlled by Defendant. Drivers had not received pay for lay-overs taken at their residences without prior approval from management, and the 2008 manual stated that the intent of the

policy was for drivers to take the lay-over inside the tractor cab. Thus, because the driver pay manuals subjected drivers to Defendant's control during lay-over periods, the Court ruled that Defendant must pay Plaintiffs for all of the time Defendant subjected them to control. Accordingly, the Court granted Plaintiffs' motion.

***Ruffin, et al. v. MotorCity Casino*, 2015 U.S. App. LEXIS 236 (6th Cir. Jan. 7, 2015).** Plaintiffs, a group of security guards, brought an action alleging that their meal periods constituted working time and were thereby compensable because they spent that time predominantly for Defendant's benefit. Guards were entitled to a paid 30 minute meal period, but they could not leave casino property, have food delivered to the casino, or receive visitors, and had to monitor their radios during meal periods. *Id.* at *3-4. Although the guards rarely dealt with emergencies during meal breaks, monitoring the radio exposed them to constant, work-related chatter on the radio. *Id.* at *4. The District Court held that monitoring the radio was a *de minimis* activity, not a substantial job duty, and thus not compensable. As a result, the District Court granted summary judgment in favor of Defendant. *Id.* at *5. On appeal, the Sixth Circuit affirmed. The Sixth Circuit noted that if an employee can pursue his or her meal time adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA. *Id.* at *7. The Sixth Circuit observed that monitoring a radio is generally a peripheral activity that an employee can perform while spending her meal breaks however he or she likes. *Id.* at *9. Plaintiffs spent their meal periods adequately and comfortably by eating, reading, socializing, and conducting personal business on their phones despite needing to monitor their radios. Plaintiffs also stipulated they were free to smoke, watch television, use casino-provided computers, and play cards during meal periods, and Plaintiffs introduced no evidence that monitoring the radio interfered with, or prevented them from enjoying, these activities. The Sixth Circuit thus found that the absence of any evidence that Plaintiffs performed a substantial job duty during their meal breaks supported the District Court's holding that those breaks were predominantly for the guards' own benefit. *Id*. at *10. Further, the Sixth Circuit considered whether the employer's business regularly interrupts the employee's meal period, and noted that the frequency of such interruptions is important because the question is not whether the employees' meals were interrupted, but whether the degree of interruption caused them to spend their meal periods primarily for the employer's benefit. *Id.* at *10. Plaintiffs stipulated that such interruptions occurred only occasionally, and while one named Plaintiff could not identify a single instance when an emergency interrupted her meal period, another recalled missing only one meal period in more than 10 years of employment. Thus, because Plaintiffs enjoyed their meals without regular interruptions, the Sixth Circuit remarked that the meal periods predominantly benefitted the guards. *Id.* at *12. Finally, the Sixth Circuit considered the employee's inability to leave the employer's property during meal breaks, and noted a regulation of the U.S. Department of Labor, which states that "it is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." *Id.* The Sixth Circuit indicated that the relevant inquiry therefore should be whether the employer requires an employee to take meals on the premises as an indirect or round-about way of extracting unpaid work from the employee. *Id.* at *14. Here, although security guards were required to take their meals on casino property, Plaintiffs did not show that the meal periods predominantly benefitted the casino because Plaintiffs spent their meal periods doing exactly what one might expect an off-duty employee to be doing on a meal break such as eating, socializing, and reading. Thus, because Plaintiffs performed no substantial job duties during meal breaks, emergency calls rarely interrupted the meals, and the guards pursued their meal time adequately and comfortably, the Sixth Circuit ruled that Plaintiffs' meal periods did not predominantly benefit Defendants and were therefore not compensable.

(xv) Arbitration Of Wage & Hour Class Claims

***Capital Pizza Huts, Inc. v. Linkovich, et al.*, 2015 U.S. Dist. LEXIS 158854 (W.D. Mo. Nov. 24, 2015).** In this action, Petitioner, an employer, challenged an Arbitrator's clause construction award and order granting a motion for conditional collective action certification brought by a group of workers. The workers filed a claim with the American Arbitration Association ("AAA") challenging their employer's policy of reimbursing drivers on a flat rate per-delivery basis, without taking into account the average distance for a delivery. *Id*. at *3. The workers moved for conditional certification. The employer objected and argued

that the arbitration agreement did not authorize class arbitration. *Id*. Relying on the Supreme Court's precedents interpreting the construction of the contracts, the Arbitrator found that though the arbitration agreement did not explicitly permit or prohibit collective actions in arbitration, it extended to all claims relating to compensation. *Id*. at *4. Accordingly, the Arbitrator found that a collective arbitration was permissible, and also granted the motion for conditional certification. *Id*. at *5. The employer moved to vacate the Arbitrator's award, which the Court denied. First, Petitioner argued that the Arbitrator exceeded his authority by nullifying the agreement between the parties by interpreting the arbitration agreement in an improper manner. *Id.* at *8. The Court observed that this case was similar to *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), where the employer argued that the arbitral panel exceeded its power under 9 U.S.C. § 10(a)(4) by imposing class arbitration without a sufficient contractual basis. *Id*. at *9. The Supreme Court disagreed, finding that the arbitrator construed the contract, and did find an agreement to permit class arbitration. *Id*. Similarly, in this case, the Court found that the Arbitrator did not exceed his power under § 10(a)(4). Second, Petitioner argued that the Arbitrator manifestly disregarded the law by concluding that the arbitration agreement permitted collective action arbitration. *Id.* Petitioner argued that the Arbitrator's holding was in conflict with the Federal Arbitration Act ("FAA") and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662 (2010), and his interpretation was contrary to previous interpretations of the same contract *In The Matter Of The Arbitration Between Curtis Hanna And Pizza Hut, Inc.* (AAA July 23, 2013). *Id.* The Court rejected this argument, relying on the Supreme Court's distinction of *Stolt-Neiltsen* in *Sutter*, finding that Petitioner misread *Stolt-Nielsen*, where the arbitral decision lacked any contractual basis for ordering class procedures, and not because it lacked a sufficient one. *Id*. at *13. Finally, Petitioner argued that the Arbitrator exceeded his authority and violated the employer's due process rights in certifying a collective action that could only be tried by formula. *Id.* at *16. The Court found that the Arbitrator interpreted the parties' contract and found that differences among potential opt-ins did not prohibit conditional or first stage collective action certification. *Id.* at *17. The Court also determined that the Arbitrator noted that further arguments regarding trial by formula could be addressed at the second stage of collective action certification through a motion to decertify. *Id.* Consequently, the Court held that even assuming that the Arbitrator's conclusions were erroneous, vacatur was not warranted because he acted within his delegated authority. *Id.* Accordingly, the Court denied Petitioner's motion to vacate.

***Cohen, et al. v. UBS Financial Services*, 2015 U.S. App. LEXIS 11184 (2d Cir. June 30, 2015).** Plaintiff, a financial advisor, brought a collective action and class action against Defendants asserting wage & hour claims under the FLSA and California state laws, including the Private Attorney General Act ("PAGA"). Plaintiff was employed by Defendant UBS Financial Services, Inc. ("UBS"), and consented by contract to arbitrate claims concerning compensation, benefits, or other terms or conditions of employment, before the Financial Industry Regulatory Authority ("FINRA"). *Id*. at *2. UBS moved to stay and compel arbitration. Without disputing the arbitration agreement, Plaintiff argued that its enforcement was barred by Rule 13204 of the FINRA Code of Arbitration Procedure for Industry Disputes ("Industry Code"). *Id*. The District Court granted Defendant's motion. On Plaintiff's appeal, and the Second Circuit affirmed. At the outset, the Second Circuit noted that Rule 13204 stated nothing about class or collective action waivers, but barred arbitration of a claim so long as it was embedded in a class or collective action. *Id*. at *8-9. The Second Circuit, however, noted that Rule 13204 does not preserve the right to assert a claim in a class or collective form notwithstanding a contractual waiver. *Id*. at *9. Plaintiff relied entirely on sub-sections (a)(4) and (b)(4) of Rule 13204 for his claims, which bar the enforcement of arbitration agreements under certain circumstances. *Id*. at *11. The Second Circuit observed that neither sub-section had anything to do with the enforceability of the waivers. *Id*. at *11-12. The Second Circuit remarked that although such waivers are often found in arbitration agreements, the two contract terms were conceptually distinct. *Id*. at *12. The Second Circuit explained that a class or collective action waiver is a promise to forgo certain procedural mechanisms in court, and whereas, an agreement to arbitrate is a promise to have a dispute heard in some forum other than a court. *Id*. The Second Circuit concluded that Rule 13204 restricts the latter, and not the former, and quoted the FINRA Board of Governors' observation that there was no restriction on firms regarding the content of pre-dispute arbitration agreements with employees. *Id*. Plaintiff also relied on a 2012 FINRA guidance letter, which stated that any language in a member firm's employment agreement that required employees to waive their right to file or participate in a collective

action against a member firm was contrary to the provisions of the Industry Code. *Id.* at *13. The Second Circuit, however, remarked that because the Board of Governors expressed the contrary view, the 2012 guidance letter had no deference anymore. *Id*. Accordingly, the Second Circuit concluded that Rule 13204 did not prohibit the enforcement of pre-dispute waivers of class and collective action procedures.

***Conners, et al. v. Gusano's Chicago Style Pizzeria,* 2015 U.S. App. LEXIS 3632 (8th Cir. Mar. 9, 2015).** Plaintiffs, a group of former restaurant servers, brought a collective action alleging that Defendant maintained an illegal tip pool in violation of the FLSA. A month later, Defendant required all its current employees to execute a new arbitration agreement that required individual arbitration of all employment disputes. *Id.* at *3. The arbitration agreement contained an explanation of its scope, the required procedures for invoking arbitration, the effect the agreement would have on the employee's ability to pursue relief in court, the right of every employee to opt-out of the agreement free of retaliation, and how to opt-out effectively. *Id.* at *3-4. Along with the new agreement, Defendant also issued a two-page memorandum describing the agreement's terms and expressly explaining to employees that their failure to opt-out of the new policy would prevent them from joining this action. *Id.* at *4. Soon thereafter, Plaintiffs, who were not subject to the new agreement, filed an emergency motion to prohibit improper communications with putative class members and sought to preclude Defendant from enforcing the agreement against the collective action employees. *Id.* at *4-5. The District Court granted the motion and enjoined Defendant from enforcing the arbitration agreement against any employees who choose to join this action. *Id.* at *6. Upon Defendant's appeal, the Eighth Circuit vacated the District Court's order, finding that Plaintiffs lacked standing to challenge the arbitration agreement. Although Plaintiffs argued that they had standing to challenge the agreement because they suffered "a concrete and particularized injury" in the form of an increased share of litigation expenses, the Eighth Circuit held that, even assuming this to be true, Plaintiffs could not show an "actual or imminent" threat because, at the time of the challenge to the agreement, no current employees had opted-in to the action, and there was no indication that the arbitration agreement had chilled the participation of any current employees. *Id.* at *10-13. The Eighth Circuit therefore concluded that Plaintiffs lacked standing to challenge the current employees' arbitration agreement. *Id.* at *14. Accordingly, the Eighth Circuit vacated the District Court's injunction order and remanded the case for further proceedings.

***Coronado, et al. v. D.N.W. Houston, Inc.,* 2015 U.S. Dist. LEXIS 134299 (S.D. Tex. Sept. 30, 2015).** Plaintiffs, a group of adult exotic dancers, brought a collective action against Defendants, a group of dance clubs and their owners and managers, alleging that Defendants misclassified them as independent contractors and failed to pay required wages for the hours they worked pursuant to the FLSA. *Id.* at *6. Defendants moved to dismiss the FLSA claims and compel arbitration pursuant to an arbitration agreement signed by 34 Plaintiffs. *Id.* at *12. The Court denied Defendants' motion as to the 33 Plaintiffs who signed the agreement after the filing of this action, and granted it as to one Plaintiff who signed a different and new enforceable arbitration agreement. Plaintiff argued that the arbitration clauses in both the agreements were substantively unconscionable because they had a 45-day delay period to mediate before arbitration could be initiated, thereby limiting the FLSA's statute of limitations, and they allowed Defendants to recover fees from dancers no matter which party prevailed in arbitration. *Id.* at *25. While the Court found that the mediation requirements and procedure were not unconscionable and was not a basis to avoid arbitration, it found that, because the agreements contained provisions allowing Defendants to recoup attorneys' fees from Plaintiffs even if they prevailed on their FLSA claims, the arbitration clauses would be unenforceable unless those provisions were severable. *Id.* at *31. The Court also determined that, unlike the new agreement signed by a single Plaintiff, the other agreements signed by 33 Plaintiffs did not include a severability clause, and attempting to severe the unconscionable provision would require rewriting the contract based on guessing at the parties' intent. *Id.* at *32-33. The Court therefore held that the arbitration agreements signed by 33 Plaintiffs were unenforceable. The new agreement signed by one Plaintiff included a provision that the dancer would have to pay back all tips she earned if she were found to be an employee, or else those tips would be used to off-set her wages. *Id.* at *35. Although the Court reasoned that provision unconscionable because it waived the right under the FLSA to be paid a minimum wage, it held that the arbitration clause was enforceable because the tip-return provision was severable, and the severability clause showed the parties' intent to keep the new agreement intact when a clause

contained one part that was not integral and unenforceable. *Id.* at *35-36. Accordingly, the Court required one Plaintiff who signed the new agreement to arbitrate her claim, and denied Defendants' motion to compel arbitration as to the remaining 33 Plaintiffs.

***Espinoza, et al. v. Galardi South Enterprises, Inc.,* 2015 U.S. Dist. LEXIS 173408 (S.D. Fla. Dec. 31, 2015).** Plaintiffs, a group of adult entertainers, brought an action against Defendants, the strip clubs where they worked, alleging minimum wage and overtime violations under the FLSA and Florida law. One Defendant moved to compel arbitration against Plaintiffs. The Court denied Defendant's motions to compel arbitration. *Id.* at *3. Plaintiffs did not dispute that they and the opt-in Plaintiffs signed the arbitration agreements at issue; rather, they argued that the Court should not enforce the agreements in accordance with its responsibility relative to FLSA collective actions. *Id.* The Court had previously granted conditional certification of a FLSA collective action against Defendants, to which more than 20 claimants opted-in. *Id.* at *3-4. The Court noted that under its broad and considerable discretion, it had the power to refuse to enforce arbitration agreements foisted on potential opt-in Plaintiffs where the agreements were confusing, misleading, coercive, and clearly designed and implemented to unfairly thwart their ability to opt-in to the litigation. *Id.* at *9. While the Court noted that the agreements were not unconscionable, it found that Defendant's post-April 8, 2014 presentation of arbitration agreements to its entertainers was motivated, at least in part, by the filing of Plaintiffs' action, and was intended, at least in part, to dissuade the entertainers from participating in the action. *Id.* at *18. Thus, the Court held it would exercise its managerial powers to prevent confusion and unfairness, and ensure that the potential opt-in Plaintiffs have a fair opportunity to opt-in to the FLSA collective action. *Id.* at *22. Accordingly, the Court denied Defendant's motion to compel arbitration. *Id.*

Editor's Note: The ruling in *Espinoza* is a rare construction of the FLSA, as the Court declared that a workplace arbitration agreement could not be valid insofar as a collective action was concerned.

***Ford, et al. v. Yasuda,* Case No. 13-CV-1961 (C.D. Cal. April 29, 2015).** Plaintiffs, a group of students, brought a putative class action alleging that Defendants, a cosmetology institute, required them to provide services to paying clients but failed to pay them wages for their work in violation of the FLSA, the California Labor Code, and the California Unfair Competition Law. *Id.* at 2-3. Upon enrollment in Defendants' cosmetology career training program, each Plaintiff agreed to submit any disputes with Defendants to binding arbitration. More than 17 months after Plaintiffs filed the complaint, Defendants moved to compel individual arbitration. The Court denied the motion, finding that Defendants waived their right to enforce the arbitration agreement. *Id.* at 5. First, the Court found that Defendants had knowledge of their contractual right to compel arbitration because Defendants had drafted and required students to sign the agreement as a standard procedure. *Id.* at 6. Second, the Court opined that Defendants acted inconsistently with their right to arbitration because they actively litigated the case for more than 17 months before they moved to compel. The Court noted that, tellingly, Defendants requested the dismissal of Plaintiffs' second amended complaint, without raising the issue of arbitration, and instead chose to test their theories that Plaintiffs were not employees. *Id*. at 8. Finally, the Court concluded that granting the motion to compel arbitration would prejudice Plaintiffs. Although Defendants had not propounded any discovery or caused any loss of evidence, the Court found that their delay was undue because they faced no barrier to moving to compel at the outset of this action. *Id.* at 10-11. Compelling arbitration would require Plaintiffs to re-litigate the matters already decided by the Court on Defendants' motion to dismiss, and thus, would result in prejudice. *Id.* at 11. The Court, therefore, held that Defendants waived their right to arbitration, and accordingly, denied the motion to compel.

***Galen, et al. v. Redfin Corp.,* 2015 U.S. Dist. LEXIS 161111 (N.D. Cal. Dec. 1, 2015).** Plaintiffs brought two separate actions in state court alleging that Defendant misclassified them as independent contractors. Pursuant to the binding arbitration clause in Plaintiffs' independent contractor agreements, Defendant moved to compel arbitration of Plaintiff Galen's claim. The California trial court denied the motion, and the California Court of Appeal reversed on appeal. Thereafter, the California Supreme Court granted Galen's petition for review. *Id*. at *3. Defendant then removed the action to the District Court, and moved to compel arbitration in both cases. Galen moved to enforce the law of the case, and alternatively, stay the

case pending the decision in *Sanchez v. Valencia Holding Co.*, *LLC*, 61 Cal. 4th 899 (2015), which addressed the standard of unconscionability in California contract law. *Id.* at *5. Subsequently, the California Supreme Court decided *Sanchez*, and consequently dismissed Galen's petition for review in its one-sentence order. *Id.* at *6. Thereafter, the California Supreme Court vacated its prior dismissal order *nunc pro tunc*. Galen argued that the trial court's order denying Defendant's motion to compel arbitration was the law of the case, and removal of the case did not change the procedural posture of the case. Defendant argued that the order was not final. The Court noted that generally it must enforce the law of the case unless other changed circumstances exist or a manifest injustice would otherwise result. *Id.* at *10. The Court opined that appellate reversal of the order constituted changed circumstances, because the appellate ruling clearly undermined the rationale of the original order. The Court found that it would constitute manifest injustice to deny Defendant its right to remove an otherwise removable case in order to ensure that its motion is heard, and unjust to Defendant to treat the order as final even though it had been reversed and was still under review in the state courts. *Id.* at *13. Given the strange procedural posture of this case, the Court declined to apply the law of the case doctrine. As to Defendant's motion to compel arbitration, the Court observed that the incorporation of professional arbitration rules that delegate the questions of arbitrability can constitute clear and unmistakable evidence that the parties intended to delegate that question. *Id.* at *16. Here, although it was left ambiguous whether the AAA Commercial Rules or AAA Labor and Employment Rules would apply, the Court noted that both sets of rules included identical delegation provisions. *Id.* at *17. Further, although Defendant had greater bargaining strength than Plaintiffs, and presented the agreements on a take-it-or-leave-it basis, the Court remarked that the level of procedural unconscionability was not so high as to defeat the delegation clause on its own. *Id.* at *23. Regarding substantive unconscionability, the Court found that the fee-shifting provision that required the loser to pay costs could be severed without altering the arbitration provision because California law only permits fee-shifting in favor of prevailing Plaintiffs or employees. *Id.* at *25. The Court also opined that the agreement's selection of Seattle as the forum for arbitration could be severed as it would make significantly harder for the California-based Plaintiffs to litigate their claims. Finally, the arbitration provision applied to any disputes regarding the interpretation or enforcement of the agreement as long as the disputes arose out of or related to the agreement, and the agreement defined the relationship between the parties, and it was the interpretation of that relationship that would be at issue in the dispute. Thus, the Court stated that the question of arbitrability should be delegated to the arbitrator. Accordingly, the Court granted Defendant's motions to compel arbitration in both cases.

***Gunn, et al. v. NPC International, Inc.,* 2015 U.S. App. LEXIS 15321 (6th Cir. Aug. 28, 2015).** Plaintiffs, a group of current or former employees, filed five separate actions alleging that Defendants denied them minimum wages and overtime compensation under the FLSA. In each of those cases Defendants filed several dispositive and non-dispositive motions and participated in scheduling conferences. After receiving unfavorable rulings on the dispositive motions, and almost over a year after Plaintiffs filed the complaints, Defendants asserted that Plaintiffs' claims were subjected to mandatory arbitration under Plaintiffs' employment contracts. Defendants moved to dismiss the action for lack of jurisdiction, or alternatively to compel arbitration. The District Court concluded that Plaintiffs would suffer unfair prejudice due to the expense of time and money, and denied Defendants' motion. *Id*. at *4. On appeal, the Sixth Circuit affirmed. At the outset, the Sixth Circuit noted that the District Court relied on *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713 (6th Cir. 2012); and *Hurley v. Deutsche Bank Trust Co.*, 610 F.3d 334 (6th Cir. 2010), where the Sixth Circuit affirmed the denials of motions to compel arbitration. *Id*. at *5. The Sixth Circuit also observed that in *Shy v. Navistar International Corp.*, 781 F.3d 820 (6th Cir. 2015), which was decided after the District Court's ruling, the Sixth Circuit had vacated the denial of a motion to compel. The Sixth Circuit reasoned that in *Hurley,* it had denied a motion to compel after Defendant had participated in litigation for two years before asserting its right to arbitration. *Id*. *Shy* vacated the denial of motion to compel where the arbitration was first raised 10 months after a third-party moved to intervene, but promptly after intervention was granted and the intervener's complaint was filed. *Id*. at *6. Distinguishing *Johnson Associates*, the Sixth Circuit in *Shy* held that Defendant's pre-litigation conduct was inconsistent with reliance on arbitration, but Defendant did not actively pursue litigation during the pendency of the motion to intervene, and consequently, the intervener did not incur unnecessary expenses amounting to actual prejudice. *Id*. Here, the Sixth Circuit opined that Defendants moved to dismiss or

compel arbitration only after obtaining unfavorable rulings on it initial dispositive motions. *Id*. at *7-8. The Sixth Circuit ruled that this factor weighed in favor of finding waiver. Defendants argued that its delay caused Plaintiffs minimal prejudice because no discovery was conducted unlike in *Johnson Associates*. The Sixth Circuit, however, observed that here Defendants deliberately undertook a course of conduct inconsistent with reliance on arbitration for almost twice as long as Defendant in *Johnson Associates*. *Id*. at *11. Accordingly, the Sixth Circuit found that the District Court's denial of the motion to compel was consistent with its precedents.

***Guess?, Inc. v. Russell, et al.,* 2015 U.S. Dist. LEXIS 154621 (C.D. Cal. Nov. 12, 2015).** After a group of employees filed a class arbitration against their employer before the American Arbitration Association ("AAA") asserting claims for unpaid overtime under the FLSA and state wage & hour laws, the employer brought a declaratory judgment action alleging that the employees were precluded from arbitrating claims on a class-wide basis, and rather must proceed on an individual basis. *Id.* at *1. The employees moved to dismiss the complaint pursuant to Rule 12(b)(6), and the Court granted the motion. *Id.* at *2. The employees argued that the availability of class arbitration was a procedural question, which an arbitrator, not the Court, should decide. *Id.* at *6. At the outset, the Court noted that the question of arbitrability was an issue for judicial determination unless the parties clearly and unmistakably provided otherwise. *Id.* The parties' agreement stated that all employment-related disputes would be resolved pursuant to the model rules for arbitration of employment disputes of the AAA. *Id.* at *9. The Court found that by agreeing to resolve their disputes in accordance with the AAA's model rules for arbitration of employment disputes, the parties also agreed to the AAA's supplemental rules for class arbitration, which provided that the arbitrator shall determine whether the applicable arbitration clause permitted the arbitration to proceed on behalf of or against a class. *Id.* at *12. Consequently, the Court held that the parties clearly and unmistakably agreed that an arbitrator, and not the Court, would determine the availability of class arbitration under the parties' arbitration agreement. *Id.* Defendant, however, argued that in light of the U.S. Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662 (2010), the parties could not be deemed to have consented to arbitrate the availability of class arbitration without a more express provision in their agreement to that effect. *Id.* at *13. The Court found that while *Stolt-Nielsen* might be relevant to determining whether a particular agreement authorized class arbitration, it had no bearing on who should make that determination. *Id.* Moreover, the Court remarked that the weight of authority since *Stolt-Nielson* – holding that incorporation of the AAA's model rules constituted consent to have an arbitrator decide the availability of class arbitration – belied Plaintiff's argument. *Id.* Accordingly, the Court granted the motion to dismiss.

***Herzfeld, et al. v. 1416 Chancellor, Inc.,* 2015 U.S. Dist. LEXIS 95256 (E.D. Pa. July 22, 2015).** Plaintiff, an exotic dancer, brought a collective action under the FLSA seeking unpaid minimum wages for hours worked for which Defendant failed to pay the mandatory minimum wage, overtime wages, and liquidated wages. *Id.* at *6-7. Plaintiff also sought to bring a class action on behalf of all dancers performing at Defendant's club under the Pennsylvania Minimum Wage Act, the Pennsylvania Wage Payment and Collection Law, and Pennsylvania common law. *Id.* at *7. Defendant moved to compel arbitration pursuant to a "stage rental license agreement" executed by Plaintiff that contained a broad arbitration clause requiring all disputes related to the agreement to be settled by arbitration. *Id.* at *5. The Court denied Defendant's motion, finding that the arbitration clause was substantively unconscionable because it eliminated Plaintiff's ability to purse a statutory collective action and class action in arbitration. *Id.* at *20-21. Although the arbitration clause did not mention class proceedings or contain a class action waiver, the arbitration clause provided that each party would bear its own attorneys' fees. The Court found that the fee provision in the agreement was unconscionable because the arbitration clause, in effect, prohibited Plaintiff from recovering attorneys' fees from Defendant, in contravention of the FLSA, which provides for the recovery of attorneys' fees. *Id.* at *26. The Court also determined that there was no evidence of a "clear and unequivocal surrender" of Plaintiff's statutory right to a collective action. *Id.* at *27. The Court explained that, because collective and class action arbitration was unavailable to Plaintiff as a matter of law, the arbitration provision imposing an involuntary, unknowing loss of the FLSA collection action and class action rights was substantively unconscionable. *Id.* at *29. Thus, according to the Court, the principal ground for unconscionability arose from the loss of Plaintiff's statutory right to a collective action

and loss of a class action by operation of law. *Id.* at *34. The Court further noted that, because Plaintiff's collective FLSA claims also formed the basis of her Pennsylvania claim, severing Plaintiff's state law class action claims from her FLSA overtime claims and ordering piece-meal arbitration would only duplicate, rather than streamline, the parties' effort to resolve the claims. *Id.* at *32. The Court therefore ruled that the arbitration clause was substantively unconscionable, and accordingly, denied Defendant's motion to compel arbitration.

***Holick, et al. v. Cellular Sales Of New York, LLC,* 2015 U.S. App. LEXIS 16815 (2d Cir. Sept. 22, 2015).** Plaintiffs brought a putative class action alleging that Defendants improperly classified them as independent contractors and unlawfully denied them various forms of compensation and benefits under state and federal labor laws. *Id.* at *2. Defendants moved to compel arbitration based on an arbitration clause contained in Plaintiffs' employment agreements. When Plaintiffs began their relationship with Defendants, Defendants required them to create a separate corporate entity and sign an independent sales agreement to work as sales representatives. *Id.* at *3. Defendants later hired Plaintiffs as full-time employees, and the parties executed new compensation agreements, which contained an arbitration provision. *Id.* at *5. Plaintiffs in this action confined their claims to events occurring prior to the execution of the compensation agreements. *Id.* Plaintiffs alleged that before the execution of the compensation agreements, Defendants misclassified them as independent contractors when they were actually employees because Defendants controlled their work performance. *Id.* at *6. Defendants invoked the arbitration provision of the compensation agreements to compel arbitration. The District Court denied arbitration, finding that another contract that was in effect during the time when Plaintiffs' claims arose supported a finding of non-arbitrability. *Id.* at *2. Defendants appealed and argued that the denial of their motion to compel arbitration conflicted with long-standing federal precedent under which all doubts as to the intent of the parties and the scope of an arbitration clause must be resolved in favor of arbitration. *Id.* at *6. Defendants asserted that the compensation agreement did not contain an "express temporal limitation," and therefore, could apply to claims prior to the memorialization of the compensation agreement. *Id.* The Second Circuit disagreed and affirmed the District Court's decision. While the Second Circuit acknowledged that it had held that broad arbitration provisions that contain no express temporal limitation could apply to claims that arose prior to the execution of an arbitration agreement, it was not persuaded by Defendants' argument that it must interpret the arbitration agreement to have a temporal scope simply because it had done so in other cases. *Id.* at *16-17. According to the Second Circuit, the correct approach was to assess whether the parties intended for the arbitration clause to cover the present dispute. *Id.* The Second Circuit examined the parties' conduct prior to the execution of the compensation agreements, and found it evident that the scope of the arbitration clause was temporally limited. The Second Circuit reached this conclusion based, in large part, on the fact that when Plaintiffs signed compensation agreements, the parties' contractual positions changed in a way that impacted arbitrability. *Id.* at *18. The Second Circuit noted that in sales agreements, Defendants agreed that the Plaintiffs' individual companies were not their employees, but later agreed to employ Plaintiffs. This evolving business relationship, as the Second Circuit noted, was directly relevant to whether the parties intended to have an employment relationship prior to executing the compensation agreement. *Id.* According to the Second Circuit, it would be inconsistent with the parties' conduct to construe the compensation agreements, which referenced "employment," to apply to a period when the parties themselves did not contemplate such a relationship, and Defendants' change in course was just the type of positive assurance required to show that the parties did not intend for the arbitration clause to cover the current dispute. *Id.* at *18-19. The Second Circuit rejected Defendants' reliance on Plaintiffs' allegations that they were in fact Defendants' employees before they executed the compensation agreement, reasoning that Plaintiffs' factual allegation did not touch matters covered by the arbitration clause because they did not evince the parties' intent to enter into an employment relationship, and the more relevant factual allegation for assessing the arbitration agreement's scope was how Defendants labelled them as non-employees. *Id.* at *19-20. Accordingly, finding that the parties did not intend for the arbitration agreement to be retroactive, the Second Circuit affirmed the District Court's denial of Defendants' motion to compel arbitration.

***Jimenez, et al. v. Menzies Aviation, Inc.,* 2015 U.S. Dist. LEXIS 108223 (N.D. Cal. Aug. 17, 2015).** Plaintiffs brought an action alleging that Defendants failed to pay minimum and overtime wages to its non-

exempt employees at the San Francisco International Airport ("SFO"). While the complaint was pending, Defendants adopted a new ADR Policy, which required employees to arbitrate all employment claims. The policy did not contain an express opt-out provision. After Plaintiff Jimenez filed a first amended complaint, she discovered information allegedly entitling a sub-group of putative class members to additional overtime-related damages. Jimenez was not a part of this group. Therefore she obtained leave to file a second amended complaint, adding named Plaintiff Mijos as the new sub-group's class representative. *Id.* at *5. Plaintiffs then filed the second amended complaint. Defendants moved to compel arbitration of the claims for which Plaintiff Mijos was the class representative. The Court denied the motion. Given that the ADR Policy applied to putative class members' existing class claims and that Defendants sought to compel arbitration of a sub-section of those claims, the Court concluded that the ADR Policy risked interference with the rights of the putative class members. Moreover, Defendants did not inform Plaintiff Mijos or other putative class members about this action, or advise them of the ADR Policy's impact on their rights in this case. Further, Defendants did not provide any opportunity to opt-out of its new policy, making assent to the ADR Policy a condition of employment. The Court opined that the implementation of the arbitration policy was a deliberate effort to undermine the pending class litigation. *Id*. at *16. Further, the Court held that the issuance of the ADR Policy posed a risk to the rights of Plaintiff Mijos and other putative class members, and accordingly, declined to compel arbitration of Plaintiff Mijos' claims. *Id*. at *16-17.

***Levison, et al. v. Mastect, Inc.,* 2015 U.S. Dist. LEXIS 112462 (M.D. Fla. Aug. 25, 2015).** Plaintiffs, a group of installation and service technicians, brought an action seeking to recover overtime wages. Plaintiffs contended that Defendant DirecTV, Inc., wrongfully established a fissured employment scheme by classifying Plaintiffs as employees of Defendants MasTec, Inc., and MasTec Services Co., Inc., and that the MasTec Defendants wrongfully caused the employees to sign a dispute resolution policy ("DRP"), which waived the rights to pursue class or collective actions and bound them to arbitration. *Id*. at *2. Defendants moved to compel arbitration, which the Court granted. Defendants sought to compel arbitration primarily relying on a case from the U.S. District Court for the Middle District of Florida against MasTec, Inc. entitle *Sanchez Cordero v. MasTec, Inc.*, Case No. 6:15-CV-572 (M.D. Fla. July 28, 2015), that compelled arbitration since the DRP included collective actions and required arbitration of any dispute arising out of or related to the employee's employment. *Id*. at *4. In *Sanchez Corero*, the Court had relied on *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573 (M.D. Fla. May 18, 2012), where the Court had compelled arbitration based on Plaintiffs' acknowledgment of an arbitration policy contained in an employee handbook. *Id*. Plaintiffs relied on *D.R. Horton, Inc.*, 357 NLRB No. 184 (NLRB Jan. 3, 2012), where the National Labor Relations Board had rejected waivers of collective or class actions in favor of arbitration. *Id*. at *5. The Court observed that that the Eleventh Circuit had not adopted *D.R. Horton*. Thus, the Court remarked that the arbitration agreements with collective action waivers were enforceable. *Id*. Accordingly, the Court granted Defendants' motion to compel arbitration.

***Lopez, et al. v. Kmart Corp.*, 2015 U.S. Dist. LEXIS 58328 (N.D. Cal. May 4, 2015).** Plaintiff, an employee, brought a class action in the state court alleging that Defendant failed to provide accurate wage statements as required by § 226(a) of the California Labor Code, and engaged in practices that constituted unfair competition under § 17200 of the California Business & Professions Code. In April 2012, Defendant implemented an arbitration policy/agreement ("Agreement") under which participating employees and Defendant each waived the right to pursue employment-related claims in court, and instead agreed to submit such disputes to binding arbitration. *Id*. at *2. Plaintiff and other employees participated in on-line training and acknowledged their receipt of various employment policies using Defendant's My Personal Information ("MPI") portal and a training system known as "Learn Your Way." *Id*. at *3. Defendant hired Plaintiff as a cashier when he was 16 years old and a sophomore in high school. Plaintiff acknowledged receipt of the Agreement, but never requested his parents' consent. Plaintiff claimed that he was never explained what an arbitration agreement was or that he could review the terms with an attorney. *Id*. at *6. Defendant removed the action and moved to compel arbitration, which the Court denied. At the outset, the Court noted that the arbitration agreement is valid only if the elements of viable contract are present and satisfied, including: (i) the ability to contract; (ii) consent; (iii) lawful object; and (iv) consideration. *Id*. at *10. The questions before the Court therefore, were whether Plaintiff was capable of contracting and consenting to the Agreement, and if he was, whether he was entitled to disaffirm the contract now, and whether the

contract was unconscionable. *Id*. at *11. The Court observed that California law provides that a minor has the capacity to contract, with the exception of those contracts specifically prohibited. *Id*. The Court also noted that § 6710 of the California Family Code sets forth a minor's right of disaffirmance, stating that a contract of a minor maybe disaffirmed before majority or within a reasonable time afterwards. *Id*. In addition, the Court observed that California law specifically excludes certain contracts from disaffirmance; however, contracts such as employment or arbitration agreements were not excluded. *Id*. at *14. Defendant contended that the Agreement here was not subjected to disaffirmance per § 6711 because § 1391 of the Labor Code constitutes the express authority to enter into this type of agreement. The Court noted that § 1391, however, limited the hours that employers may employ minors, and also set forth penalties for violations of those hour rules. *Id*. at *14-15. The Court determined that Defendant interpreted § 6711 too broadly, as § 1391 does not expressly state that a minor cannot disaffirm an employment contract. *Id*. at *15. The Court concluded that although Plaintiff entered into a valid arbitration agreement with Defendant, he exercised his statutory right of disaffirmance, thereby rescinding the contract, which rendered it a nullity. *Id*. at *20. Accordingly, the Court ruled that the arbitration agreement was unenforceable, and denied Defendant's motion to compel arbitration.

***Lorenzo, et al. v. Prime Communications L.P.*, 2015 U.S. App. LEXIS 20400 (4th Cir. Nov. 24, 2015).** Plaintiff, a former employee, brought an action alleging that Defendant unlawfully deprived her of commissions and overtime pay in violation of the FLSA and the North Carolina Wage & Hour Act. Defendant moved to compel arbitration and relied on an arbitration provision contained in its employee handbook, which it had provided to Plaintiff when she began her employment. The District Court denied the motion, and on appeal the Fourth Circuit affirmed. The Fourth Circuit noted that a District Court may order arbitration only when it is satisfied that the parties agreed to arbitrate, and that the question of whether the parties agreed to arbitrate is resolved by application of state contract law. *Id.* at *9. The Fourth Circuit observed that when Plaintiff received the employee handbook, she also signed an acknowledgment form providing that the terms of the employee handbook, including its arbitration provision, were guidelines only and that they did not create any binding commitments. *Id.* at *9-10. The Fourth Circuit opined that the District Court correctly recognized that the acknowledgment form expressly disclaimed any implied agreement to be contractually bound by any terms in the employee handbook, and that any implied assent that might have been created by Plaintiff's receipt and review of the handbook and by her continued employment was nullified by the express agreement of the parties not to be bound by any of the handbook's terms. *Id.* at *10. Accordingly, the Fourth Circuit affirmed the order denying Defendant's motion to compel arbitration.

***Maddy, et al. v. General Electric Co.*, 2015 U.S. App. LEXIS 20979 (3d Cir. Dec. 3, 2015).** Plaintiffs, a group of technicians, brought an action seeing unpaid overtime wages under the Fair Labor Standards Act ("FLSA") and various state laws. Defendant had implemented a mandatory alternative dispute resolution program (the "Solutions Program"). *Id*. at *3. Defendant moved to compel arbitration pursuant to the mandatory arbitration provision in the 2009 Solutions Program. The District Court denied the motion. On Defendant's appeal, the Third Circuit affirmed. In denying Defendant's motion, the District Court found that Plaintiffs did not enter into valid agreements to arbitrate when they signed the Solutions Program acknowledgment forms. *Id*. at *5-6. The Third Circuit noted that, under Texas law, a valid agreement to arbitrate exists if an employee received notice of the employer's arbitration policy, and the employee accepted it, for example, by continuing employment after receiving notice. *Id*. at *6. The Third Circuit found that, although signing an acknowledgement form and continuing employment ordinarily constitutes a valid agreement, the acknowledgement forms here did not show that Plaintiffs received notice of the arbitration provisions contained in the 2009 Solutions Program. *Id*. Accordingly, the Third Circuit affirmed the District Court's order denying Defendant's motion to compel arbitration.

***McCabe, et al. v. Robert Half International, Inc.,* 2015 U.S. Dist. LEXIS 156283 (D.N.J. Nov. 19, 2015).** Plaintiffs, a group of current and former staffing managers, brought a putative collective action alleging that Defendants had misclassified them as exempt employees in violation of the FLSA. *Id.* at *4-5. Defendants moved to compel individual arbitration of Plaintiffs' claims, which the District Court granted. The arbitrator subsequently issued a partial final award, ruling that she was authorized to conduct a class arbitration and

accepted Plaintiffs' argument to arbitrate any dispute or claim as FLSA collective action. *Id.* The District Court refused to vacate the arbitrator's award. Defendants appealed to the Third Circuit, arguing that it should decide whether the agreements provided for class arbitration, rather than the arbitrator. *Id.* The Third Circuit vacated the arbitrator's award, and remanded the case to determine if the employment agreements called for class arbitration. *Id.* at *6. Upon remand, Defendants moved for an order confirming that the arbitration agreements did not call for class-wide arbitration, and to dismiss the action, which the District Court granted. *Id.* First, Defendants argued that the Federal Arbitration Act ("FAA") did not permit an arbitrator to conduct class arbitration unless the parties agreed to participate. *Id.* at *7. The Court noted that the U.S. Supreme Court had clearly determined that the parties' consent was a basic element of interpreting arbitration agreements under the FAA. *Id.* The Court found that a party may not be compelled under the FAA to submit to class arbitration unless there was a contractual basis for concluding that the party agreed to do so. *Id.* at *8. Further, the Court found that the mere agreement to arbitrate was insufficient to infer a party's consent to class arbitration because of the fundamental changes brought about by the shift from bilateral arbitration to class action arbitration. *Id.* Consequently, the Court noted that the arbitrator may not conduct class arbitration unless the parties agreed to participate and because the agreements here did not explicitly authorize class-wide arbitration, the matter hinged on whether the parties implicitly agreed to class-wide arbitration. *Id.* at *9. Second, Defendants argued that the absence of any reference to class arbitration weighed against inferring acceptance. The Court found that several case law precedents have weighed against finding implicit consent if there was no explicit mention of class-wide arbitration. *Id.* at *10-11. Plaintiffs asserted that many case law precedents had found intent to permit class-wide arbitration despite the absence of any express language to that effect. *Id.* The Court reasoned that almost all cases cited by Plaintiffs were inapplicable to the specific legal question at issue concerning instead whether to vacate an arbitration award. *Id.* Consequently, the Court concluded that complete silence on the issue of class-wide arbitration weighed against inferring consent and that the agreements in the instant case merely provided that certain disputes or claims "shall be submitted to arbitration pursuant to the commercial arbitration rules of the American Arbitration Association." *Id.* at *14-15. Third, Defendants argued that Plaintiffs failed to show an implicit agreement to participate in class arbitration. The Court determined that the language of the agreements did not show any intent to allow class arbitration because the overtime claims of other employees did not arise out of or relate to Plaintiffs' employment, termination, or agreement. *Id.* Further, the Court opined that the arbitration agreements limited claims to those arising out of the relationship between the contracting parties and generally did not authorize class arbitration of absent parties' claims. *Id.* Plaintiffs argued that the agreements could have explicitly excluded the possibility of class-wide arbitration. *Id.* at *16. The Court, however, found that mere absence of explicit exemption did not evince an intent to permit class-wide arbitration. *Id.* Accordingly, the Court dismissed the action on the basis that class-wide arbitration was not allowed.

***Robinson, et al. v. Alston,* 2015 U.S. App. LEXIS 257 (11th Cir. Jan. 8, 2015).** Plaintiffs, a group of servers at a restaurant, brought a collective action alleging that Defendant failed to pay them minimum wage and overtime compensation in violation of the FLSA. The District Court granted the parties' consent motion to stay the proceedings pending arbitration. *Id*. at *2. Over the next several months, the parties exchanged information but failed to initiate arbitration. Plaintiffs moved to re-open the case, and Defendant failed to respond. *Id*. The District Court granted Plaintiffs' motion to re-open the case and, several months later, Defendant moved to compel arbitration. *Id.* The District Court denied the motion, holding that Defendant forfeited his right to arbitration based on this conduct. *Id*. at *1. On appeal, the Eleventh Circuit affirmed on the alternative ground that Defendant waived the right to arbitration. Plaintiffs argued that Defendant delayed arbitration to transfer assets from the bankrupt Defendant Ultimate Sports Bar, LLC to Blue Star Kitchen, Inc. *Id.* at *3. At the outset, the Eleventh Circuit noted that it had established a two-part test to determine whether a party waived its right to arbitrate, including: (i) a District Court decides if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right; and (ii) a District Court looks to see whether, by doing so, that party has in some way prejudiced the other party. *Id*. at *4. The Eleventh Circuit found that Defendant acted inconsistently with a desire to arbitrate when it ignored correspondence from Plaintiffs seeking to initiate the arbitration proceedings and, instead, chose to retain a bankruptcy attorney and take Ultimate Sports Bar, LLC into bankruptcy. Further, the Eleventh Circuit opined that, by failing to proceed to arbitration, Defendant raised Plaintiffs' litigation costs. Plaintiffs

participated in both the District Court and bankruptcy proceedings, and, by ignoring their requests to initiate the arbitration hearing, Defendant forced Plaintiffs to file additional motions with the District Court. *Id*. at *5. The Eleventh Circuit concluded that the totality of Defendant's conduct constituted a waiver of Defendant's arbitration right and, accordingly, affirmed the ruling of the District Court. *Id*. at *6-7.

***Roe, et al. v. SFBSC Management, LLC,* 2015 U.S. Dist. LEXIS 26057 (N.D. Cal. Mar. 2, 2015).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendant violated various provisions of the California Labor Code and the FLSA. Defendant moved to compel arbitration pursuant to "Performer Contracts" that declared Plaintiffs to be independent contractors, and required arbitration to resolve all disputes between the parties. The Court denied Defendant's motion, finding that several terms in the arbitration agreement were unconscionable. *Id*. at *14. The Court found the agreements procedural unconscionability because Plaintiffs showed that they signed their contracts under conditions in which ordinary people would detect "unequal bargaining power" and would feel that they had no "real" chance to negotiate, no "meaningful choice" but to sign. *Id.* at *22. Particularly, Plaintiffs asserted that the management at Defendant's clubs told them that all performers had to sign the contracts in order to work, and that management presented them with the contracts when they were "mostly naked." *Id.* at *16. Plaintiffs also claimed that management sometimes presented the contracts for signing when they were intoxicated, and that the "accept or reject" choice was effectively a sham because if they reject, management either would purposely lose the agreement and present a new one to fill out correctly, or find a reason to fire the performer. *Id.* at *17. Under these alleged conditions, the Court concluded that Plaintiffs presented at least "mild" procedural unconscionability. *Id.* at *22. The Court also found that the arbitration agreement contained multiple provisions that were substantively unconscionable. *Id*. at *31. The Court noted that the ban on Plaintiffs' consolidating claims lacked even a "modicum of bilaterality." *Id.* at *25. Further, the agreement provided that the costs of arbitration should be borne equally by performer and Defendant unless the arbitrator concluded otherwise. The Court found that "[t]he Ninth Circuit has repeatedly found such provisions to be substantively unconscionable and thus unenforceable under California law," and it saw no significant difference between the cost-allocation terms at issue here and those rejected by previous Ninth Circuit precedent. *Id.* at *29. Given the multiple unlawful provisions, the Court declined to sever the problematic parts of the contracts, and held that the entire arbitration agreement was unenforceable. *Id.* at *30-31. Accordingly, the Court denied Defendant's motion to compel arbitration.

***Sakkab, et al. v. Luxottica Retail North,* 2015 U.S. App. LEXIS 17071 (9th Cir. Sept. 28, 2015).** Plaintiff, a retail employee, brought a putative class action alleging that Defendant, an eyewear retailer, misclassified Plaintiff and other employees as exempt supervisors in violation of the FLSA and the California Labor Code. *Id.* at *4. Plaintiff later amended his complaint to add a representative claim under the Private Attorney General Act ("PAGA"). Under the PAGA, employees may sue their employer for certain workplace violations on behalf of themselves, as well as other current or former employees, in representative suits similar to class actions. Defendant sought to compel arbitration of all of Plaintiff's claims pursuant to dispute resolution agreement contained in its retail associate guide. *Id.* at *6. The arbitration agreement expressly precluded Plaintiff from pursuing class, collective, or representative claims, whether in court or in arbitration. *Id.* Plaintiff had signed an acknowledgment indicating that he understood and agreed to the terms of the dispute resolution. The District Court granted Defendant's motion to compel arbitration of all claims and dismissed Plaintiff's complaint. Plaintiff appealed and argued that his representative claim under the PAGA could not be waived. The Ninth Circuit agreed and reversed the District Court's decision. The Ninth Circuit found that the PAGA claim could not be dismissed based on the California Supreme Court decision in *Iskanian v. CLAS Transportation Los Angeles, Inc.*, 59 Cal. 4th 348 (2014), that barred the enforcement of PAGA waivers. *Id.* at *8. Although the U.S. Supreme Court found in *Concepcion v. AT&T Corp.*, 131 S. Ct. 1740 (2011), that the Federal Arbitration Act ("FAA") preempts California's law on unconscionable contracts, the Ninth Circuit opined that the FAA did not preempt the *Iskanian* rule because it was a "generally applicable contract defense" preserved by the FAA's § 2 savings clause that barred any waiver of PAGA claims, regardless of whether the waiver appeared in an arbitration agreement or a non-arbitration agreement. *Id.* at *15-17. The Ninth Circuit further determined that the *Iskanian* rule did not conflict with the FAA's purpose because it did not prohibit outright the arbitration of

certain claims, but rather prohibited only the waiver of representative PAGA claims, and thus did not interfere with the FAA's goal of overcoming judicial hostility to arbitration. *Id.* at *20-21. Moreover, the Ninth Circuit reasoned that the *Iskanian* rule did not prevent the parties from selecting the procedures they want to be applied in arbitration, and therefore it did not interfere with arbitration. *Id.* at *23. The Ninth Circuit explained that a PAGA action is brought on the state's behalf and not a mechanism for resolving the claims of other employees; in contrast, a class action is designed to adjudicate the claims of absent class members, and principles of due process mandate that class members' rights be protected by requiring special and formal procedures to resolve those claims. *Id.* at *24-25. Because representative PAGA claims do not require any special procedures, the Ninth Circuit concluded that prohibiting a waiver of the claims did not diminish the parties' freedom to select the arbitration procedures that best suit their needs. *Id.* at *26. The Ninth Circuit, therefore, held that a waiver of Plaintiffs' representative PAGA claim could not be enforced, and accordingly reversed the District Court's order dismissing Plaintiff's action.

***Sanchez, et al. v. Nitro Lift Technologies, LLC*, 2015 U.S. Dist. LEXIS 18670 (E.D. Okla. Feb. 17, 2015).** Plaintiffs brought an action alleging that Defendant failed to pay overtime wages in violation of the FLSA and Oklahoma's Protection of Labor Act. Initially, the District Court had denied Defendant's motion to compel arbitration, holding that the arbitration clause within the confidentiality and non-compete agreement signed by Plaintiffs only applied to matters within the scope of that agreement. *Id*. at *1. On Defendant's appeal, the Tenth Circuit reversed on the basis that the broad arbitration clause, considered together with the language of the narrow contract, created an ambiguity, and that ambiguities about the scope of an arbitration clause should be resolved in favor of arbitration. *Id*. at *2. Upon remand, the District Court compelled arbitration. First, Plaintiffs argued that the cost and fee-shifting provisions in their contract violated the substantive rights afforded to employees by the FLSA. The agreement provided that the costs of arbitration "shall be borne by the disputing party whom the decision of the arbitrator is against." *Id.* at *4. The District Court opined that an arbitration agreement that required an employee to pay a portion of the arbitrator's fees was unenforceable under the Federal Arbitration Act ("FAA") because it undermined federal statutory rights. *Id*. at *7. The Court pointed out that the FLSA affords an employee the right to bring an action without fear of having to bear his employer's fees unless he litigates in bad faith. Thus, the Court found that the cost and fee-shifting provision was void and unenforceable, and it would deter a substantial number of similarly-situated potential litigants, as they would fear being stuck with substantial costs and fees in the event they did not prevail in their claim. *Id.* at *7-8. Second, Plaintiffs argued that the forum selection clause would cause employees substantial expense to arbitrate in an inconvenient forum (in Houston, Texas), as opposed to Oklahoma where they worked for Defendant. *Id.* The Court found that distance between Oklahoma and Houston, and travel expenses combined with Plaintiffs' evidence about their current financial status, was sufficient to show that arbitration in Houston would be prohibitively expensive. *Id*. at *9. Accordingly, the Court found the forum selection clause unenforceable. *Id.* As Defendant offered to waive the unenforceable provisions, the Court determined whether it could sever them without a severance clause. The Court found that the contract law of both Oklahoma and Louisiana encourage severing the enforceable provisions from the unenforceable portions, rather than to declare the entire contract void. *Id*. at *12-13. Accordingly, finding that the cost and fee-shifting and forum selection provisions were not essential to the agreement to arbitrate, the Court severed those provisions and enforced the arbitration agreement. *Id.* at *13.

***Stanfield, et al. v. Fly Low, Inc.,* 2015 U.S. Dist. LEXIS 102444 (S.D. Fla. Aug. 5, 2015).** Plaintiffs, a group of former waitresses, brought a collective action alleging that Defendant failed to pay them overtime wages and the required federal minimum wage in violation of the FLSA. Plaintiffs also asserted claims of retaliatory discharge and invasion of privacy. *Id.* at *4. Defendants filed a motion to compel arbitration, which the Court granted. Defendant argued that Plaintiffs' claims were covered claims under arbitration agreement. Plaintiffs countered that the arbitration agreements could not be enforced because they were signed under duress or forgery. *Id.* at *7. The Court opined that arbitration agreements incorporated the AAA's Employment Arbitration Rules and mediation process, which provided clear evidence that the parties agreed to having an arbitrator resolve any objections to the validity of the arbitration agreement. *Id*. at *7. Therefore, the Court ruled that an arbitrator must resolve Plaintiffs' objections as an initial matter. Plaintiffs also argued that compelling them to arbitrate was opposed to the collective action policy in the FLSA. The

Court noted that the Eleventh Circuit previously had held in *Walthour v. Chipio Windshield Repair LLC*, 745 F.3d 1326 (11th Cir. 2014), that an arbitration agreement having a collective action waiver may be unenforceable only if a statute like the FLSA had a contrary congressional command. *Id*. at *9. The Eleventh Circuit concluded that because the FLSA did not have such a command, the federal policy favored arbitration, even in the face of a collective action waiver. *Id*. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Steingruber, et al. v. Family Dollar Stores Of Florida*, Case No. 15-CV-199 (M.D. Fla. Aug. 13, 2015).** Plaintiff, an assistant store manager, brought a collective action alleging that Defendant misclassified her as exempt from the overtime requirements of the FLSA. Plaintiff raised two causes of action in her complaint, including a request for a declaratory judgment regarding the enforceability of the arbitration agreement, and a claim for unpaid overtime wages. *Id.* at 1-2. Plaintiff alleged that she did not accept or agree to Defendant's arbitration agreement, but rather clicked on a button purporting to accept the agreement only to acknowledge that she read and printed it. *Id.* at 2. Defendant moved to dismiss Plaintiff's complaint because the written arbitration agreement between the parties mandated arbitration of all employment-related claims and also required that the threshold question of arbitrability of the agreement be determined by an arbitrator, not the Court. *Id.* at 4. The Court noted the arbitration agreement specified that it was an agreement between Plaintiff and Family Dollar, Inc. including its "parents, subsidiaries, partners, divisions, and affiliated entities, and all successors and assigns of any of them." *Id.* at 5. Thus, because Defendant Family Dollar Stores of Florida, Inc. is a subsidiary of Family Dollar Inc., the Court held it was a party to the agreement. *Id.* The Court observed that according to the arbitration agreement, challenges to the agreement itself must be resolved by arbitration except as to the "class action waiver," which prohibited the parties from bringing collective actions and required that challenges to the validity of the waiver be determined by a Court and not an arbitrator. *Id.* The Court pointed out, however, that while Plaintiff challenged the enforceability of the agreement as a whole, she did not specifically challenge the delegation clause. *Id.* at 6. Specifically, the complaint alleged that the "arbitration agreement was not enforceable as to Plaintiff, was not applicable to the pending claims in whole or in part, and was void or voidable pursuant to law." *Id.* Thus, the Court found the threshold question of enforceability was a proper issue before an arbitrator and not before the Court. Id. Defendant also moved to enforce the collective action waiver in the arbitration agreement. *Id.* The Court ruled that Plaintiff could not compel Defendant to submit to class arbitration without agreement and Defendant had clearly not agreed to such actions; instead, the class action waiver in the agreement expressly prohibited class or representative actions. *Id.* at 8. Further, the Court concluded that enforcement of the class action waiver was required by the terms of the writing and in furtherance of the purposes of the Federal Arbitration Act to enforce agreements according to their terms and to streamline proceedings. *Id.* Accordingly, the Court ordered the parties to submit to arbitration. *Id.*

***Sutherland, et al. v. Ernst & Young, LLP*, 2015 U.S. App. LEXIS 773 (2d Cir. Jan. 20, 2015).** Plaintiff, an audit employee, brought an action alleging that Defendant misclassified her and other similarly-situated employees as exempt in violation of the FLSA and New York Labor Law. Four months after Plaintiff filed her complaint, Defendant moved to dismiss or compel arbitration. The District Court dismissed the action, and the Second Circuit affirmed. On appeal, Plaintiff argued that Defendant waived its right to demand arbitration. The Second Circuit noted that, to determine whether a party has waived its right to arbitration by expressing its intent to litigate the dispute in question, three factors are considered, including: (i) the time elapsed from when litigation was commenced until the request for arbitration; (ii) the amount of litigation to date, including motion practice and discovery; and (iii) proof of prejudice. *Id.* at *2. Prejudice can be substantive, when a party loses a motion on the merits and then attempts, in effect, to re-litigate the issue by invoking arbitration, or it can be found when a party postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur unnecessary delay or expense. *Id.* at *2-3. Although Plaintiff argued that she had been substantively prejudiced by Defendant's procedural gamesmanship, the Second Circuit held that Plaintiff failed to demonstrate how any gamesmanship disadvantaged her or how she had been prejudiced by Defendant's failure to demand arbitration in a more timely manner. Because Defendant moved to dismiss or compel arbitration four months after Plaintiff filed her complaint, and no substantial motion practice or discovery occurred during that time period, the Second

Circuit reasoned that Defendant did not waive its right to compel arbitration. Accordingly, the Second Circuit affirmed the District Court's order dismissing the action.

***Zenelaj, et al. v. HandyBook, Inc.,* 2015 U.S. Dist. LEXIS 26068 (N.D. Cal. Mar. 3, 2015).** Plaintiffs, a group of cleaning professionals, brought a putative class action alleging that Defendant misclassified them as independent contractors, and thus unlawfully denied them overtime and minimum wages under the California Labor Code. Defendant moved to compel arbitration pursuant to an arbitration provision in an agreement executed by the parties. The Court granted Defendant's motion. The Court agreed with Defendant that it could not decide whether the arbitration provision at issue was unconscionable or applicable because the provision delegated this threshold issue to an arbitrator. *Id.* at *4. The Court found that the parties had clearly and unmistakably agreed to allow an arbitrator to decide the arbitration provision's validity, scope, and application by expressly incorporating the AAA Commercial Arbitration Rules. *Id.* at *6. Since the parties delegated the question of arbitrability to the arbitrator by expressly incorporating the AAA Commercial Arbitration Rules into their agreement, the Court concluded that any questions regarding the arbitration provision's validity, scope, or application to this dispute must be decided by the arbitrator. *Id.* Plaintiffs also argued that the arbitration provision did not cover their misclassifications claims because they did not "relate to" the agreement. *Id*. at *14. The Court, however, found that the broad arbitration provision and a review of the complaint did not foreclose the possibility that Plaintiffs' claims "relate to" the agreement. *Id.* at *15. The Court noted that the agreement contained much of the evidence that should be considered to determine whether Defendant misclassified Plaintiffs. Although the choice-of-law and forum selection provision arguably did not favor arbitration, the Court held that it would reserve its judgment as to whether the arbitration provision actually covered Plaintiffs' cause of action because an arbitrator should first determine the issue of arbitrability. *Id.* at *17-18. The Court further stayed Plaintiffs' class claims and representative claims under the Private Attorney General Act ("PAGA"), despite a valid class action waiver and invalid waiver of PAGA claims under state law, finding that the arbitrability of these claims must be decided by an arbitrator in accordance with the clear and unmistakable intent of the parties. *Id.* at *19-25. Accordingly, the Court granted Defendant's motion to compel arbitration.

(xvi) Settlement Approval Issues In Wage & Hour Class Actions And Collective Actions

***Ahmed, et al. v. Landry's Inc.,* Case No. 15-CV-2186 (S.D.N.Y. Nov. 10, 2015).** Plaintiffs, a group of employees, brought a collective action alleging that Defendants failed to pay the minimum, overtime, and "spread-of-hour" wages required by law, misappropriated tips owed to Plaintiffs, and failed to provide proper wage notice and statements in violation of the FLSA and the New York Labor Law ("NYLL"). *Id*. at 1. Before the Court ruled on Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b), the parties entered into a settlement agreement and submitted a joint letter requesting the Court's approval of the settlement. *Id.* at 2. The Court observed that the settlement agreement largely satisfied the FLSA's requirement, as the joint letter outlined the anticipated burdens and expenses avoided by settling Plaintiffs' claims and stated that the agreement was a result of arms' length bargaining between experienced attorneys. *Id.* at 3. Furthermore, the terms of the agreement required Plaintiffs to release only those claims arising under the FLSA and the NYLL and contained no restrictive confidentiality provisions. *Id.* at 3-4. The Court acknowledged that no terms in the proposed agreement precluded a finding that the settlement was fair and reasonable. However, the Court held that the parties failed to provide important information including the grounds for the overall settlement amount as well as each named Plaintiff's share thereof and the bases for the reasonableness of the proposed attorneys' fees. *Id.* at 4. First, the Court found that the parties' joint letter merely stated that Plaintiffs' range of possible recovery was between $0 and $164,165, representing the damages for unpaid minimum wage and record-keeping violations with liquidated damages. *Id.* Additionally, the Court found that the letter cursorily explained that each Plaintiff's respective share of the settlement amount was based on their individual dates of employment, approximate hours worked, and rates of pay. *Id.* Further, the Court determined that the letter did not discuss Defendants' potential liability stemming from the other claims in the complaint, including unpaid overtime wages and that Plaintiffs provided no supporting declarations or exhibits substantiating the accuracy of the calculations or the sufficiency of the amount allocated to each individual Plaintiff. *Id.* Furthermore, the Court noted that the parties cited other cases approving settlements in which similar portions of the

settlement amount were reserved for attorneys' fees, but provided no information to conclude that the same determination was warranted here. *Id.* The Court held that Plaintiffs' counsel must provide records detailing the hours expended and the nature of the work done for each attorney as well as evidence of how the proposed fees compared to Plaintiffs' lodestar. *Id.* Accordingly, the Court denied the parties' request for approval of their settlement agreement without prejudice, and requested the parties submit a supplemental letter on the items enumerated in the Court's order.

***Allen, et al. v. Labor Ready Southwest, Inc.*, 2015 U.S. App. LEXIS 9139 (9th Cir. June 2, 2015).** Plaintiffs, a group of day laborers, brought an action alleging a failure to pay wages for time spent while waiting for assignments and for time spent travelling from Defendant's local office to the businesses that needed labor. Plaintiffs also alleged that Defendant took unlawful paycheck deductions for using cash disbursement machines ("CDM") provided by Defendant. Subsequently, the parties settled the action for a gross amount of $4.5 million, and Defendant agreed to pay $10 for non-CDM claims and $25 for CDM claims to class members submitting timely claims. *Id.* at *6. Unpaid amounts would revert to Defendant. As a form of injunctive relief, Defendant agreed to shut down the CDMs and replace them with an electronic pay card through which workers would receive their pay daily without charge. *Id.* at *7. A group of objectors sought to intervene and the District Court denied their motion. Thereafter, the District Court overruled the objectors' concerns, granted final settlement approval, and awarded $1.125 million in attorneys' fees. On appeal, the Ninth Circuit affirmed the denial of the motion to intervene, and vacated the grant of final approval to the settlement. First, the Ninth Circuit noted that the objectors filed their motion after four years of on-going litigation on the eve of settlement, and threatened to prejudice the settling parties by potentially derailing the settlement, especially where their concerns could have been addressed through the normal objection process. *Id*. at *10-11. Thus, the Ninth Circuit opined that the objectors' motion was untimely. Next, the Ninth Circuit observed that District Courts must look for subtle signs that class counsel have allowed their own self-interests to infect the negotiations. *Id.* at *14. Here, all of the money that did not go toward claims actually made, attorneys' fees and costs, and the administration costs would revert to Defendant who agreed not to dispute the award of fees to class counsel, as long as that award did not exceed 25% of the common fund. *Id.* at *14-15. Further, the attorneys' fee award exceeded the maximum possible amount of class monetary relief by a factor of three. Confronted with these multiple indicia of possible implicit collusion, the Ninth Circuit remarked that the District Court had an obligation to assure itself that the fees awarded per the agreement were not unreasonably high, which the District Court failed to do. *Id.* at *15. Further, the District Court failed to make express findings about the value of the injunctive relief, which would have justified the reasonableness of class counsel's fee award. There were also no express findings by the District Court on what it considered to be a reasonable lodestar amount when class counsel represented that the fee award was less than his lodestar figure. Considering all these factors, the Ninth Circuit vacated the final approval of the settlement and the attorneys' fee award, and remanded the action. *Id.* at *18. The Ninth Circuit remarked that the District Court must give the entire class and not just the objectors the opportunity to review class counsel's completed fee motion and to submit objections if they so choose.

***Appleman, et al. v. DS Services Of America, Inc.,* 2015 U.S. Dist. LEXIS 111721 (S.D. Fla. Aug. 24, 2015).** Plaintiff, a former sales representative, brought a collective action against Defendant seeking back pay for unpaid overtime under the FLSA. The parties subsequently settled and Plaintiff moved for approval of the parties' settlement agreement, which the Court denied. *Id.* at *1. Subsequently, two individuals opted-in, and thereafter the parties attempted to resolve the matter as to the entire purported collective action. The proposed collective action was defined as "all individuals employed by Defendant from October 3, 2012 to the date of approval (the "class period") who worked as a sales representatives at any time during the class period." *Id.* at *2. The Court remarked that the parties agreed to resolve the rights of over 300 potential opt-in Plaintiffs without those Plaintiffs being joined in this action or being able to object to the terms of the action. *Id.* at *3. The Court opined that the Eleventh Circuit has previously held that collective actions are unique, and unlike Rule 23's opt-out provisions, no person can become a party Plaintiff unless he or she affirmatively "opts-in" by filing his or her written consent. *Id.* at *4. The Court determined that if the parties sought to resolve the case by settlement, they should first seek conditional approval of the proposed collective action and offer adequate notice procedures to allow potential Plaintiffs

to opt-in to the case. Thus, the Court held that it could not approve the agreement at present, and accordingly, denied Plaintiff's motion to approve the settlement agreement.

***Augustyniak, et al. v. Lowes Home Centers, LLC*, 2015 U.S. Dist. LEXIS 57592 (W.D.N.Y. May 1, 2015).** Plaintiffs, a group of current and former human resource managers ("HRMs"), brought an action alleging that Defendants failed to pay them overtime wages and violated the FLSA and the New York Labor Law. The parties subsequently reached a settlement. It contemplated that Defendants would pay up to $3 million to class members and up to $1.5 million for attorneys' fees. The $3 million was based on an average payment of $3,700 for every person who opted-in to the lawsuit, assuming that over 800 of the approximately 2,279 class members would opt-in. *Id*. at *4. The settlement would be apportioned among the opt-in Plaintiffs based on the number of workweeks each individual opt-in Plaintiff worked during the relevant class period; thus, a Plaintiff who worked as HRM during most of the period would receive $8,000, while a Plaintiff who worked as a HRM only a few weeks would receive less than $1,000. *Id*. at *5. Each named Plaintiff also would receive a $3,000 incentive payment. The parties jointly sought approval of the settlement, which the Court denied. The Court first found that the settlement class could not be conditionally certified. The Court explained that the parties relied on discovery from a previous action – *Lytle v. Lowes Home Centers, Inc.*, 2014 U.S. Dist. LEXIS 3227 (M.D. Fla. 2014) – where a collective action was conditionally certified; Plaintiffs here argued that this proved that the class members were similarly-situated to them. The parties contended that the main dispositive issue in both cases was the same, *i.e.*, whether Defendants HRMs exercised discretion and independent judgment during the relevant period. That was the issue that was the subject of most of the written and deposition discovery in the *Lytle* action, and which inevitably would consume much of the focus in this case. The Court noted that numerous HRMs in the *Lytle* action testified that they made significant decisions, and had influence into almost all final decisions at their stores. *Id*. at *10. The Court found that these statements undercut the allegations made by Plaintiffs, and denied conditional certification of the collective action. As to the fairness of the settlement, the Court noted that there was no *bona fide* dispute as to the appropriate statute of limitations for FLSA claims. Since the parties conceded that there was no basis for a determination that any FLSA violation was willful, the statute of limitations was two years. *Id*. at *15. In effect, there was no *bona fide* reason for including HRMs falling outside that time period in this settlement. The Court, therefore, remarked that for those HRMs who had no viable FLSA claim, the proposed settlement would be a gift. *Id*. In addition, the Court remarked that the benefits of a collective action depend on employees receiving accurate and timely notice so that they can make informed decisions about whether to participate. However, the proposed notice made no mention of the fact that the HMRs who had no valid FLSA claims would opt-in to the settlement, increasing the likelihood that the $3 million settlement would be reached or exceeded. *Id*. Finally, the Court found that the attorneys' fees award of $1.5 million had no basis for a lodestar award. Accordingly, the Court concluded that the settlement was not fair, and denied the motion.

***Calderon, et al. v. Form Works/Baker JV, LLC,* Case No. 13-CV-21438 (S.D. Fla. April 14, 2015).** Plaintiffs, a group of employees, brought an FLSA action alleging failure to pay overtime, failure to pay the prevailing wage for all hours worked, and intentional misclassification into lower-paying job categories. Plaintiffs also sought a declaratory judgment based on these allegations. Subsequently, the parties settled the action, and moved for approval of their settlement agreement on a confidential basis. The Court denied the motion. At the outset, the Court found that the motion failed to discuss the Court's subject- matter jurisdiction. *Id*. at 1. Earlier, the Court had determined that Plaintiffs' statement of claim ("Statement") indicated the Court lacked subject-matter jurisdiction over this controversy. *Id*. at 2. Therefore, the Court dismissed the case, which was reversed on appeal on the basis that the Statement did not have the status of a pleading and was not an amendment to the complaint. *Id*. The Court remarked that regardless of the existence of subject-matter jurisdiction based on the complaint alone, the Court must be satisfied that subject-matter jurisdiction existed at that stage. Because the motion did not address that point, Defendant had repeatedly insisted no subject-matter jurisdiction existed, and the Court's earlier order made clear that it was an important issue in the controversy, the Court declined to approve the settlement. *Id*. In addition, the Court noted that even if subject-matter jurisdiction existed, it must scrutinize the settlement to determine whether it was a fair and reasonable resolution of a *bona fide* dispute. *Id*. at 2-3. The Court that

the motion did not include even a dollar figure of the proposed settlement, which precluded the Court from determining whether it was fair and reasonable. *Id*. at 3. Accordingly, the Court directed the parties to submit a new motion and settlement agreement that would address the Court's concerns and conformed to the FLSA.

***Chavez, et al. v. PVH Corp.,* 2015 U.S. Dist. LEXIS 17511 (N.D. Cal. Feb. 11, 2015).** Plaintiffs, a group of retail store employees, brought a putative class action alleging that Defendant violated the California Labor Code by paying employees with payroll debit cards, and providing employees with inaccurate or incomplete wage statements. Plaintiffs' action was one of three putative class action lawsuits filed against Defendant that raised similar and overlapping allegations regarding its use of payroll debit cards. In the first of the three class actions, *Scott-George v. PVH Corp.,* Plaintiffs alleged that Defendant failed to pay wages for meal breaks, rest breaks, bag checks, overtime, double overtime, and vested vacation pay, and also failed to provide compliant wage statements, in violation of the California Labor Code. *Id.* at *3. Two months later, Plaintiffs brought this class action alleging that Defendant had a pattern or practice of paying employees their final wages upon termination via payroll debit cards that required fees for usages, which resulted in employees not receiving all wages owed upon termination. *Id.* at *4. The third class action, *Lapan v. PVH Corp.,* alleged that Defendant paid employees through a payroll card program, which required that employees pay certain fees and charges, allegedly resulting in employees not receiving their full wages. *Id.* at *6. The *Lapan* Plaintiffs alleged breach of contract, and violation of the FLSA and numerous provisions of the California Labor Code, including § 203. *Id.* Thereafter, the *Scott-George* Plaintiffs filed an amended complaint adding, for the first time, the allegation that Defendant paid them with payroll debit cards that resulted in reduction of earned wages. *Id.* at *7. Two months after the amendment, Plaintiffs reached a settlement with Defendant. The agreement of $1,850,000 provided that, after deducting the maximum amounts for attorneys' fees, litigation costs, and enhancement awards, approximately $1,276,250 would be distributed to class members who submit timely claim forms. *Id.* at *8. Plaintiffs from *Lapan* and *Scott-George* objected to the proposed settlement, arguing that it was the result of a "reverse auction," whereby Defendant sought to settle the claims for a relatively low amount of money. *Id.* at *12. The objectors also alleged that Defendant intended to use the release in the settlement to bar claims brought pursuant to § 203 in the related suits. *Id.* They further argued that the release language in the settlement was impermissibly broad, as it released claims based on facts not alleged in the complaint. *Id.* The Court agreed and denied approval of the proposed settlement. The Court noted Plaintiffs and Defendant acknowledged that they intended to use the release in this action to bar claims based on facts other than those alleged in the complaint, and such an action violates the rule in the Ninth Circuit that a class action settlement only could release claims based on an identical factual predicate as the claims alleged in the operating complaint. *Id.* at *13. Although the language of the settlement agreement, on its face, appeared to release only those claims that were raised or could have been raised related to the facts of the case, at the final settlement hearing, both Plaintiffs and Defendant stated that the release would also release claims based on facts which were not alleged in their compliant, including § 203 claims. *Id.* at *15-16. Thus, because the settlement purported to release claims beyond the scope of Plaintiffs' complaint, the Court found the settlement unfair and inappropriate for approval. In addition, the Court found that the proposed notice to be sent to class members was inadequate and misleading because it did not inform the class members that they might be releasing claims based on facts beyond those alleged in the complaint; rather, it informed the class members that they were only releasing claims that were raised or could have been raised related to the facts of the this action. *Id.* at *21. The notice also failed to inform the class members of the existence of related, pending litigation. *Id.* at *22. Accordingly, the Court denied final approval of the settlement.

***Cheeks, et al. v. Freeport Pancake House, Inc.,* 796 F.3d 199 (2d Cir. 2015).** Plaintiff, a restaurant server and manager, brought an action alleging that Defendant failed to pay overtime wages in violation of the FLSA and the New York Labor Law. *Id.* at 200. Plaintiff also alleged that, when he complained about Defendant's failure to pay him and other employees the required overtime wages, Defendant retaliated against him by demoting and terminating him. *Id.* The parties appeared at an initial conference before the District Court and engaged in pre-trial discovery. During that span, they entered into a private settlement and filed a joint stipulation and order of dismissal with prejudice pursuant to Rule 41(a)(1)(A). The District

Court declined to accept the stipulation, concluding that Plaintiff could not agree to a private settlement of his FLSA claims without either the approval of the District Court or the supervision of the U.S. Department of Labor ("DOL"). *Id.* The District Court directed the parties to file a copy of the settlement agreement on the public docket and to "show cause why the proposed settlement reflected a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." *Id.* Rather than disclose the terms of their settlement, the parties asked the District Court to stay further proceedings and certify the question for interlocutory appeal. Because both parties advocated in favor of reversal, the Second Circuit solicited the views of the DOL. The DOL argued that the FLSA fell within the "applicable federal statute" exception to Rule 41(a)(1)(A), such that the parties lacked authority to enter into a binding stipulation of dismissal without the involvement of the District Court or the DOL. *Id.* at 201. The Second Circuit affirmed the District Court's order and remanded. Rule 41(a)(1)(A) provides, in relevant part, that: "[s]ubject to Rules 23(c), 23.1(c), 23.2, and 66 and any applicable federal statute, the Plaintiff may dismiss an action without a Court order by filing: (i) a notice of dismissal . . . or (ii) a stipulation of dismissal signed by all parties who have appeared." The Second Circuit reviewed the phrase "any applicable federal statute" and found that two decisions from the Supreme Court – *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), and *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) – operated to preclude private settlements. *Id.* at 201-02. The Second Circuit noted that these two cases established that employees may not waive the right to recover liquidated damages under the FLSA, and employees may not privately settle the issue of whether an employer is covered under the FLSA. *Id.* at 203. Although these cases left open the question of whether employees could enforce private settlements of FLSA claims where there was a *bona fide* dispute as to liability, in considering that question, the Eleventh Circuit in *Lynn's Food Stores, Inc. v. United States Department of Labor*, 679 F.2d 1350 (11th Cir. 1982), answered "yes," but only if the DOL or a District Court first determined that the proposed settlement was fair and reasonable. *Id.* Although the Second Circuit discussed a District Court split that distinguished between "enforcement of a private settlement" and dismissal with prejudice by parties to a private settlement, it ultimately held that a private settlement of an FLSA claim could not serve as the basis for a Rule 41 dismissal with prejudice. *Id.* at 204. Accordingly, the Second Circuit affirmed the District Court's order and remanded for further proceedings.

***Coffin, et al. v. MRI Enterprises,* 2015 U.S. Dist. LEXIS 34385 (E.D.N.Y. Mar. 19, 2015).** Plaintiffs brought an action alleging that Defendants failed to pay them overtime wages in violation of the FLSA and the New York Labor Law ("NYLL"). The parties settled their dispute and filed a motion seeking approval of their settlement. The Court denied the motion. The Court remarked that it was unable to determine whether the settlement was fair and reasonable because the parties failed to provide the Court with enough information. *Id*. at *2. The Court explained that in seeking approval, the employer should articulate the reasons for disputing the employee's right to a minimum wage or overtime, and the employee must articulate the reasons justifying his entitlement to the disputed wages. *Id*. The Court determined that the parties failed to provide sufficient information regarding the time periods during which Plaintiffs were employed and the applicable hourly wage such that the Court could analyze if the settlement amount was fair and reasonable. *Id*. Additionally, the Court found that it could not approve the settlement agreement because it contained a confidentiality provision, which was contrary to well-established public policy and impeded one of the goals of the FLSA to ensure that all workers were aware of their rights. *Id*. at *3. The Court explained that, by including a confidentiality provision, an employer thwarts the informational objective of the FLSA by silencing the employee who had vindicated a disputed FLSA right. For these reasons, the Court denied the parties' motion for settlement approval.

***Dynabursky, et al. v. Alliedbarton Security Services LP*, Case No. 12-CV-2210 (C.D. Cal. July 29, 2015).** Plaintiff brought a putative class action alleging that Defendant's company-wide policy precluding security officers from taking off-duty meal and rest breaks violated California law. The parties reached a settlement and submitted a joint stipulation to refer the case to arbitration for class action settlement purposes. The parties wanted to resolve the case, along with two related state court class actions, by submitting one joint class settlement agreement to a single third-party arbitrator for preliminary and final approval. *Id.* at 2. The Court refused to approve the stipulation and directed parties to submit a regularly-noticed motion addressing the issue. The parties then jointly moved to submit the class action settlement

to arbitration, wherein the arbitrator would resolve all three cases in a single proceeding. The Court denied the motion again. The Court noted that the Federal Rules of Civil Procedure expressly contemplated that the Court, not an arbitrator or other third-party, would approve any class action settlement. *Id.* at 3. The parties argued that the Court could confirm any eventual arbitral award, or refuse to confirm any eventual arbitral award if the Court found it unfair, unreasonable, or inadequate. *Id.* at 4. The Court disagreed. The Court noted that its power to review an arbitral award is extremely limited. It may reverse an arbitration award – even in the face of an erroneous interpretation of the law – only where the moving party shows that the arbitrator understood and correctly stated the law but then proceeded to disregard the law. *Id.* The Court also rejected the parties' comparison of the proposed settlement mechanism to the Court's delegation of matters to a Magistrate Judge. The Court noted that, although the Court can set aside a Magistrate Judge's order as contrary to law, the Court lacks the power to vacate an arbitration award simply because it is contrary to law. *Id*. Accordingly, the Court denied the parties' motion to refer the case to arbitration.

Flood, et al. v. Carlson Restaurants, Inc., **Case No. 14-CV-2740 (S.D.N.Y. May 6, 2015).** Plaintiffs brought a nationwide collective action against Defendants alleging a failure to pay overtime for off-the-clock work under the FLSA. Several Plaintiffs and Defendants agreed to individual settlements, and jointly moved the Court to conduct a confidential *in camera* review of nine private settlement agreements. The Court denied the motion. It noted that under the common law right to access, a presumption of public access attaches to any "judicial document," defined as a document "relevant to the performance of the judicial function and useful in the judicial process." *Id*. at 1. If a presumption applies, the Court must first determine the weight to be given to the presumption based on the role of the materials at issue in the exercise of Article III judicial power and the value of such information to those monitoring the judicial system. Further, the Court opined that it should weigh the presumption against any countervailing interests such as the privacy interests of those resisting disclosure, judicial efficiency, and the danger of impairing law enforcement. *Id*. The Court reasoned that FLSA agreements should not be confidential. The Court found that the FLSA settlements "indisputably" implicate the "judicial function," as they require judicial approval. *Id*. Therefore, the Court concluded that such agreements were considered as judicial documents subject to the presumption of access. The Court remarked that the rationale for rejecting confidential FLSA settlements from public scrutiny could thwart the public's independent interest in assuring that employees' wages are fair. The parties contended that confidentiality was warranted as public disclosure of those settlements might cause interference in the on-going litigation or possible settlement. The Court, however, concluded that the public's interest outweighed the parties' purported privacy interest, and denied the parties' request. *Id*. at 2.

Flood, et al. v. Carlson Restaurants, Inc.**, 2015 U.S. Dist. LEXIS 88068 (S.D.N.Y. July 6, 2015).** Plaintiffs, a group of tipped employees at TGI Friday's restaurants, filed suit claiming that Defendants improperly availed themselves of the tip credit and wrongfully paid tipped employees less than the full statutory minimum hourly wage in violation of the FLSA and various state wage & hour laws. Defendants reached settlements with nine individual Plaintiffs and moved for approval of the settlement agreements. The Court denied the motion on two grounds. First, the agreements prohibited Plaintiffs from disclosing the existence of the agreements, the communications leading to the agreements, or the terms and provisions of the agreements with any person other than their attorneys, immediate family, or tax consultants, and provided Defendants liquidated damages of two percent of the settlement amounts for each breach. *Id.* at *4-5. The Court found that these provisions ran afoul of the purposes of the FLSA and the public's independent interest in assuring that employees' wages are fair. *Id.* The Court noted that, even when settlement papers are publicly available on the Court's docket, non-disclosure provisions defeat well-established public policy because they undermine the FLSA's primary goal of ensuring that workers are aware of their rights. *Id* at *6. The Court reasoned that barring Plaintiffs from publicly speaking about their experiences would frustrate Congress' intent to ensure widespread compliance with the statute by silencing employees who have vindicated disputed FLSA rights. *Id.* Second, the agreements contained waiver and release clauses under which Plaintiffs waived any possible claims against Defendants, including unknown claims and claims unrelated to wage & hour issues. *Id.* The Court found these waivers and releases too sweeping to be fair and reasonable because they covered any possible claims against Defendants,

including unknown claims and claims that had no relationship whatsoever to wage & hour issues. The Court opined that such releases were "doubly problematic" in the FLSA context, where Courts have a duty to police unequal bargaining power between employees and employers. *Id.* The Court noted that, unless the releases were limited to claims relating to the existing suit, the Court would not approve the agreements. Accordingly, the Court denied Defendants' motion for approval of the settlement agreements.

***Litty, et al. v. Merrill Lynch & Co., Inc.,* 2015 U.S. Dist. LEXIS 74693 (C.D. Cal. April 27, 2015).** Plaintiff, a Financial Advisor ("FA"), brought a putative class action and collective action alleging that Defendants misclassified FAs as exempt and did not provide overtime compensation. Following the parties' agreement to settle, Plaintiff moved for certification of settlement class and preliminary approval of settlement. The Court denied certification of the settlement class, finding that Plaintiff failed to satisfy the commonality requirement. The Court had previously denied Plaintiff's motion for class certification on the basis that variations in how and where the FAs performed their primary duties was fatal to commonality. *Id.* at *10. Although Plaintiff had amended his complaint alleging claims on behalf of a more narrowly-defined class, the Court noted that it was still fatal to commonality as Plaintiff did not address any of the Court's concerns since the first failed class certification motion. *Id.* Plaintiff further failed to present any evidence demonstrating that his claims were typical of the claims of the class, despite the Court's previous finding that variation among job duties showed each claim atypical. *Id.* at *12-13. Although Plaintiff removed some of the senior FA positions from the proposed class, the Court determined that the record still showed significant disparities in duties, and how and where the putative class members performed their duties. The Court, therefore, concluded that Plaintiff failed to demonstrate that common question could be adjudicated on a class-wide basis, and thus a certification pursuant to Rule 23 would not be appropriate. *Id.* at *15. Because Plaintiff failed to provide substantial allegations and the modest factual showing that he was similarly-situated to other proposed collective group members' job requirements and pay provision, the Court also ruled that Plaintiff's action could not proceed as a collective action under 29 U.S.C. § 216(b). *Id.* As to settlement, the agreement proposed a total settlement amount of $5 million, out of which Plaintiff's counsel could seek $1 million in fees. After subtracting the requested attorneys' fees and costs, the California Labor & Workforce Development Agency payment, service awards, and anticipated administrative costs, the remaining net settlement fund was approximately $3.8 million. *Id.* at *24. The parties claimed that this was a significant recovery for class members in light of the risks and costs of further litigation. The Court, however, found that the amount offered weighed against preliminary approval. Because the Court had stricken all class, collective, and representative allegations, the Court found that the action was not as complex as Plaintiff purported. According to the Court, there was no substantial risk to the class members because Plaintiff's counsel did not represent them, and Plaintiff was in an exceedingly poor position to broker a class settlement of any kind. *Id.* at *26. It appeared to the Court that Defendants took advantage of Plaintiff's compromised position in order to negotiate a sweeping agreement to settle Plaintiff's case as well as two other class actions brought by the proposed interveners asserting off-the-clock and misclassification claims. *Id.* at *28. The Court therefore concluded that the settlement agreement was neither fair, reasonable, nor adequate. Accordingly, the Court denied Plaintiff's motion for certification of settlement class and preliminary approval of a settlement.

***Lopez, et al. v. KMDG LLC,* 2015 U.S. Dist. LEXIS 111626 (E.D. Wis. Aug. 24, 2015).** Plaintiff brought a putative class action against Defendants for unpaid overtime wages under the FLSA and Wisconsin's wage & hour laws. The parties moved for settlement approval. The Court remarked that the proposed stipulation raised several questions and could not be approved until they were resolved. *Id.* at *1-2. The Court remarked that while seeking approval of the settlement, the parties had not addressed the collective action aspects of the case, and other than having the additional individuals who opted-in, Plaintiff had not sought conditional certification under 29 U.S.C. § 216(b). *Id*. at *2. The Court remarked that the parties' stipulation also cited two cases regarding the attorneys' fees, both of which were class actions. *Id*. In addition, the Court expressed concern regarding the impact of *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), on Plaintiffs' claims *Id*. Therefore, the Court directed the parties to file a response to those questions before conducting a hearing on the settlement agreement. *Id*. at *2-3.

***Myles, et al. v. AlliedBarton Security Services, LLC,* 2015 U.S. Dist. LEXIS 156760 (N.D. Cal. Jan. 9, 2015).** Plaintiff, on behalf of herself and a putative class of approximately 11,500 security officers, brought an action against Defendant, her former employer, for violations of § 203 of the California Labor Code. Previously, the parties moved for approval of a proposed class settlement, which the Court denied because the proposed deal was replete with indicia that it would benefit Defendant and class counsel at the expense of the absent class members. *Id.* at *2. Subsequently, the parties filed a second proposed class settlement, which the Court denied again as the parties failed to correct many of the prior problems that doomed the first effort. *Id.* The Court opined that although parties had made some marginal improvements, they had not addressed the two most fundamental issues, including: (i) the settlement amount was extremely low in comparison to the only mathematical estimates of liability the parties provided and they did not provide any justification for the steeply discounted settlement amount; and (ii) because the release covered putative class members who received notice even if they made no claim for money, Defendant's liability would be limited on a "claims-made" basis. *Id.* at *5. Regarding the first issue, the Court observed that Plaintiff had estimated total potential liability at $18,975,000, based on multiplying the average hourly wage of the putative class by their average daily shift of right hours, multiplied by the approximate average delay in payment of vacation pay under § 203, multiplied by the average number of people in the putative class, plus a PAGA penalty of $100 per class member and a § 226 penalty of $50 per class member. *Id*. at *3. Although, the Court realized that the litigation was risky, the gross settlement amount of $1,750,000 was a tiny fraction of the total potential liability recoverable at trial, and that fraction was reduced further by class counsel's fees, settlement administration costs, and an "incentive" payment to the class representative. *Id.* at *4. The Court remarked that even if the baseline payment per class member was $114, most of the putative class members would never make a claim, which would reduce Defendant's pay-out to as little as half of the gross settlement amount. The Court, therefore, concluded that with a statute like § 203, whose references to "penalties" clearly contemplates a deterrent effect, that was an additional strike against the settlement, and although, such a strike might be mitigated by a convincing explanation of how the settlement amount was arrived at, the parties had provided no such explanation. *Id.* at *4-5. Accordingly, the Court again denied the parties' proposed class settlement.

***Ramirez, et al. v. Ricoh Americas Corp.,* 2015 U.S. Dist. 11789 (S.D.N.Y. Jan. 30, 2015).** Plaintiff, a technician, brought an action seeking unpaid wages and overtime compensation under the FLSA, the New York Minimum Wage Act, and the New York Labor law. Pursuant to a settlement agreement between the parties, Plaintiff moved for preliminary approval of a class settlement. The proposed settlement provided for a payment of of $325,000 inclusive of attorneys' fees and costs, the reasonable fees and expenses of the settlement administrator, and any class representative service award. *Id*. at *2. The proposed class consisted of about 400 members, and included all individuals employed by Defendant as a technician or in a comparable position in New York at any time between December 23, 2007, and July 14, 2014. The Court denied approval, finding that the proposed settlement agreement was substantially unfair. Although the negotiation process appeared to be procedurally fair, the Court found that Plaintiff did not provide enough details to back-up the settlement terms. Although Plaintiff contended that much more discovery would be required prior to trial to establish liability and damages, including depositions of Defendant, class members, and possibly experts, the Court found that Plaintiff failed to identify how much more discovery would be required, how many class members would need to deposed, and what experts would possibly be required in an action such as this one. *Id.* at *10. Plaintiff also failed to identify the conflicting case law or what the anticipated expense and likely duration of the litigation might be in the absence of the agreement. *Id.* at *11. Plaintiff further failed to show that the litigation would be complex, expensive, and time-consuming. Additionally, the Court pointed out other factors – such as the lack of evidence showing that the putative class members support the settlement as well as the lack of details provided regarding the amount of payroll documents, time records, and other information exchanged between parties, or about the number of workers whom Plaintiff interviewed, and the fact that only one deposition had been taken over the 7-month time period between the filing of the complaint and the settlement – to conclude that it did not militate in favor of granting settlement approval. *Id.* at *12-13. Plaintiff also failed to identify the risks of establishing liability and damages, or to address the range of reasonableness of the settlement fund. *Id.* at *14-16. The Court therefore found that none of the factors favored settlement approval. The Court further pointed out to the inconsistency of the proposed class definition in Plaintiff's notice of motion and

memorandum of law, and the absence of a definition of the proposed class in the proposed settlement agreement and notices. *Id.* at *17. Plaintiff failed to explain what a comparable position to the position of technician would mean, and according to the Court, the inconsistency in the definition alone warranted rejection of the proposed settlement agreement. *Id.* The Court also identified other inconsistent, misleading, and ambiguous terms in the agreement, and therefore rejected Plaintiff's motion for preliminary approval of the settlement.

Ravenell, et al. v. Avis Budget Group, Inc., **Case No. 08-CV-2113 (E.D.N.Y. Sept. 16, 2015).** Plaintiffs, a group of shift managers, brought a collective action alleging that Defendants failed to pay them overtime compensation in violation of the FLSA. The parties subsequently settled the action and moved for settlement approval, which the Court denied. The total amount of the settlement fund amounted to $7,800,000 and the net amount to be distributed to the 251 Plaintiffs amounted to $4,866,600, after payment of attorneys' fees and costs, service payments to the named Plaintiffs, and settlement administration costs. *Id.* at 3. The settlement agreement did not provide the final amount that each Plaintiff would receive, or the underlying data with which the distribution calculations would be made. The Settlement stipulated that each of the 251 Plaintiffs would receive each Plaintiff's settlement calculation, which would be calculated by the number of workweeks a Plaintiff worked as a shift/operations manager during each of their respective applicable statute of limitations periods, excluding workweeks that were released in any prior litigation and excluding workweeks during any leave of absence period, divided by the total number of workweeks worked by all Plaintiff as a shift/operations manager for either Defendant during the applicable statute of limitations period and multiplying that fraction against the net settlement fund. *Id.* The Court remarked that this formula alone did not enable a determination of fairness, and observed that to determine fairness, the Court must review the underlying data that would be used to calculate the distributions, as well as the final amount to be distributed to each Plaintiff. *Id.* Plaintiffs' counsel also requested approval of their attorneys' fees of $2,597,400, which constituted one-third or 33.3% of the total settlement fund and costs of $251,000. The Court found that Plaintiff's counsel failed to submit any factual basis regarding the reasonableness of the fees. Accordingly, the Court concluded that due to the lack of information, it was unable to determine if the settlement was fair and reasonable, and accordingly, denied the motion.

Schneider, et al. v. Habitat For Humanity International, Inc.**, 2015 U.S. Dist. LEXIS 14679 (W.D. Ark. Feb. 5, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendants failed to pay them one and a half times their regular rate for all time that they worked in excess of 40 hours per week in violation of the FLSA and the Arkansas Minimum Wage Act. The parties settled the litigation. Pursuant to their settlement, the parties filed a joint motion requesting the Court to review the FLSA settlement *in camera*, and to approve the settlement. The parties argued that the private settlement agreement did not need the Court's approval; however, if the Court determined its approval was necessary, then its review should be performed *in camera* and the settlement agreement should be filed under seal. *Id*. at *2. The Court noted that the U.S. Supreme Court held in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945), that in the absence of a *bona fide* dispute, a party may not waive his rights under the FLSA to minimum wages, overtime wages, or liquidated damages. *Id.* at *2-3. Further, the Supreme Court observed that statutory rights conferred on private parties cannot be waived if those rights affect the public interest and if their waiver would contravene the statutory policy. *Id*. at *3. The Supreme Court pointed out that permitting private parties to waive the FLSA guaranteed protections against substandard wages in the absence of a *bona fide* dispute would nullify the purposes of the FLSA. *Id*. Further, the Eleventh Circuit in *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982), held that settlement agreements waiving FLSA rights were unenforceable when they were neither entered as a stipulated judgment nor negotiated or supervised by the U.S. Department of Labor ("DOL"). *Id*. at *4. In absence of any Eighth Circuit precedent to the point, the Court remarked that the risk was minimal that an unreasonable settlement would result from "unequal bargaining power as between employer and employee" in FLSA lawsuits where each of the following three criteria was met: (i) the lawsuit was not a collective action; (ii) all individual Plaintiffs were represented by an attorney thought the proceedings ; and (iii) all parties had indicated to the Court in writing through their attorneys that they wished for their settlement agreement to remain private and that they did not wish for any reasonableness review of their

settlement to occur. *Id.* In such cases, the Court held that any reasonableness review or public filing of an FLSA settlement was unnecessary. Accordingly, as each of the requirements was met, the Court denied the parties' motion, and instructed them to file a joint stipulation of dismissal. *Id*. at *7-8.

Editor's Note: Though not a certified collection action, the result in *Schneider* adopts a minority view that FLSA settlements need not be approved by the Court or the DOL.

***Sharobiem, et al. v. CVS Pharmacy, Inc.,* Case No. 13-CV-9426 (C.D. Cal. Sept. 2, 2015).** Plaintiff, a pharmacist, brought a class action alleging that Defendants failed to pay overtime compensation. After the parties settled the matter, Plaintiff moved for preliminary approval of the settlement and provisional class certification, which the Court denied. The Court observed that Plaintiff failed to provide sufficient information on how she estimated the class had claims for $4.26 million in overtime compensation. *Id*. at 2. The Court observed that Plaintiff merely stated that Plaintiff's counsel conducted a detailed analysis of class member data to arrive at that amount, but otherwise gave no explanation of that analysis. *Id*. The Court noted that Plaintiff failed to provide a reasoned analysis of why the case was properly discounted to the $2,937,600 settlement amount, which was approximately 69% of the estimated total possible recovery of $4.26 million. *Id*. The Court noted that Plaintiff claimed in a cursory fashion that the settlement was appropriate given the continued risks of litigation, including the uncertainty of achieving class certification, increased fees, and costs of taking a case through trial and possible appeal. *Id*. The Court found that Plaintiff failed to provide sufficient information about class members' pay rates for the Court to determine whether the recovery amount was within the range of reasonable allocations of the $2,937,600. *Id*. at 3. The Court, accordingly, refused to give preliminary approval to the class settlement. The Court next observed that Plaintiff did not explicitly request certification of an FLSA collective action, yet the settlement agreement included provisions regarding the release of FLSA claims, clearly contemplating the existence of an FLSA collective action. *Id*. For this reason, the Court ruled that Plaintiff must first move for preliminary certification of both a class action and collective action supported by the relevant declarations. Further, the Court expressed serious reservations about the scope of the FLSA release. The Court explained that the FLSA authorizes only opt-in collective actions, and under no circumstances could Plaintiff's counsel collude to take away the FLSA rights including the worker's right to control his or her own claim without having the burden of having to opt-out of someone else's lawsuit. *Id*. Here, no separate value was being paid for the FLSA release, and yet, if a class member choose not to opt-into the FLSA collective action by not filing a claim form, he or she would have released all state law claims for no compensation at all. Accordingly, the Court concluded that the settlement was not fair, reasonable, and adequate. *Id*. at 4. The Court also expressed concerns with the claim form, as the form's instructions were unfairly confusing, and did not differentiate between a class action and the FLSA collective action. *Id*. at 5. Accordingly, the Court denied Plaintiff's motion for approval of the settlement.

***Stewart, et al. v. USA Tank Sales, Inc.*, Case No. 12-CV-5136 (W.D. Mo. Aug. 3, 2015).** Plaintiffs, a group of current and former tank makers, brought a collective and class action alleging that Defendant denied them overtime compensation in violation of the FLSA and the Missouri Minimum Wage and Maximum Hour Law. Subsequently, the parties settled the action, and Plaintiffs moved for approval of a joint settlement stipulation. Pursuant to the settlement agreement, Defendant paid $12,629.58 to Plaintiff Shawn Stewart; $12,687.16 to Plaintiff Brian Damann; $8,406.93 to Plaintiff Grant Oilar; $20,019.23 to Michael Hagermann; $13,896.38 to Nathan Damann; $12,847.31 to Plaintiffs' counsel for reimbursement of expenses; and $57,013 to Plaintiffs' counsel for attorneys' fees. *Id.* at 2. In return, all five of the named Plaintiffs agreed to waive their FLSA claims against Defendant. *Id.* The Court, however, determined that the record was missing necessary information regarding the settlement, because the settlement provided payment to two individuals, Michael Hagermann and Nathan Damann, who were not parties to this lawsuit, and there was no explanation on the record explaining why they were receiving money. *Id*. Furthermore, nothing in the existing record explained how this litigation involved a *bona fide* wage & hour dispute, how the proposed settlement was fair and equitable to all parties, or the reasonableness of the proposed attorneys' fees award. *Id.* at 3. Thus, the Court concluded that it could not approve the settlement. Accordingly, the Court denied Plaintiffs' motion for settlement approval.

***Stubrud, et al. v. Daland Corp.,* 2015 U.S. Dist. LEXIS 114505 (D. Kan. Aug. 28, 2015).** Plaintiffs, a group of current and former delivery drivers, brought a collective action alleging that Defendants failed adequately to reimburse Plaintiffs' automobile expenses, which led their net wages to fall below the federal minimum wage. The parties subsequently settled, and Plaintiffs moved the Court for approval of a collective action settlement and attorneys' fees. The Court denied the motion. The Court noted that, although the FLSA does not require a fairness hearing like that required for settlements of class actions brought under Rule 23, many judges have determined that fairness hearings should be held unless the parties notify the Court that the opt-in Plaintiffs received notice of the settlement and had an opportunity to object. *Id.* at 1. The Court found that Plaintiffs' submissions did not reflect that opt-in Plaintiffs had received notice of the settlement and had an opportunity to object. However, the Court declined to set a fairness hearing because it found that it could not approve the settlement agreement in its existing form. *Id.* The Court held that the settlement agreement should not be kept confidential and should not prohibit or penalize collective action members for sharing information about the settlement with others. The Court found that, because the parties' agreement contained a provision that penalized members from disclosing the terms of the settlement, the Court could not approve it. Finally, the Court determined that the exhibit referred to in the settlement agreement – containing the list of all opt-in Plaintiffs and the corresponding settlement amounts calculated – was not attached with the agreement. *Id.* at 2. Accordingly, the Court denied Plaintiffs' motion to approve the collective action settlement and attorneys' fees and ordered the parties to submit a revised settlement agreement.

***Valdez, et al. v. The Neil Jones Food Co.,* 2015 U.S. Dist. LEXIS 9284 (E.D. Cal. Jan. 26, 2015).** Plaintiffs, a group of non-exempt hourly employees, brought a class action against Defendant alleging failure to provide meal and rest breaks and failure to pay overtime. The parties settled and sought approval of the class action settlement. The Court denied preliminary approval of the parties' settlement, and subsequently Plaintiffs filed a second motion for preliminary approval. The Magistrate Judge again recommended denying the motion. The parties sought to approve a single class for the purposes of settlement consisting of hourly employees within California. The Magistrate Judge found that Plaintiffs failed to establish commonality. While the named Plaintiff Valdez testified that he did not receive overtime on three occasions, Plaintiff Martinez testified that she never worked more than eight hours without receiving overtime. *Id.* at *16. Regarding the meal breaks claim, Plaintiff Martinez contended that Defendant knew she could not go to lunch because she was the only mechanic. The Magistrate Judge remarked that even if that were the case, it did not establish commonality for the class as a whole. Plaintiff Martinez testified that for a period of time Defendant told her to take a 20-minute rather than a 30-minute lunch break. The Magistrate Judge found that although this claim might prove to be sufficient to establish commonality with those employees working under the same conditions, the motion for preliminary approval did not raise this question. *Id.* at *17. In addition, Plaintiffs' testimony about the period of rest breaks Defendant permitted varied. As a result, the Magistrate Judge concluded that Plaintiffs failed to raise a common question that was capable of class-wide resolution. *Id.* at *19. Accordingly, the Court denied class certification. The Magistrate Judge also noted that in the initial motion for preliminary approval, the parties only provided for notice to be mailed to the last known address of the employee, which Defendant had to provide to the settlement administrator. The Court found that this was not sufficient to meet the notice requirement. Although the revised agreement required the settlement administrator to do a skip trace for any mail that was returned without a forwarding address and mail a notice to any newly discovered address, the Magistrate Judge remarked that this did not remedy the earlier concern. Because Defendant's employees were seasonal workers, over half of the proposed class members had not worked for Defendant for a year or longer. Thus, the Magistrate Judge found that there still existed the concern that the addresses provided by Defendant would not be current. *Id.* at *25-26. Finally, the Magistrate Judge noted that after deducting $268,000 in attorney fees from the total settlement amount of $850,000, the net settlement fund of $531,758 provided for $3.33 to compensate each pay period equivalent that included Defendant's share of the payroll taxes. Given that 75% of any undistributed funds would revert to Defendant, the Magistrate Judge opined that the parties may have agreed upon an inflated settlement fund, knowing that a large number of the class members would not receive notice or submit claim forms, in order for class counsel to receive substantial attorneys' fees with Defendant not significantly at risk of

actually incurring the obligation to pay the majority of the net settlement fund. *Id.* at *27. Accordingly, the Magistrate Judge recommended denying preliminary approval to the settlement.

***Vargas, et al. v. General Nutrition Centers, Inc.,* 2015 U.S. Dist. LEXIS 35330 (W.D. Pa. Mar. 20, 2015).** In this FLSA collective action seeking overtime pay, the parties, following a settlement, filed a joint motion to file their settlement agreement and release under seal citing their mutual understanding that the documents should be deemed confidential. *Id*. at *2. The Court denied the motion. The Court determined that the FLSA settlement agreement submitted to the Court for approval is a judicial record and, as such, the FLSA settlements are subject to the right of access doctrine and available to the public unless the parties make a sufficient showing to override the strong presumption of access. *Id*. The Court indicated that the parties, however, had ignored that body of law and had instead sought the Court to deem their settlement agreement and release to be confidential. The Court noted that a stipulation to seal would not overcome the strong presumption, nor would the mere fact that the settlement agreement contained a confidentiality provision. *Id.* at *3. Thus, the Court concluded that the parties had failed to make sufficient showing to override the strong presumption in favor of the public's right of access. Accordingly, the Court denied the parties' motion.

***Wallace, et al. v. Countrywide Home Loans, Inc.,* Case No. 08-CV-1463 (C.D. Cal. April 17, 2015).** Plaintiffs, a group of branch account executives, brought a putative class action and a collective action alleging that Defendant misclassified them as exempt and denied them overtime pay in violation of the FLSA and the California Labor Code. Defendant allegedly classified Plaintiffs as exempt from overtime pay requirements from 2002 to 2004. Later, Defendant re-classified them as non-exempt and paid them overtime pursuant to a voluntary back pay program. Under the program, Defendant sent each qualifying employee an acknowledgment letter explaining the details of the back pay programs, and paid five hours of overtime pay per week of employment. *Id.* at 2-3. Plaintiffs brought this action challenging Defendant's program of distributing back pay. Eventually, the parties reached a settlement on behalf of a class of the branch account executives who received compensation in connection with Defendant's back pay program. *Id.* at 5. Under the settlement agreement, each member of the settlement class who timely submitted a claim was entitled to receive the lesser of: (i) $1,500; or (ii) the number of overtime hours the class member contended to have worked in excess of five hours per week multiplied by 1.5 times the regular rate for each pay period. *Id.* at 6. The settlement agreement also provided that each of the three named Plaintiffs could apply for an enhancement award of $7,500 and that Plaintiffs' counsel could apply for an award of costs not to exceed $150,000 and attorneys' fees of up to $3,150,000. *Id.* The settlement agreement estimated a maximum total settlement pay-out of $10,500,000. Plaintiffs moved for final approval of settlement and Plaintiffs' counsel sought $3,150,000 in attorneys' fees. The Court granted final approval of the settlement finding it fair, reasonable, and adequate. The Court noted that in light of the risks and uncertainties, the settlement amount represented a positive result for the settlement class and it included a fair, reasonable, and adequate scheme for distributing payments to class members. *Id.* at 11. The Court further granted Plaintiffs' motion for attorneys' fees, finding that a departure was warranted from the Ninth Circuit's benchmark of 25% of the common fund recovery. *Id.* at 21. The Court found the requested fees reasonable in light of the entire history and circumstances of the case. *Id.* at 17-18. The Court noted that the settlement created a $6,271,500 settlement fund for 4,181 potential class members, and 1,079 class members would receive payments ranging up to 41,500, and totaling approximately $1,509,596.98. *Id.* at 18. The Court found that Plaintiffs' counsel achieved significant results on behalf of the class, expending thousands of attorney and paralegal hours on this complex case over its nine and a half year history, and this weighed in favor of awarding the requested fee. Moreover, the lodestar cross-check also confirmed the reasonableness of the requested fee. The Court noted that Plaintiffs' counsel submitted a lodestar figure of $3,424,687.50, calculated at rates between $350 to $600 per hour, and sought the maximum amount of fees and costs available under the settlement agreement, which represented a 0.92 fee multiplier under the lodestar approach. *Id.* at 21. The Court therefore found Plaintiffs' counsels' requested attorneys' fees in the amount of $3,150,000 reasonable, and accordingly, granted final approval of the settlement.

***Willner, et al. v. Manpower, Inc.*, 2015 U.S. Dist. LEXIS 65 (N.D. Cal. Jan. 2, 2015).** Plaintiff, an hourly employee, brought a putative class action alleging that Defendant failed to furnish accurate wage statements, and failed to pay all wages to employees who received their wages by U.S. mail in violation of the California Labor Code. The parties settled the action and filed a motion for preliminary approval, which the Court denied without prejudice. The Court had identified three obvious deficiencies in the settlement agreement, including: (i) the release was overly broad; (ii) it omitted the average payment that each claimant could expect to receive; and (iii) it omitted the amount that was expected to be paid to the claims administrator. The parties subsequently filed an amended settlement agreement and the Court granted settlement approval. Under the settlement agreement, Defendant agreed to make a maximum settlement payment of $8,750,000, which consisted of (i) all settlement payments to class members; (ii) class counsel's attorneys' fees; (iii) the class representative's incentive payment; (iv) the settlement administrator's fees and costs; (v) the hold-back fund to cover any required payments to the claimants who were mistakenly omitted from the class list; and (vi) the payment under the Private Attorney General Act to the state. *Id*. at *15. The Court found that the amended settlement agreement had corrected the three obvious deficiencies identified in its previous order. First, the parties revised the language of the release to clarify that it applied only to claims that "arise out of the allegations in the lawsuit." *Id.* at *8. Although the original version of the settlement agreement erroneously contained the words "or are related to," the parties discovered the mistake and corrected it. *Id.* Second, the proposed notice now reflected that there were approximately 20,270 class members; identified the average payment each claimant could expect to receive; identified the amount expected to be paid to the claims administrator; and listed the address and contact information of the claims administrator. *Id*. at *9. Finally, the settlement agreement provided class members with 60 days to opt-out or object to the settlement. In light of the parties' amendments to the proposed settlement agreement, the Court concluded that the settlement fell "within the range of possible approval," and granted Plaintiff's motion for provisional certification of the settlement class. *Id*. at *10. The Court clarified that the certification was for settlement purposes only, and would not constitute or be construed as an admission by Defendant that this action was appropriate for class treatment for litigation purposes. *Id*.

***Willner, et al. v. Manpower, Inc.,* 2015 U.S. Dist. LEXIS 80697 (N.D. Cal. June 22, 2015).** Plaintiff, an hourly employee, brought a putative class action alleging that Defendant, a temporary staffing firm, violated the California Labor Code by failing to furnish accurate wage statements and to timely pay all wages to employees who received their wages by U.S. mail. *Id.* at *2. The parties eventually settled. Following preliminary approval of the parties' proposed settlement agreement and a conditional certification of a putative class for settlement purposes, Plaintiff moved for final approval of the settlement. The settlement required Defendant to create a fund of $8,750,000, which represented 30% to 35% of the estimated recovery. *Id.* at *4. The amount included payments to the class, attorneys' fees and costs, any service award to Plaintiff, penalties under the Private Attorney General Act in the amount of $65,625, a $25,000 hold-back fund to cover payments to mistakenly omitted claimants, and an estimated $102,000 for the cost of settlement administration. *Id.* The Court granted the motion for final approval of the settlement, finding that the strength of Plaintiff's case, its risk, complexity, and the likely duration of litigation, as well as and risk of achieving and maintaining class action status all favored approval. *Id.* at *8-10. The Court further determined that the parties had conducted sufficient discovery that allowed them to make an informed decision regarding the adequacy of the settlement, and the percentage of recovery was fair and reasonable given the uncertainties attached to the litigation of Plaintiff's claims. *Id.* at *12-13. The Court thus found the settlement fair, reasonable and adequate. The Court, however, rejected the request of Plaintiff's counsel for a 33.33% fee award totaling $2,916,666.67. Although Plaintiff argued that class counsel obtained substantial monetary relief and a policy change valued at as much as $13,125,000, and faced substantial risks in prosecuting the litigation, the Court opined that an award of 33.33% of the common fund was not appropriate given that class counsel provided no way for the Court to confirm the correctness of policy change's value. *Id.* at *18-20. While the parties did not provide sufficient information from which the Court could place a specific value on it, the Court noted that if it valued the policy change at an amount equaling at least $1,750,000 – about 13% of the estimate of Plaintiff's counsel's– then a fee award of $2,625,000 would represent 25% of the total actual and constructive relief obtained by counsel. *Id.* at *21-22. Because the briefs and declarations submitted in connection with the motion for fees adequately

supported the anticipated $1,251,463 total lodestar, the Court concluded that a fee award of $2,625,000 was reasonable. *Id.* at *22. The Court therefore awarded attorneys' fees in the amount of 30% of the common fund in the amount of $2,625,000.

(xvii) DOL Wage & Hour Enforcement Actions

***Gate Guard Services, LP, et al. v. U.S. Department Of Labor*, 2015 U.S. App. LEXIS 11480 (5th Cir. July 2, 2015).** Following an investigation by the U.S. Department of Labor ("DOL") that Gate Guard Services, LP violated the FLSA, and that an enforcement action was imminent, Gate Guard sued the DOL seeking a declaration that it was in compliance with the FLSA. In 2010, acting on a tip from a former gate attendant that Gate Guard was misclassifying its attendants as independent contractors, DOL investigator David Rapstine opened a formal investigation. *Id*. at *4. Rapstine had little training or experience in contractor misclassification cases, and in what appeared to be a cursory investigation based on his failure to ask basic questions, concluded that Gate Guard misclassified 400 gate attendants as independent contractors, and therefore, it failed to abide by the FLSA's minimum wage and overtime requirements. *Id*. at *6. Before this complaint was served, the DOL filed its own FLSA enforcement action for back wages and injunctive relief, and both cases were consolidated. After having opposed every move from Gate Guard, it became clear that the DOL had no viable position due to a nearly identical case entitled *Mack v. Talasek*, 2012 U.S. Dist. LEXIS 42485 (S.D. Tex. Mar. 28, 2012), which found that gate attendants were not FLSA-covered employees. The District Court granted Gate Guard summary judgment against the DOL's claims, and the DOL did not appeal. Gate Guard then moved to recover attorneys' fees under the Equal Access to Justice Act's ("EAJA") bad faith provision, 28 U.S.C. § 2412(b). *Id*. at *12. The District Court concluded that the DOL's conduct was not sufficiently egregious to constitute bad faith, and denied the request. *Id*. The District Court, however, allowed Gate Guard to recover attorneys' fees under the EAJA's substantially justified provision under the § 2412(d). Gate Guard then reframed its original fee request, and the District Court found that the DOL's position was not substantially justified and awarded over $565,000 in attorneys' fees. Both sides appealed and the Fifth Circuit found that the award of attorneys' fees under the EAJA's bad faith provision was appropriate. At the outset, the Fifth Circuit noted that the EAJA provides two paths for recovering attorneys' fees: (i) under § 2412(b), the federal government may be liable for attorneys' fees to the same extent that any other party would be liable under common law, *i.e.*, District Courts can award fees when a party has acted in bad faith; and (ii) under § 2412(d), which allows District Courts to award attorneys' fees unless the position of the federal government was substantially justified. *Id.* at *13. Here, the Fifth Circuit found that the DOL's position was poorly documented and legally dubious as of the commencement of the litigation. *Id*. at *19. As the case progressed, the Fifth Circuit remarked that the government's intransigence in spite of its legally deteriorating case, combined with extreme penalty demands and outrageous tactics, together supported a bad faith finding. *Id*. Accordingly, the Fifth Circuit concluded the government's bad faith was established. The Fifth Circuit remarked that the government's extraordinarily uncivil and costly litigation tactics strongly suggested that it hoped to prevail by oppressively pursuing a very weak case, which left Gate Guard at a tremendous and unfair disadvantage. *Id*. at *22-23. The Fifth Circuit observed that without Rapstine's notes or witnesses statements, Gate Guard had no way of assessing its risk in this case or evaluating its settlement potential. Only by expending over $800,000 in attorneys' fees, wasting countless hours of employees' time, and marshalling affidavits from 94 gate attendants was Gate Guard able to vindicate itself. *Id*. at *22. The Fifth Circuit concluded these expenditures were needless, and accordingly, remanded the case to the District Court for calculation of attorneys' fees under § 2412(b). *Id*. at *25.

***Home Care Association Of America, et al. v. Weil,* 2015 U.S. Dist. LEXIS 4401 (D.D.C. Jan. 14, 2015).** Plaintiffs, a group of trade associations that represent third-party home care providers, brought an action challenging the U.S. Department of Labor's ("DOL") narrowed definition of "companionship services" and the DOL's third-party employment regulation. *Id.* at *2. The companionship services exemption under 29 U.S.C. § 213(a)(15) exempts employers from paying minimum wage and overtime wages to employees in domestic service who provide companionship services to individuals who are unable to care for themselves. *Id.* at *3-4. The DOL's implementing regulations define "companionship services" to mean those services which provide fellowship, care, and protection for persons who, because of advanced age or physical or mental infirmity, cannot care for their own needs. *Id.* at *4. Under the definition, companionship

services can include limited general household work not to exceed 20% of total weekly work hours. *Id.* In 2013, the DOL issued a final rule revising its domestic service employment regulations at 29 C.F.R. Part 552. The final rule eradicated the exemption for third-party employers and contained a new, significantly-narrowed, definition of "companionship services." *Id.* at *5. The final rule defined "companionship services" to mean the provision of fellowship and protection to elderly persons or persons with illness, injuries, or disabilities who require assistance in caring for themselves. *Id.* Although the new definition included the provision of care, it required that the care be attendant to, and in conjunction with, the provision of fellowship and protection and limited the provision of care to 20% of the total hours worked per person and per workweek. *Id.* Plaintiffs moved to vacate the DOL's new definition of "companion services," arguing that this definition violated the language and legislative intent of FLSA because it removed "care" from the regulatory definition. *Id.* at *9. The Court granted the motion. Although Congress has not defined the outer bounds of companionship services, it has addressed whether that definition must include, in a meaningful way, the provision of care. The Court held that the exemption clearly targets workers who provide services to those who need care, and limiting that care to only 20% of a worker's total hours defies logic and Congressional intent. *Id.* at *15. Congress did not limit the companionship services exemption to services provided on a "casual basis," as it did for its babysitter exemption within the same statutory provision, and, when discussing the companionship services exemption in particular, legislators expressed their concern with the ability of their constituents to pay for in-home care provided on a regular basis. *Id.* at *16. Home care workers have been providing care to the elderly and disabled, under the umbrella of the companionship services exemption, since the enactment of the 1974 FLSA Amendments. Although Congress has made numerous changes to the FLSA exemptions, the Court observed that it had not cabined the definition of companionship services, which has been interpreted by the DOL the same way for 40 years. *Id.* at *19. The Court opined that Congress' intent in 1974 to exempt from minimum and overtime wage requirements domestic workers providing services, including care to the elderly and disabled, was as clear today as it was 40 years ago. Accordingly, the Court vacated the DOL's regulation defining "companionship services," promulgated in 78 Fed. Reg. 60,557 and to be codified at 29 C.F.R. § 552.6.

***Home Care Association Of America, et al. v. Weil,* 2015 U.S. App. LEXIS 14730 (D.C. Cir. Aug. 21, 2015).** Plaintiffs, three associations of home care agencies, brought an action challenging the U.S. Department of Labor's ("DOL") extension of the FLSA's minimum wage and overtime provisions to employees of third-party agencies who provide companionship services and live-in care within a home. *Id.* at *5. The FLSA exempts "domestic service" workers providing either companionship services of live-in care for the elderly, ill, or disabled, from its protections guaranteeing a minimum wage and overtime pay. *Id.* at *3-4. Until recently, the DOL interpreted these exemptions to include employees of third-party providers. However, the growing demand for long-term home care services and the rising cost of traditional institutional care fundamentally changed the nature of the home care industry, and correspondingly, professionals employed by third-party agencies increasingly have started providing the residential care services. *Id.* at *4-5. In response to these developments, the DOL adopted regulations bringing the companionship-service and live-in workers employed by third-party agencies within the FLSA's minimum wage and overtime protections. *Id.* at *5. The District Court invalidated the DOL's new regulation, concluding that they contravened the terms of the FLSA exemptions. *Id.* at *5-6. On the DOL's appeal, the D.C. Circuit reversed the District Court, finding that the DOL's decision was grounded on a reasonable interpretation of the statute and was neither arbitrary nor capricious. *Id.* at *6. The D.C. Circuit agreed with the DOL that its revised regulation was within the scope of its rule-making authority under the general agency delegation in § 29(b) of the 1974 Amendments because the subject matter of the regulation concerned a matter in respect to which the agency was expert. *Id.* at *13-15. Plaintiffs argued that, even if the regulation amounted to a valid exercise of the DOL's authority, it exceeding its authority when, instead of "defining" the terms of the companionship-services exemption, it issued a rule providing that third-party employers "may not avail themselves" of the exemption. *Id.* at *18. The D.C. Circuit rejected Plaintiffs' argument on the grounds that the DOL's authority did not flow solely from the language of the authorizing section, but from the general grant provided by § 29(b) to "work out" the statutory "gaps" through rules and regulations. *Id.* Plaintiffs also argued that DOL's new rules conflicted with the legislative history of the FLSA Amendments. The D.C. Circuit, however, found that the statute's legislative history provided no

clear answer to the third-party employment question. *Id.* at *19. Further, because Congress' overriding intent was to bring more workers within the FLSA's protection and the 1974 Amendments intended to expand the coverage of the FLSA to include all employees whose vocation was domestic service, the D.C. Circuit held that the DOL reasonably determined that the companionship-services and live-in exemptions from coverage should be defined narrowly in the regulations to achieve the law's purpose. *Id.* at *21. Moreover, the DOL justified its shift in policy based on the "dramatic transformation of the home care industry since the promulgation of the third-party employer regulation in 1975." *Id.* at *25. The DOL suggested that the new rule would improve the quality of home care services, because it would bring more workers under the FLSA's protections, which would create a more stable workforce by equalizing wage protections with other health care workers and reducing turnover, and it would benefit consumers because supporting and stabilizing the direct care workforce would result in better qualified employees, lower turnover, and a higher quality of care. *Id.* at *29. In light of the DOL's explanation, the D.C. Circuit concluded that the DOL's conduct was neither arbitrary nor capricious. Accordingly, the D.C. Circuit reversed the District Court's order and remanded for the entry of summary judgment in the DOL's favor.

***In The Matter Of Texas Roadhouse Management Corp.,* 2015 DOL Ad. Rev. Bd. LEXIS 39 (DOL July 21, 2015).** In this action, an employer appealed a decision and order of a U.S. Department of Labor Administrative Law Judge ("ALJ"), which affirmed the Wage & Hour Division's ("WHD") assessment of a civil money penalty for repeated violations of 29 U.S.C. §§ 206 and 207. Based on the WHD's investigation in late 2011 and early 2012 of Texas Roadhouse's restaurant in Hickory, North Carolina, the WHD determined that the employer repeatedly violated §§ 206 and 207. *Id*. at *1. The WHD found that the employer: (i) improperly paid 12 head waitresses a tip credit wage for performing administrative work at the end of their shifts; and (ii) failed to properly factor production bonus payments into one employee's overtime compensation, resulting in underpayment of wages. *Id*. at *2. The WHD determined that Texas Roadhouse owed a total of $5,055.92 in back wages to 13 employees. *Id*. Similarly, in early 2012, the WHD conducted an investigation of Texas Roadhouse's restaurant in Bangor, Maine, and found multiple FLSA violations. In 2013, the WHD notified Texas Roadhouse that it was assessing a civil money penalty, pursuant to the FLSA, in the amount of $880 related to the Bangor violation. It cited the Hickory violations as the previous violation for imposing a civil money penalty for a repeat violation of the FLSA. An Order of Reference was subsequently filed with the Office of Administrative Law Judges that submitted the matter for final determination by an ALJ regarding entry of the assessment and the amount of the penalty. The only issue before the ALJ was whether Texas Roadhouse engaged in repeated violations of the FLSA. Upon cross-motions by the parties, the ALJ issued an order granting WHD's motion. On Texas Roadhouse's appeal, the ARB affirmed. At the outset, the ARB noted that a violation of §§ 206 and 207 of the FLSA shall be deemed a "repeated violation" where the employer has previously violated §§ 206 or 207, provided the employer had previously received notice. *Id*. at *5. Citing the FLSA's plain meaning and its implementing regulations, the ALJ found the employer engaged in repeated violations as defined by § 16(e)(2) of the FLSA. The ARB agreed with the ALJ that neither the FLSA nor its implementing regulations require the previous and subsequent violation to be the same or similar, as Texas Roadhouse had argued. *Id*. at *6. Moreover, the ARB agreed with the ALJ that even if the FLSA were interpreted to require similar violations before civil penalties could be imposed, the Hickory and Bangor violations were similar to the extent that both involved the improper payment to employees for the hours they worked. *Id*. at *7. Accordingly, the ARB affirmed the civil penalty.

***U.S. Department Of Labor v. Cathedral Buffett, Inc.,* 2015 U.S. Dist. LEXIS 153800 (N.D. Ohio Nov. 13, 2015).** Plaintiff, the U.S. Department of Labor ("DOL"), brought an enforcement action on behalf of 238 current and former employees of Defendants, alleging violations of the FLSA's minimum wage, overtime, record-keeping, and child labor provisions. *Id.* at *2. Defendants moved to dismiss for failure to state a claim upon which relief may be granted and for lack of subject-matter jurisdiction. The Court denied Defendants' motion to dismiss. First, the Court found that the DOL had adequately alleged facts to state a claim under the FLSA sufficient to meet the threshold pleading requirements of Rule 8(a)(2). *Id.* at *3. The Court observed that the complaint provided fair notice to Defendants and contained allegations that their employees had not received the minimum wage and overtime as required by the FLSA, and that Defendants improperly employed minors and failed to maintain required payroll records. *Id.* at *4.

Defendants argued that the Court lacked subject-matter jurisdiction over the allegations that Defendants violated the provisions of the Act which prohibited the employment of oppressive child labor. *Id.* at *6. The Court opined that the DOL had dual roles in recovering prospective injunctive relief for employees and in assessing civil money penalties for child labor violations. *Id.* The Court found that the FLSA authorized the assessment of civil money penalties for child labor violations and an injunction against Defendants to restrain them from violating §§ 12(c) and 15(a)(4) of the FLSA, 29 U.S.C. §§ 212(c) and 215(a)(4). *Id.* at *7. Consequently, the Court found that nothing in the FLSA or the regulations suggested that payment of civil money penalties foreclosed on the DOL's ability to obtain injunctive relief for child labor violations. *Id.* Accordingly, the Court denied Defendants' motion to dismiss.

***U.S. Department of Labor v. El Tequila, LLC,* 2015 U.S. Dist. LEXIS 171446 (N.D. Okla. Dec. 22, 2015).** The U.S. Department of Labor ("DOL") brought an action alleging that Defendants violated the FLSA by failing to pay their employees the statutory minimum wage and overtime wages, and by failing to maintain sufficient records of their employees' wages and hours. *Id.* at *9-10. The Court had earlier granted the DOL summary judgment with respect to the calculation of damages and application of liquidated damages, except to the issue of willfulness of Defendants' violations. Referring the issue to the jury, the Court instructed that Defendants' violations of the FLSA were willful if Defendants either knew that their conduct violated the FLSA or showed reckless disregard for the matter of whether it did. The jury heard testimony from a number of witnesses on the issue of willfulness, and determined that Defendants willfully violated the FLSA during the relevant time. *Id.* at *11-12. Defendant Carlos Aguirre, who controlled the operations of Defendant El Tequila, LLC, admitted that he paid employees a set salary regardless of the number of hours they worked. *Id.* at *13. Although Aguirre kept handwritten records of how much he actually paid his employees in cash and checks, he admitted that he falsified records, and sent fake information to his accountant to make it look as if paid his employees the minimum wage and overtime. *Id*. at *4-5. Aguirre admitted to hiding this information from a DOL investigator in 2010 and instructing his employees also to tell the same lies. *Id.* at *20. The Court determined that Defendants knew that they were breaking the law and took steps to cover it up. *Id.* at *25. The Court thus held that Defendants' violations met the standard for willfulness under the FLSA, and accordingly, granted the DOL's renewed motion for judgment as matter of law.

***U.S. Department Of Labor v. Howes, LLC*, 2015 U.S. App. LEXIS 10476 (6th Cir. June 22, 2015).** The Secretary of the U.S. Department of Labor ("DOL") brought an action alleging that Defendant, Darryl Howes, owner of Darryl Howes Farms, paid less than minimum wage to workers, failed to keep adequate time records for workers, provided substandard housing to workers, and interfered with the DOL's investigation into his labor practices in violation of the FLSA, and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). The District Court granted the DOL's motion for summary judgment, which the Sixth Circuit affirmed on appeal. The District Court had determined, contrary to Howes' contentions that: (i) Howes' cucumber harvesters were employees, and not independent contractors; (ii) Howes controlled the facilities used to house the migrant farm workers in 2011, and thus was liable for violations of the MSPA in regard to the provision of substandard housing; and (iii) Howes unlawfully interfered with the DOL investigation. *Id.* at *1-2. The Sixth Circuit noted that while granting the DOL summary judgment, the District Court carefully distinguished the Sixth Circuit's opinion in *Donovan v. Brandel,* 736 F.2d 1114 (6th Cir. 1984), where it had held that the pickling cucumber harvesters were not employees under the FLSA. *Id.* at *2. Because the District Court had correctly addressed the arguments that Defendant now raised on appeal, the Sixth Circuit affirmed the District Court's judgment. *Id.*

***U.S. Department Of Labor v. Pacific Coast Foods,* Case No. 13-CV-877 (W.D. Wash. Mar. 24, 2015).** In this enforcement action, the U.S. Department of Labor ("DOL") alleged that Defendants failed to comply with the minimum wage, overtime, and record-keeping requirements of the FLSA. After a jury decided in the DOL's favor, the Court entered judgment against Defendants and permanently enjoined and restrained Defendants from violating the FLSA. Specifically, the Court restrained Defendants from requiring any of their non-exempt employees to work in excess of 40 hours without paying one and one-half times the regular rate of their normal pay. *Id*. at 2. The Court also restrained Defendants from requesting, soliciting, or suggesting to any employee to return any money wages previously due. *Id*. at *2-3. The Court further

enjoined Defendants from discriminating, retaliating, or discharging any employee who filed a complaint, testified in a wage proceeding, or cooperated in a government investigation. *Id*. at 3. The Court ordered Defendants to pay $579,903.62, which represented the unpaid overtime compensation. *Id*. at *4. The Court also ordered Defendants to pay $72,956, which represented the unpaid minimum wage compensation. *Id*. The Court required Defendants to further pay an additional sum of $652.859.62 as liquidated damages, $31,800 due in damages for retaliation. *Id*. at *5. In sum, the Court ordered Defendants to jointly and severally liable to pay $1,337,519.20 for violating the FLSA.

(xviii) Application Of Statute Of Limitations In FLSA Collective Actions

***Baugh, et al. v. CVS RX Services, Inc.,* Case No. 15-CV-14 (E.D. Pa. July 24, 2015).** Plaintiff, a former floater pharmacist, brought an action alleging that Defendant denied him overtime wages in violation of the FLSA and Pennsylvania's Minimum Wage Act and Wage Payment and Collection Law. Defendant moved for summary judgment, which the Court granted. At the outset, the Court noted that a Plaintiff must bring his overtime claims under the FLSA within two years, and, if he proves a willful violation, the statute of limitations is extended to three years. Here, the Court found that Plaintiff adduced no evidence that Defendant willfully disregarded its obligations under the FLSA. *Id*. at *2. The Court observed that an employer has not willfully violated the FLSA if it acts reasonably in determining its legal obligation. *Id*. at *3. The Court therefore, ruled that absent willfulness, Plaintiff's claims were covered by the two-year statute of limitations. The Court noted that as Plaintiff was terminated on October 7, 2012, she filed this action on January 5, 2015, and therefore, her FLSA claims were time-barred. *Id*. As to Plaintiff's state law claims, the Court remarked that it can exercise supplemental jurisdiction over state claims only if they are related to claims upon which it has original jurisdiction. Accordingly, the Court dismissed Plaintiff's state law claims because her FLSA claims were dismissed. *Id*. at *4. The Court reasoned that 28 U.S.C. § 1367(d) ensures that Plaintiff's state law claims were tolled while pending for at least an additional 30 days after dismissal. *Id*.

***Tyus, et al. v. Wendy's Of Las Vegas, Inc.*, 2015 U.S. Dist. LEXIS 32591 (D. Nev. Mar. 13, 2015).** Plaintiffs, a group of employees, brought a putative class action alleging that Defendants failed to pay them the lawful minimum wage in violation of Nevada Statutes. *Id.* at *2. Defendants moved for partial judgment on the pleadings, which the Court granted. Defendants asserted that Nevada Revised Statute ("NRS") § 608.260 provided that the applicable statute of limitations was two years for minimum wage claims, and therefore, Plaintiffs' class and individual claims falling outside the two year statute of limitations must be dismissed. *Id.* at *4. Plaintiffs, however, asserted that NRS § 608.260 did not apply to this case, as the Minimum Wage Amendment that contained no limitation for actions to enforce its terms had impliedly repealed NRS § 608.260. *Id*. The Court noted that in *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013), the Ninth Circuit ruled that "although the Minimum Wage Amendment is silent on the limitation period for minimum wage actions, such silence did not imply a repeal of the two-year limitation period of NRS § 608.260." *Id*. at *5. Plaintiffs, however, argued that Nevada Supreme Court's holding in *Thomas v. Nevada Yellow Cab Corp.,* 327 P.3d 518 (Nev. 2014), impliedly repealed NRS § 608.260. In *Thomas*, the Nevada Supreme Court held that "when a statute is irreconcilably repugnant to a constitutional amendment, the statute is deemed to be impliedly repealed by the amendment." *Id*. at *5-6. The Court found that unlike the statutory provision in *Thomas*, the two-year statute of limitations period found in NRS § 608.260 does not necessarily and directly conflict with the Minimum Wage Amendment, which would make it irreconcilably repugnant. The Court maintained that the statutory provision could be construed in harmony with the Nevada Constitution. *Id*. at *6. Thus, the Court concluded that although the Minimum Wage Amendment was silent on a limitations period, it did not impliedly repeal the two-year statute of limitations period found in NRS § 608.260. Accordingly, the Court dismissed with prejudice all wage claims accruing more than two years before Plaintiffs filed suit.

***Zhou, et al. v. WU,* 2015 U.S. Dist. LEXIS 26411 (S.D.N.Y. Mar. 3, 2015).** Plaintiffs, a group of former delivery workers, brought an action alleging that Defendants failed to pay minimum and overtime wages in violation of the FLSA and the New York Labor Law ("NYLL"). Defendants included three restaurants ("China Fun," "China Fun East," and "China Fun West"), and three individuals who ran them. Plaintiffs Weizhen Song and East Guangli Zhang were formerly employed with China Fun; and Plaintiff Zhang was

also employed at China Fun West, along with Plaintiff Zhongwei Zhou. *Id*. at *1-2. Defendants moved to dismiss the complaint, which the Court granted in part. Defendants sought dismissal arguing that statute of limitations on the claims of Song and Zhang had lapsed. The Court noted that Song stopped working at China Fun East on March 31, 2007, and therefore, his claims for a willful violation under the FLSA stopped on March 31, 2010. *Id*. at *9. Similarly, Defendants contended that Zhang left China Fun East on December 5, 2006, and China Fun West on December 5, 2010. Therefore, Defendants argued that Zhang's claims against China Fun East lapsed on December 5, 2009, and his claims against China Fun West lapsed on December 5, 2013. Defendants argued that since the complaint was filed on March 14, 2014, all of the claims were time-barred. The Court noted that equitable tolling allows extensions to statute of limitations, but only if a Plaintiff alleges that: (i) he has been pursuing his rights diligently; and (ii) some extraordinary circumstance stood in his way and prevented a timely filing. *Id*. at *11. In addition, the Court observed that deciding whether a Plaintiff acted with reasonable diligence under the circumstances, it may consider: (i) the party's efforts at the earliest possible time to secure counsel; (ii) the party's lack of education or funds to consult a lawyer; and (iii) the party's direct access to other forms of legal assistance. *Id*. The Court held that the question of equitable tolling was a factual issue that cannot be resolved on the pleadings. Accordingly, the Court denied Defendants' motion based on equitable tolling.

(xix) Concurrent State Law Claims In Wage & Hour Class Actions

***Chaplin, et al. v. SSA Cooper, LLC*, 2015 U.S. Dist. LEXIS 59058 (D.S.C. May 6, 2015).** Plaintiff, a former employee, brought an action seeking unpaid overtime compensation under the FLSA and the South Carolina Payment of Wages Act ("SCPWA"). Defendant filed a motion to dismiss Plaintiff's SCPWA claim on the grounds that it was a duplicative, alternately-pled cause of action for an FLSA violation. *Id* at *3. The Court denied the motion. Plaintiff contended that he based his SCPWA claim on Defendant's failure to pay bonuses required by Defendant's employment contracts and/or compensation policies, and he based his FLSA claim on Defendant's failure to pay overtime compensation. *Id*. at *3. The Court noted that the SCPWA provides remedies under South Carolina law to recover unpaid wages, and the FLSA provides statutory remedies for failure to pay overtime compensation. *Id* at *3. The Court acknowledged that several case law authorities had found that the FLSA preempted SCPWA claims when employees sought to recover unpaid overtime compensation or minimum wages provided by the FLSA. *Id*. at *4. Here, however, Plaintiff's SCPWA claim did not implicate a violation of federal statutory law; rather, Plaintiff's SCPWA claim arose out of Defendant's alleged failure to pay a non-discretionary bonus mandated by the employee compensation plan. *Id*. at *5. Specifically, the Court reasoned that Plaintiff alleged that Defendant deducted time from his compensable hours in order to avoid paying a bonus, even though he otherwise met the thresholds for the bonus. *Id*. The Court found that Plaintiff's allegations were separate and distinct from those asserted under the FLSA, and, therefore, Plaintiff's SCPWA claim was not preempted by the FLSA. *Id*. Accordingly, the Court denied Defendant's partial motion to dismiss.

***Foster, et al. v. M5 Hospitality Group, LLC,* 2015 U.S. Dist. LEXIS 111413 (D.S.C. Aug. 24, 2015).** Plaintiff, on behalf of a class of non-exempt employees, brought a collective and a class action, alleging that Defendant's practice of deducting 1% of tips for a mandatory tip pool, and requiring its servers to remit $1.00 per day back to Defendant from tips they received for "breakage" violated the FLSA provisions related to tip pools and minimum wages. *Id.* at *4. Plaintiff worked as a server at Defendant's restaurant, and Defendant allegedly paid him an hourly wage less than the statutory minimum wage by taking the tip credit under the FLSA. *Id.* Plaintiff alleged that the employees were entitled to full minimum wage of $7.25 per hour, without credit for the tips received, and also the total amount of the tips deducted. *Id.* at *5. Plaintiff also alleged that Defendant must pay for all hours worked over 40 hours in a workweek without any credit for tips received. *Id.* In addition, Plaintiff alleged that money received as tips constituted wages under the South Carolina Payment of Wages Act (the "SC Wage Act"), and that Defendant illegally deducted amounts from the wages of Plaintiff and the members of the class without providing proper written notice as required. *Id.* at *6. Defendant moved to dismiss Plaintiff's claim under the SC Wage Act, arguing that FLSA preempted the claim because it was predicated upon a finding of FLSA violations relating to the tip credit and tip pool, and was duplicative of the FLSA claims. *Id.* at *9. Defendant also asserted that the SC Wage Act does not contain any provisions regarding a tip credit or tip pool and that, in order to establish a violation under the SC Wage Act, Plaintiffs would have to establish FLSA violations first

and then seek the remedies provided by the exclusive FLSA enforcement scheme. *Id*. The Court denied Defendant's motion on the basis that Plaintiff plausibly stated a claim under S.C. Code Ann. § 41-10-30. *Id.* at *13. The SC Wage Act requires employers to notify employees in writing of the wages agreed upon and the deductions that will be made from the wages. *Id.* at *12-13. It further provides for recovery of an amount equal to three times the full amount of the unpaid wages in addition to other relief. *Id.* at *13. Because Plaintiff was not seeking payment of minimum wages or overtime under the SC Wage Act, but seeking return of the mandatory tip pool deductions and breakage deductions that Defendant allegedly made without proper notice, the Court found that Plaintiff plausibly stated a claim under the SC Wage Act. *Id.* The Court explained that the SC Wage Act is broader than the FLSA in that it is not limited to controversies involving minimum wage and overtime, but applies to all wages due, and thus Plaintiff's claim based on lack of written notice of deductions was separate and distinct from his FLSA claims. *Id.* at *13-14. Accordingly, the Court denied Defendant's motion to dismiss Plaintiff's claim under the SC Wage Act.

***Hurst, et al. v. First Student, Inc.,* 2015 U.S. Dist. LEXIS 143638 (D. Ore. Oct. 22, 2015).** Plaintiff brought a class action alleging that Defendant failed and refused to pay him and similarly-situated individuals for hours spent during training and orientation in violation of Oregon's minimum wage law. *Id.* at *1. Plaintiff attended Defendant's employment training program, which consisted of training on company policies, scenario analysis, first aid, and pre-trip bus inspection. *Id.* at *2. Defendant allegedly did not pay Plaintiff any wages for the time spent completing the training program. Plaintiff's action sought unpaid minimum wages and a civil penalty. Defendant moved for partial summary judgment as to the civil penalty claim, arguing that Plaintiff was time-barred from collecting the civil penalty. Under Oregon's minimum wage law, once a Plaintiff proves a violation of minimum wage law under ORS § 653.055, the employer is liable for unpaid minimum wages and a civil penalty as provided in ORS § 652.150. *Id.* at *5. Defendant argued that the two statutory sub-sections have different statute of limitations – six years for unpaid wages and three years for civil penalty – and thus, Plaintiff's claim could be split into two separate causes of actions, *i.e.*, one for unpaid minimum wages and one for an additional civil penalty. *Id.* The Court disagreed, and held that an examination of the provisions revealed that the unpaid minimum wages and the civil penalty were merely distinct types of damages, not separate claims. *Id.* at *4. Although the Court agreed with Defendant that the two statutory sub-sections have different statute of limitation, it found that Defendant offered no authority for the proposition that different limitation periods create distinct causes of action. *Id.* at *5. According to the Court, the civil penalty was one type of damages that could arise from an employer's failure to pay a minimum wage, and not, as Defendant impliedly asserted, a separate claim or cause of action. *Id.* at *6. Defendant also argued that Plaintiff lacked standing to claim a civil penalty. The Court rejected the argument, finding that Plaintiff's claim that he did not receive any wages for the time he spent in Defendant's training program was an injury-in-fact, sufficient to show standing. *Id.* at *7. Accordingly, the Court denied Defendant's motion for summary judgment on Plaintiff's individual claim for civil penalties.

***Lemus, et al. v. Denny's Inc.,* 2015 U.S. App. LEXIS 10284 (9th Cir. June 18, 2015).** Plaintiff, a former manager, filed a putative class action in state court alleging violations of the California Private Attorney General Act ("PAGA") and the California Labor Code. Plaintiff alleged that Defendant coerced him and other aggrieved employees to purchase slip-resistant shoes from Defendant's preferred vendor and deducted the cost of the shoes from the employees' wages. After Defendant removed the case to the District Court on the basis of diversity, the District Court granted Defendant's motion for summary judgment, and denied as moot Plaintiff's motion for class certification. On Plaintiff's appeal, the Ninth Circuit affirmed. First, the Ninth Circuit noted that, under § 2802(a) of the California Labor Code, an employer must indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. *Id*. The Ninth Circuit, however, found that Plaintiff had not argued that the black, slip-resistant shoes that Defendant allegedly coerced him into buying were part of a uniform or otherwise were not generally usable in the restaurant occupation. *Id*. at *3. Therefore, despite the general indemnification provision in § 2802, the Ninth Circuit held that Defendant was not required to reimburse the cost of slip-resistant footwear. *Id*. at *3-4. Plaintiff also argued that Defendant violated § 221 of the Labor Code when Defendant deducted the cost of slip-resistant footwear from the wages of its employees. *Id*. at *4. Plaintiff asserted that he did not expressly

authorize in writing wage deductions when he ordered slip-resistant shoes electronically. *Id*. at *5. The Ninth Circuit, however, rejected Plaintiff's argument because California law explicitly states that "if a law requires a record to be in writing, an electronic record satisfies the law." *Id*. Because Plaintiff ordered his shoes on-line and logged-on to the computer using a personal password, the Ninth Circuit found that the District Court did not err in granting summary judgment on Plaintiff's claim. *Id*. Finally, the Ninth Circuit determined that there was no evidence that Defendant threatened Plaintiff or indicated that it would punish Plaintiff if he did not buy his shoes from its preferred vendor. *Id*. at *6-7. The Ninth Circuit noted that, although the facts showed some pressure to purchase from the preferred vendor, Defendant did not utilize physical force or threat of force, nor did it exert overwhelming pressure on its employees. *Id*. Accordingly, the Ninth Circuit concluded that the District Court did not err and affirmed the District Court's order granting Defendant's motion for summary judgment.

***Makaneole, et al. v. Solarworld Industries America, Inc.,* 2015 U.S. Dist. LEXIS 28333 (D. Ore. Mar. 9, 2015).** Plaintiff brought a putative class action and alleged that Defendants' practice of programming an electronic time-keeping system to deduct minutes from hours worked denied him wages and overtime pay in violation of Oregon state law. In December 2014, the Magistrate Judge had recommended dismissal with prejudice Plaintiff's third claim as to all Defendants. *Id*. at *1. The Magistrate Judge noted that Plaintiff's third claim – for Defendants' failure to pay wages on termination – was based on the same factual allegations as those underlying Plaintiff's second claim for Defendants' failure to pay overtime. *Id*. at *2. The Magistrate Judge found that under Oregon law, a Plaintiff may not seek two penalties for violations of wage & hour laws based on the same underlying facts. *Id*. Thus, the Magistrate Judge recommended dismissal Plaintiff's third claim with prejudice, since Plaintiff sought two penalties based on the same set of facts. *Id*. at *3. Plaintiff filed Rule 72 objections, asserting that the Magistrate Judge erred in recommending dismissal of Plaintiff's third claim with prejudice because: (i) Oregon permits recovery of a double penalty based on facts that allege more than one wage & hour law violation; and/or (ii) in this putative class action there could be Plaintiffs who have claims for regular wages that remain unpaid even though their employment had ended, but who did not have overtime claims. *Id*. Plaintiff contended that if the Court dismissed Plaintiff's third claim with prejudice, the class members who only had claims for regular wages that remain unpaid after termination would be unable to obtain any penalty because they would be ineligible to recover a penalty for Defendants' failure to pay overtime wages and they would be foreclosed from seeking a penalty for Defendants' failure to pay regular wages on termination. *Id*. The Court found that the Magistrate Judge did not err when he ruled that Plaintiff sought penalties in his second claim – for Defendants' alleged failure to pay Plaintiff overtime wages upon termination – that were duplicative of the penalties Plaintiff sought in his third claim for Defendants' alleged failure to pay overtime wages during employment. *Id*. at *3-4. The Court also concluded that the Magistrate Judge did not err when he found that Plaintiff was barred from seeking such duplicative penalties. *Id*. at *4. The Court, however, ruled that a party may raise alternative claims pursuant to Rule 8(d)(2), and if a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. *Id*. Thus, the Court permitted Plaintiff to plead claims in the alternative. Accordingly, the Court dismissed Plaintiff's third claim without prejudice, but permitted him to file an amended complaint curing the deficiencies. *Id*.

***Miranda, et al. v. Coach, Inc.,* 2015 U.S. Dist. LEXIS 51768 (N.D. Cal. April 17, 2015).** Plaintiffs, a group of former sales associates, brought a putative class action seeking unpaid and overtime wages under the California Labor Code. Plaintiffs alleged that Defendants required them to submit to a bag check when leaving the store that deprived them of time for breaks and meals, and kept them late without pay at the end of their shifts. The Court had previously dismissed Plaintiffs' overtime claims and request for injunctive relief, and had denied Defendants' motion to dismiss Plaintiffs' meal break and rest period claims. *Id*. at *1-2. Plaintiffs then amended their complaint realleging their overtime claims but not the injunctive relief claim. Defendants again moved to dismiss, and the Court denied the motion. At the outset, the Court remarked that when it dismissed the complaint, it gave Plaintiffs leave to amend, and that is exactly what they did. *Id*. at *2. The Court remarked that Plaintiffs made no changes that substantively altered their allegations, or that would require the Court to reverse its previous order denying Defendants' motion to dismiss meal and rest break claims. *Id*. at *2-3. The Court stated that it had previously dismissed the claims because the original allegations merely parroted the statute without alleging concrete facts showing

that the named Plaintiffs actually worked overtime hours without proper pay or failed to receive full regular wages. *Id*. The Court remarked that Plaintiffs had cured that defect in their amended complaint. *Id*. at *5. Because Plaintiffs had adequately alleged the remaining claims, it refused to dismiss the remaining claims. Defendants then argued that the time spent waiting for bag checks was non-compensable under the U.S. Supreme Court's opinion in *Integrity Staffing Solutions, Inc. v. Busk,* 135 S. Ct. 513 (2014), which held that time spent by employees waiting for and undergoing security screenings before leaving the workplace is not compensable under the FLSA. *Id*. at *6. The Court noted that while *Integrity Staffing Solutions* was premised on an interpretation of the Portal-to-Portal Act of 1947 and how it exempts employers from liability for certain categories of work-related activities, California law's definition for "hours worked" is defined differently and California law does not include an exemption similar to the Portal-to-Portal Act. *Id*. Accordingly, the Court denied Defendants' motion to dismiss.

***Moodie, et al. v. Kiawah Island Inn Co., LLC,* 2015 U.S. Dist. LEXIS 111394 (D.S.C. Aug. 4, 2015).** Plaintiffs, a group of Jamaican residents working under the H-2B visa program, brought an action alleging that Defendant violated the FLSA and the South Carolina Payment of Wages Act ("SCPWA") by failing to pay them the minimum wages and the prevailing wages. *Id.* at *4-5. According to the complaint, Defendant contracted with Florida East Coast Travel Services, Inc., to act as its agent and to assist in obtaining H-2B workers from Jamaica, and notified Plaintiffs that they had been hired or re-hired and had to travel to Kingston, Jamaica to undergo medical processing as a condition of obtaining their H-2B visas, and then to Defendant's jobsite in South Carolina. *Id.* at *2-3. Plaintiffs alleged that Defendant effectively paid them less than the minimum wage by not compensating them for the travel costs and medical costs they incurred while applying for visas in Kingston, Jamaica, and then in traveling to South Carolina. *Id.* at *3-4. Plaintiffs also alleged that Defendant improperly deducted housing and daily transportation costs from their pay and did not pay them the higher supplemental prevailing wage required by the DOL in 2013 in non-overtime weeks. *Id.* at *5- 8. Plaintiffs further alleged violations of the SCPWA and breach of contract claims for failure to pay the H-2B prevailing wage. *Id.* Defendant moved to dismiss all claims except the claims based on unreasonable deductions for housing and transportation. The Court denied Defendant's motion in part and granted in part. The Court denied Defendant's claim that it did not have to reimburse Plaintiffs' travel expenses because Plaintiffs were on H-2B work visas, not H-2A visas. *Id.* at *14. The Court found no reasonable basis to distinguish the costs of visas and inbound travel for H-2A and H-2B workers, which they incurred primarily for the benefit of Defendant. *Id.* at *16-18. The Court also denied Defendant's motion to dismiss Plaintiffs' claim of medical expenses, finding that the medicals testing was done primarily for the benefit of Defendant, and it served no purpose other than to allow Plaintiffs to work for Defendant on H-2B visas. *Id.* at *18-19. The Court further denied Defendant's motion to dismiss Plaintiffs' claim based on the DOL's notification regarding overtime finding that Defendant failed to state a basis for dismissal. *Id.* at *29. The Court reviewed the regulatory background that led to the new 2013 prevailing wage determination and found nothing that supported Defendant's conduct of not complying with the DOL's supplemental prevailing wage determinations. *Id.* at *26-30. The Court, however, granted Defendant's motion to dismiss to the extent Plaintiffs sought payment of the federal minimum wage or payment at the supplemental prevailing wage rate on their state claims. The Court found that Plaintiffs' state law claims were not merely duplicative of their FLSA claims as they sought the prevailing wage, which was higher than the federal minimum wage and the higher supplemental prevailing wage issued by the DOL in 2013 in non-overtime weeks. *Id.* at *31-32. Since Plaintiffs could not seek this compensation under the FLSA, the Court held that Plaintiffs were not barred from asserting state law claims for which FLSA failed to provide a remedy. *Id.* at *32. The Court also granted Defendant's motion to dismiss Plaintiffs' breach of contract claim to the extent Plaintiffs relied on promises Defendant made to the DOL that it would pay the prevailing wage as the terms of the employment contracts consisted of what Defendant promised Plaintiffs and not what it promised a third-party. *Id.* at *34-35. The Court, however, agreed with Plaintiffs that the H-2B regulation, which required the payment of the prevailing wage, was the law at the time the contract was created, and therefore, Plaintiffs stated a valid contractual breach claim based on H-2B regulations. *Id.* at *37-38. Accordingly, the Court granted Defendant's motion to dismiss Plaintiffs' claims to the extent it was duplicative of the FLSA claims and relied on promises made by Defendant to the DOL, and denied the motion in all other respects.

***Parham, Jr., et al. v. The Wendy's Co.,* 2015 U.S. Dist. LEXIS 33531 (D. Mass. Mar. 17, 2015).** Plaintiff, a former maintenance technician, brought a putative class action against Defendant seeking unpaid wages pursuant to the FLSA and Massachusetts overtime law. Defendant counterclaimed, asserting misrepresentation, breach of implied covenant of good faith and fair dealing, and breach of the duty of loyalty. Specifically, Defendant alleged that Plaintiff recorded work hours when he was not actually performing Defendant's work. *Id.* at *2. Both parties moved for partial dismissal. Defendant moved to dismiss Plaintiff's Massachusetts overtime law claim, and Plaintiff moved to dismiss the counterclaims against him. The Court denied Defendant's motion and partly granted Plaintiff's motion. Denying Defendant's motion, the Court found that Defendant failed to support its position that Plaintiff's work fell within the "restaurant" exemption enumerated in the Massachusetts overtime law, G.L. ch. 151, § 1A ("Section 1A"). The statute includes 20 enumerated exemptions, including one for "any employee who is employed…in a restaurant." *Id.* at *8. Defendant argued that Plaintiff worked "in a restaurant" within the meaning of this statue, and thus was not entitled to overtime pay. In support, Defendant relied on an opinion letter issued by the Massachusetts Department of Labor Standards ("DLS") pertaining to overtime exemptions listed in Section 1A concerning employees who were employed "in a hotel, motel, motel court or like establishment." *Id.* at *10. The DLS issued the letter in response to an inquiry about whether banquet servers employed by a hotel, who performed work in a hotel or on hotel property, were exempt from overtime pay. *Id.* The Court found that the DLS opinion letter did not support Defendant's assertion. Although Plaintiff worked in some aspect of restaurant operations, the Court reasoned that it was not enough to bring Plaintiff's job within the "restaurant" exemption. *Id.* at *11. The Court noted that Plaintiff was not employed in a traditional restaurant occupation, such as a host, cashier, server, cook, or dishwasher, and his job entailed traveling between Defendant's restaurants, performing maintenance and repair work both inside and outside the restaurants, and numerous other duties not tied to a particular restaurant, such as taking inventory of truck stock, purchasing parts from suppliers, or managing truck maintenance. *Id.* at *9-10. The Court also noted that, like traditional restaurant positions, Plaintiff did not report to on-site restaurant manager, but to a regional maintenance manager and a National Director of Facilities. *Id.* The Court pointed out that DLS, in its letter, has specifically declined to extend coverage to situations where services "are arguably no longer performed in a hotel." *Id.* The Court therefore declined to give the restaurant exemption enumerated in Section 1A the broad reading that would be needed to encompass Plaintiff's duties as Defendant's maintenance technician as alleged, and accordingly denied Defendant's motion to dismiss Plaintiff's Massachusetts overtime law claim. *Id.* at *12. In addition, the Court partly granted Plaintiff's motion to dismiss the misrepresentation and breach of loyalty counterclaims, and found that Defendant's allegations did not provide the required specific allegations to pursue those claims. *Id.* at *14-17. The Court also denied Plaintiff's motion to dismiss the counterclaim alleging breach of implied covenant of good faith and fair dealing, and allowed Defendant to establish that Plaintiff breached an agreement to record only those hours he worked for Defendant, and that he breached that agreement by performing "side-work" and gained undue economic advantage. *Id.* at *15. Accordingly, the Court denied Defendant's motion to dismiss, and partly granted Plaintiff's motion to dismiss.

***Raphael, et al. v. Tesoro Refining And Marketing Co., LLC,* 2015 U.S. Dist. LEXIS 130532 (C.D. Cal. Sept. 25, 2015).** Plaintiff, a former employee, brought a class action alleging that Defendant engaged in a uniform policy of denying him and other similarly-situated employees with all wages owed in violation of the Private Attorney General Act ("PAGA") and for several provisions of the California Labor Code. Defendant moved for summary judgment, and the Court granted the motion. Defendant argued that the PAGA action must be dismissed because Plaintiff failed to allege and establish that class certification was appropriate within 90-days as required by Local Rule 23-3. In response, Plaintiff asserted that PAGA actions do not need to meet class action requirements. The Court noted that while the Ninth Circuit had not yet decided whether Plaintiffs suing under the PAGA must satisfy Rule 23 requirements, there have been numerous rulings that PAGA claims must comply with Rule 23 guidelines, and that failing to move for certification would result in dismissal. *Id*. at *4. The Court remarked that it was inclined to follow its prior rulings and similar rulings, and accordingly, held that Plaintiff lacked standing to represent the rights and interests of the aggrieved employees in this action. *Id*. at *5. The Court further remarked that even if Rule 23 did not apply to PAGA representative claims, such claims should be stricken if they were unmanageable. Here, the Court noted that Plaintiff's claims were on behalf of himself and thousands of current and former

employees. The Court observed that Defendant provided a non-exhaustive list of 26 relevant inquiries and requirements that the Court found essential to assess in order to determine the appropriate penalties. *Id*. at *7. The Court found that it would have to engage in a multitude of individualized inquiries, thereby making PAGA action unmanageable and inappropriate. *Id*. Furthermore, the Court observed that Plaintiff's notice to the California Labor and Workforce Development Agency, pursuant to § 2699.3(a)(1) of the California Labor Code, did not include sufficient facts and theories and put the agency on notice on his PAGA claims. *Id.* at *8-9. Accordingly, the Court granted Defendant's motion for summary judgment.

***Saucedo, et al. v. John Hancock Life & Health Insurance Co.*, 2015 U.S. App. LEXIS 13646 (9th Cir. Aug. 5, 2015).** Plaintiffs, a group of former employees, brought an action alleging Defendants failed to maintain a farm labor contractor's license and failed to make certain disclosures to Plaintiffs that farm labor contractors were required make in violation of the Washington Farm Labor Contractor Act ("FLCA"). The John Hancock Insurance Co. and the Texas Municipal Plans Consortium, LLC (collectively "Hancock") owned apple orchards, which it leased to Farmland Management Services ("Farmland") under two Master Lease and Management Agreements. *Id.* at *8-9. Farmland sub-leased the orchards to NW Management and Realty Services ("NWM") under an Orchard Management Agreement. *Id.* at *9. Hancock and Farmland's Master Leases required Farmland to obtain any necessary licenses, or require any third-party hired to do so. *Id.* at *11. NWM failed to obtain a farm labor contractor license from the Washington Department of Labor & Industries. *Id.* Plaintiffs alleged that Farmland and Hancock were jointly and severally liable with NWM for the FLCA violations because they used the services of an unlicensed farm labor contractor without either inspecting NWM's license or asking the director of the Department of Labor & Industries whether NWM was licensed. The District Court denied Hancock and Farmland's motions to dismiss the claims, holding that the FLCA imposed an affirmative duty on Hancock and Farmland to verify that NWM was properly licensed. Further, the District Court denied all Defendants' motions to dismiss on the ground that although NWM was an "agricultural employer," "agricultural employers" and "farm labor contractors" were not mutually exclusive, and that agricultural employers who are paid to farm another's land – such as NWM – are required to obtain licenses under the FLCA. *Id.* at *12. Thereafter, the District Court granted Plaintiff's motion for summary judgment, finding that NWM was a farm labor contractor because it engaged in employing agricultural workers for a fee, that NWM was required to comply with the FLCA but did not, and that Hancock and Farmland were jointly and severally liable for NWM's violations because they did not take the affirmative steps to determine whether NWM was licensed. *Id.* at *13. On appeal, the Ninth Circuit certified two questions of law regarding the interpretations of the FLCA to the Washington Supreme Court. The first question was whether the FLCA, in particular Washington Revised Code § 19.30.010(2), included in the definition of a "farm labor contractor" an entity who is paid a per-acre fee to manage all aspects of farming – including hiring and employing agricultural workers as well as making all planting and harvesting decisions, subject to approval – for a particular plot of land owned by a third-party. The second question was whether the FLCA makes jointly and severally liable any person who uses the services of an unlicensed farm labor contractor without either inspecting the license issued by the director of the Department of Labor & Industries to the farm labor contractor or obtaining a representation from the director of the Department of Labor & Industries that the contractor is properly licensed, even if that person lacked knowledge that the farm labor contractor was unlicensed. The Ninth Circuit opined that because of the complexity of these state law issues and because of their significant policy implications, the Washington Supreme Court, which had not yet interpreted the relevant provisions of the FLCA, was best suited to answer the certified questions in the first instance. *Id.* at *14. The Ninth Circuit also opined that the Washington Supreme Court's authoritative answers were necessary to dispose of this proceeding, and accordingly certified the questions of law.

***Steger, et al. v. Life Time Fitness, Inc.,* 2015 U.S. Dist. LEXIS 120805 (N.D. Ill. Sept. 10, 2015).** Plaintiffs, a group of personal trainers, brought an action alleging that Defendants had a practice of not recording all hours worked by personal trainers and failed to provide them with wage statements or pay stubs setting forth all hours actually worked in violation of the FLSA and various state laws of California and Illinois. Plaintiffs alleged that because of Defendants' practice, they were not paid for off-the-clock work or overtime for any work in excess of eight hours a day, or 40 hours a week. Defendants moved to dismiss named Plaintiffs' Jared Steger and David Ramsey's Illinois Wage Payment Collection Act ("IWPCA")

claims, which the Court granted in part. At the outset, the Court noted that the IWPCA does not establish a substantive right to overtime pay or any other kind of wage, but rather allows for a cause of action based on compensation wrongfully withheld pursuant to an employment contract or agreement. *Id*. at *4-5. Defendants argued that Plaintiffs' claims failed because they did not allege that they had an agreement to pay off-the-clock work. Plaintiffs alleged that Defendants' incentive compensation plan promised certain wages for every hour worked, and that Defendants routinely failed to record hours for off-the-clock work such as time spent for marketing activities, completing paperwork and reports, and cleaning equipment. *Id*. at *6. The Court found that Plaintiffs sufficiently showed that an agreement existed with Defendants to pay 1.5 times the applicable minimum wage. *Id*. at *7. Defendants further argued that Plaintiffs' claim for unused vacation time or paid time off ("PTO") failed under its policy of "use-it-or-lose," which provides that accrued and unused PTO is not carried over from year to year. *Id*. at *8. The Court remarked that pursuant to the PTO policy, Defendants never agreed to pay Plaintiffs carry over accrued and unused vacation from year to year; in fact, the policy stated the opposite. Accordingly, the Court concluded that without an agreement to compensate them for the vacation time, Plaintiffs' used vacation time under the IWPCA claims failed.

***Tyus, et al. v. Wendy's Of Las Vegas, Inc.*, 2015 U.S. Dist. LEXIS 111594 (D. Nev. Aug. 21, 2015).** Plaintiffs, a group of restaurant employees, brought a class action for failure to pay the lawful minimum wage, alleging that Defendants improperly claimed the right to compensate employees below the upper-tier hourly minimum wage level under Nevada law. Defendants moved for partial judgment on the pleadings and Plaintiffs moved for partial summary judgment. The Court granted Defendants' motion and denied Plaintiffs' motion. Plaintiffs' sole surviving claim was for unpaid minimum wages under the Nevada Minimum Wage Amendment. Defendants urged the Court to find that Nevada would adopt rationales articulated in previous case law precedents that punitive damages are unavailable to Plaintiffs claiming violations of minimum wage laws. *Id.* at *7. The Court reasoned that Nevada had long subscribed to the rule that where a statute gives a new right and prescribes a particular remedy, then such remedy must be strictly pursued, and is exclusive of any other. *Id.* at *8. Further, the Court observed that the right to receive a minimum wage arises from legislative mandate and did not exist under common law. *Id.* Accordingly, the Court opined that remedies available for violating minimum wage laws are limited to those expressly provided by statute and constitutional amendment. *Id.* at *8-9. Further, the Court noted that because damages for violations of the Nevada Minimum Wage Amendment are limited to those expressly provided by the amendment and there is no provision in the amendment for punitive damages, Plaintiffs could not recover punitive damages for their claims. *Id.* Additionally, the Court observed that although Nevada law permits the awarding of punitive damages for tort claims where Defendant has been guilty of oppression, fraud, or malice or where such damages are explicitly provided by statute, an award of punitive damages cannot be based upon a cause of action sounding solely in contract. *Id.* at *10-11. Thus, though Plaintiffs' minimum wage claims arose from Defendants' alleged failure to pay a statutory obligation, the Court reasoned that when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute. *Id.* at *11. Accordingly, the Court ruled that Plaintiffs could not seek punitive damages based solely on a claim for violations of the Nevada Minimum Wage Amendment, and dismissed their claims for punitive damages.

***Williams, et al. v. Tri-State Biodiesel, LLC,* 2015 U.S. Dist. LEXIS 7926 (S.D.N.Y. Jan. 23, 2015).** Plaintiffs, a group of former employees, brought a putative collective and class action under the FLSA and the New York Labor Law ("NYLL") alleging that Defendant failed to pay them certain overtime wages. Defendant collected used cooking oil ("UCO") from restaurants and other producers, and paid its employees their normal hourly rate for hours worked up to 50 per week. *Id.* at *2-5. Initially, Defendant used a system of self-reporting to track hours employees worked, under which an employee would fill in a signed timesheet. *Id.* at *6. Defendant then switched to an automated timecard system, which required employees to punch-in and punch-out. Plaintiff asserted that he worked an additional 10 to 15 hours per week from home, for a total of 70 to 75 hours per week, and that Defendant failed to pay him overtime. Defendant moved for summary judgment, arguing that Williams drove interstate on several occasions, and thus he was exempt from the overtime provisions of the FLSA and the NYLL. The Court granted in part

and denied in part Defendant's motion for summary judgment. The Court denied Defendant's motion on Plaintiffs' overtime claims under the FLSA and the NYLL based on the motor carrier exemption, finding a dispute of material issues on whether the exemption applied to employees for all the relevant workweeks. *Id.* at *39. The record did not disclose whether the interstate travel that Williams undertook was a "natural, integral, and inseparable part" of his duties. *Id.* at *37. The Court noted that the only interstate trips that Defendant asserted Williams made occurred during the period of November 2010 through June 2012, and that Defendant was not engaged in interstate activity at all until it began picking up UCO from New Jersey in late 2010 or early 2011. *Id.* at *38. The Court thus concluded that a jury might easily conclude that even if Williams' interstate activity beginning in November 2010 placed him within the motor carrier exemption, his interstate activity prior to that date did not. *Id.* Because Defendant sought summary judgment as to the entire period of William's employment, and failed to show that the other named Plaintiff made even one interstate trip, the Court concluded that Defendant was not entitled to summary judgment under the motor carrier exemption. *Id.* at *40-41. The Court also denied Defendant's motion for summary judgment on Williams' unpaid wages claims, as Williams asserted that he worked extra hours per week that were not reflected in the records and Defendant specifically told him that he would not be paid extra for the work he performed at home. *Id.* at *46-48. The Court, however, granted Defendant's motion for summary judgment as to Plaintiffs' claims for "spread of hours" pay under the NYLL, which requires employers to pay employees "one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage," for any day in which the employee works for more than 10 hours. *Id.* at *42. The Court also granted Defendant's summary judgment on the issue of willfulness in claiming the motor carrier exemption, for Plaintiffs pointed to no testimony from Defendant's employees, documents, or anything else that could allow a trier of fact to find that Defendant's alleged violations were willful. *Id.* at *51-52. Accordingly, the Court granted in part and denied in part Defendant's motion for summary judgment.

***Zackaria, et al. v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 151351 (C.D. Cal. Nov. 3, 2015).**
Plaintiff, on behalf of a group of current and former employees, brought a class action in the state court alleging that Defendant knowingly misclassified the employees as exempt under the state law, and denied them overtime wages, and wages for missed meal periods and rest breaks. Plaintiff asserted violations of the California Labor Code, and sought civil penalties under the California Private Attorneys General Act ("PAGA"). After Defendant removed the action under the CAFA, Plaintiff filed a motion for class certification. The Court denied the motion. Subsequently, each party filed two motions *in limine*. The basis of Defendant's motion was that since the Court denied class certification because the exemptions questions at issue in this action did not lend themselves to common proof, Plaintiff could not pursue a representative PAGA claim on behalf of an unidentified number of additional non-party employees. *Id*. at *4. The Court denied the motions *in limine*. The Court noted that under the PAGA, an aggrieved employee may bring a civil action personally and on behalf of current and former employees to recover civil penalties for violations of the labor code. *Id*. at *7. The Court also observed that a majority of case law authorities have found that representative PAGA claims do not need to be certified under Rule 23 to proceed. For example, in *Baumann v. Chase Investment Services Corp.*, 135 S. Ct. 870 (2014), the U.S. Supreme Court found that a PAGA suit was fundamentally different than a class action, and were not sufficiently similar to Rule 23 class actions to trigger jurisdiction under the CAFA. *Id*. at *9. Defendant argued that *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), held that a New York statute concerning the ability of a Plaintiff to pursue a representative action did not trump Rule 23's application. *Id*. at *14. The Court observed that in *Shady Grove*, the Supreme Court held that Rule 23 was merely a procedural device that allowed for joinder of parties, and as such, applied to claims asserted in federal court even if the state law did not provide for such a procedure in state court. *Id*. at *15. The Court noted that this reasoning applied to the PAGA claims, and it found that the PAGA specifically permitted recovery for unnamed parties, and was a procedural mechanism by which litigants may recover for absent Plaintiffs, akin to a class action. *Id.* Accordingly, the Court concluded that denial of class certification had no bearing on the PAGA claim. *Id*. at *19. Defendant asserted that a Plaintiff pursuing a representative PAGA action must prove the alleged underlying Labor Code violations as to their own claim, and as to all aggrieved employees. *Id*. at *20. Defendant contended that a Plaintiff pursuing a representative PAGA claim must also face the challenge of showing that the PAGA claim was manageable for resolution. *Id*. at *20-21. The Court, however, observed that Defendant's manageability argument was inconsistent with the PAGA's

purpose and statutory scheme. *Id*. at *21. The Court explained that the purpose of the PAGA was to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and pursued by overburdened state enforcement agencies. *Id*. at *22. The Court observed that PAGA actions were unlike class actions; they were distinct in purpose and function from a purely procedural rule, and unlike Rule 23, the purpose of the PAGA was not to allow a collection of individual Plaintiffs to sue the same Defendant in one consolidated action for the sake of convenience and efficiency. *Id*. at *23. The Court concluded that the imposition of a manageability requirement, which finds its genesis in Rule 23, does not apply in this context. *Id.* Accordingly, the Court denied the motions *in limine*.

(xx) Joint Employer, Employee Status, And Employer Status Issues In FLSA Collective Actions

***Abreu, et al. v. Russian Palace, Inc.,* 2015 U.S. App. LEXIS 11795 (11th Cir. July 9, 2015).** Plaintiff, on behalf of himself and other similarly-situated, brought a collective action alleging that Defendants, their former employer, Russian Palace, Inc. (Russian Palace), and Dmitri Kotikovski individually, failed to pay them weekly and overtime wages in violation of the FLSA. Previously, the District Court had granted Kotikovski's motion for summary judgment. On appeal, the Eleventh Circuit affirmed. After consideration of the parties' briefs and upon review of the record, the Eleventh Circuit found that summary judgment was proper because Plaintiff failed to present evidence that Russian Palace exceeded the gross annual revenue threshold of $500,000 required to establish enterprise coverage under the FLSA, and Plaintiff also failed to establish that employees were entitled to individual coverage under the FLSA as cooks, chefs, servers, and managers because their job duties were inconsistent with duties that have been considered to include activities of interstate commerce. *Id.* at *1-2. Accordingly, the Eleventh Circuit affirmed the District Court's judgment granting Kotikovski's motion for summary judgment.

***Ash, et al. v. Anderson Merchandiser, LLC,* 2015 U.S. App. LEXIS 14691 (8th Cir. Aug. 21, 2015).** Plaintiffs brought an action alleging that Defendants failed to pay them overtime wages in violation of the FLSA. Defendants moved to dismiss the complaint. The District Court granted the motion without a hearing and entered judgment in Defendants' favor. *Id*. at *2. Plaintiffs moved to vacate the District Court's order pursuant to Rules 60(b) and 59(e) and requested leave to file an amended complaint. The District Court denied Plaintiffs' request. On appeal, the Eighth Circuit affirmed the District Court's order. At the outset, the Eighth Circuit noted that the District Court dismissed the complaint because Plaintiffs failed to allege that Defendants were their employer for purposes of the FLSA, and Plaintiffs failed to state a substantive cause of action under the FLSA. *Id.* at *2. In their complaint, Plaintiffs made only one allegation with regard to Defendants' status as their employer, *i.e.*, that, during all relevant times, Defendants were part of an integrated enterprise and, as such, were Plaintiffs' employer. *Id*. at *3. The Eighth Circuit noted that, under the FLSA, the test of employment is one of economic reality. Plaintiffs did not include any facts describing the economic reality of their employment, such as their alleged employers' right to control the nature and quality of their work, the alleged employers' right to hire or fire, or the source of compensation for Plaintiffs' work. *Id*. at *4. Accordingly, the Eighth Circuit concluded that Plaintiffs failed to state a claim under the FLSA. *Id*. at *7. Plaintiffs also argued that the District Court should have granted their motion to vacate the judgment and their request for leave to file an amended complaint. The Eighth Circuit found that the District Court properly exercised its discretion to deny Plaintiffs' request, and Plaintiffs failed to establish that the District Court abused its discretion. *Id*. at *10. The Eighth Circuit noted that Plaintiffs did not seek leave to amend their complaint until nine days after the District Court granted Defendants' motion to dismiss and two days after the District Court entered judgment. *Id*. Because Plaintiffs delayed in making their request, the Eighth Circuit concluded that it could not hold that the District Court abused its discretion. Accordingly, the Eighth Circuit affirmed the District Court's order.

***Benitez, et al. v. Demco Of Riverdale, LLC*, 2015 U.S. Dist. LEXIS 20325 (S.D.N.Y. Feb. 19, 2015).** Plaintiffs, a group of store managers of Planet Wings franchises, brought an action alleging that Defendants misclassified them as exempt from overtime provisions of the FLSA and the New York Labor Law ("NYLL"). Planet Wings Enterprises, Inc., Planet Wings Inc., Planet Wings Management, Inc., and their principals (the "Planet Wings Defendants") were franchisors of Planet Wings restaurants. The Planet Wings Defendants argued that they were not Plaintiffs' employer, and moved to dismiss this action. The

Court denied the motion. The Court noted that to be liable under the FLSA and the NYLL, a person or entity must be the employer of the party seeking recovery. The definition of "employer" under both statues includes any person acting directly or indirectly in the interest of any employer in relation to an employee. *Id.* at *3. Further, the Court observed that these factors focused on whether the person or entity possessed the power to control the workers in question, with an eye to the economic reality presented by the facts of each case. *Id.* Additionally, the Court noted that economic reality is dependent on whether the purported employer: (i) had the power to hire and fire the employees; (ii) supervised and controlled employees' work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records for the employees. *Id.* at *4. The Court found that the determination of whether a franchisor was a joint employer with its franchisee as to the employees who worked in the franchisee's restaurants presented a question of fact that could not be resolved on a motion to dismiss. Accordingly, the Court denied the motion to dismiss, finding that the issue could be raised anew on a properly supported motion for summary judgment after discovery.

***Chen, et al. v. Major League Baseball Properties, Inc.,* 2015 U.S. App. LEXIS 14275 (2d Cir. Aug. 14, 2015)**. Plaintiff brought a putative class action alleging that Defendants failed to pay the minimum wage in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiff alleged that he worked without pay as a volunteer for FanFest, a five-day event organized in conjunction with Major League Baseball's 2013 All-StarWeek in New York City. *Id*. at *2. Plaintiff contended that he worked three shifts, totaling approximately 14 hours, but he was not compensated for the work. *Id*. at *5. Plaintiff sought class certification of all similarly-situated uncompensated volunteers. Defendants moved to dismiss, contending that Plaintiff was exempt under the FLSA under the seasonal amusement or recreational establishment exemption. The District Court dismissed the action, and on Plaintiff's appeal, the Second Circuit affirmed. The Second Circuit remarked that the appeal centered principally on the meaning of the word "establishment," as used in § 13(a)(3) of the FLSA, which exempts seasons amusement and recreational establishments from the FLSA's minimum wage requirement. *Id*. at *6-7. Plaintiff contended that because the District Court held that "establishment" meant a distinct, physical place of business, it erroneously concluded that FanFest was the relevant establishment and was covered by the exemption. *Id*. at *7. Plaintiff argued instead that FanFest and Major League Baseball, which Defendants conceded was not covered by the exemption, were a single establishment for purposes of the FLSA. *Id*. The Second Circuit observed that legislative history, regulations of the U.S. Department of Labor ("DOL"), and case law authorities all indicated that an "establishment" is a "distinct physical place of business," as opposed to "an entire business or enterprise," which may include several separate places of business. *Id*. at *13. The Second Circuit, therefore, concluded that Congress used the term "establishment" to mean a distinct place of business as opposed to an integrated multi-unit business or enterprise. *Id*. at *15. While Plaintiff acknowledged that the definition of establishment applied generally to FLSA exemptions, he argued that this meaning was intended for retail establishments only and the DOL applied an alternative fact-intensive, multi-factor test for seasonal exemption. Plaintiff argued that he physically worked at FanFest, and that he was an employee of Defendants Major League Baseball and the Office of the Commissioner of Baseball, who planned and controlled all aspects of FanFest's operations. *Id*. at *21. The Second Circuit observed that the complaint clearly stated that the FanFest took place at the Jacob. J. Javit Center in New York and not at t Defendants' Park Avenue office or any other All-Star Week event. This physical separation was determinative in deciding whether those business units constituted a single establishment or multiple one. *Id*. Accordingly, the Second Circuit agreed with the District Court that for the purposes of § 13(a)(3) exemption, FanFest constituted a separate establishment. The Second Circuit noted that to prevail in a motion to dismiss, Defendants must establish that FanFest was plainly and unmistakably a seasonal, and/or a recreational or amusement establishment under the FLSA. *Id*. at *22. The Second Circuit found that FanFest clearly met the seasonality requirement of § 13(a)(3), as the complaint alleged that the FanFest ran for four days, and did not operate for more than seven months in any calendar year. Accordingly, the Second Circuit concluded the FanFest fell within the terms and spirit of the FLSA's seasonal amusement or recreational establishment, and affirmed the District Court's order dismissing the complaint.

***Doyle, et al. v. The City Of New York,* 2015 U.S. Dist. LEXIS 26440 (S.D.N.Y Mar. 4, 2015).** Plaintiffs, a group of minor offenders who performed community service for Defendant, brought an action seeking unpaid wages under the FLSA. While Plaintiffs were facing prosecution, the Court had granted an adjournment in contemplation of dismissal ("ACD"), to which they agreed at least in part because doing so allowed them to avoid criminal convictions. Under the New York State Criminal Procedure Law ("NYCPL") a state trial court, prior to a guilty plea or commencement of trial, and with the consent of both parties, may grant an ACD for actions involving minor criminal offenses. *Id.* at *2. Pursuant to the ACDs, Plaintiffs performed community service, for which they did not receive payment from the City of New York. The City moved to dismiss, which the Court granted. The City argued that Plaintiffs were not covered by the FLSA when they performed their community service as a condition of their ACDs because they qualified as public service volunteers within the meaning of the Act and U.S. Department of Labor ("DOL") regulations. The Court noted that the DOL requires that a public service volunteer must have a civic, charitable, or humanitarian purpose, and although such a motivation need not be singular to support the volunteer exception to the FLSA, the individual must be motivated by civic, charitable, or humanitarian reasons, at least in part. *Id.* at *8. The Court opined that Plaintiffs did not qualify as exempt public service volunteers when they performed their community service, as the complaint alleged that Plaintiffs had no civic, humanitarian, or charitable reasons for performing the work that they did on behalf of the City. Further, the Court observed while the DOL interpreted that people who were ordered to perform community service do not qualify as volunteers for purposes of the FLSA, it also concluded that, depending on all the facts and circumstances, such individuals would not be considered "employees" under the FLSA, and thus would not be entitled to minimum wage or overtime compensation. *Id.* at *10. The Court opined that the determination of whether an employer-employee relationship exists for purposes of the FLSA depends on its economic reality, and that the economic realities must be assessed by reference to the particular situation with some factors more important than others depending on the FLSA question at issue and the context in which it arises. *Id.* at *11-13. The Court noted that previous case law had held that people who perform community service as a condition of an ACD do not do so for the purpose of enabling them to earn a living, or indeed to receive financial compensation of any kind. *Id.* at *15. Plaintiffs did not allege that monetary compensation or the hope thereof played any role in their decision to accept ACDs. Rather, the Court observed that the obvious purpose of New York's ACD program is to enable the parties to resolve cases involving minor offenses in a way that provides more substantial consequences than outright dismissal of the charges, but allows individuals to avoid further prosecution and the criminal stigma that attaches to convictions. *Id.* Additionally, the Court remarked that extending the FLSA to cover those whom a state trial court orders to perform community service in lieu of criminal prosecution would not advance the FLSA's purpose, and would instead undermine the efficacy of programs like the ACD, because judges and prosecutors might be less inclined to agree to ACDs if doing so would require City agencies to pay for labor that they might not otherwise have even wanted. *Id.* at *17. Accordingly, the Court concluded that Plaintiffs were not employees within the meaning of the FLSA when they performed the community service to which they consented pursuant to their ACDs, and granted Defendant's motion to dismiss.

***Garcia-Celestino, et al. v. Consolidated Citrus Limited Partnership*, 2015 U.S. Dist. LEXIS 69251 (M.D. Fla. May 28, 2015).** Plaintiffs, a group of temporary H-2A Mexican guest-workers, brought an action alleging that Defendants violated employment contracts and minimum wage requirements of the FLSA. Plaintiffs picked citrus fruit on groves owned by Defendant Consolidated Citrus Limited Partnership ("CCLP"). Former Defendant Ruiz Harvesting, Inc. ("RHI") was a farm labor contractor that hired and furnished Plaintiffs to pick fruit for CCLP during the 2007-2008 and 2008-2009 harvest seasons. After a six-day bench trial addressing CCLP's liability as an alleged joint employer during the two harvest seasons, the Court found in Plaintiffs' favor on their H-2A contract claims. At the outset, the Court noted that *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994), set out an eight-factor test to analyze joint employer claims under the FLSA. *Id*. at *56. With respect to the first factor – nature and degree of control of harvesters – the Court opined that a grower may play an overly active role if it makes decisions such as: (i) for whom and how many employees to hire; (ii) how to design the employees' management structure; (iii) when the workday begins; (iv) when the laborers start and stop working; and (v) whether a laborer should be disciplined or retained. *Id*. at *59. The Court reasoned that here, although CCLP required RHI to participate in the H-2A program, it did not demand that RHI hire specific individuals and did not direct

RHI's hiring process. *Id*. The Court ruled that this factor weighed against finding that CCLP was Plaintiffs' joint employer. As to the second factor – degree of supervision – the Court observed that supervision can be present regardless of whether orders were communicated directly to the alleged employee or indirectly thorough the contractor. In this context, CCLP supervisors checked for shiners, garbage, and debris and also ensured that RHI personnel and harvesters complied with CCLP's citrus canker procedures. *Id*. at *61. Based on the facts, the Court concluded that the second factor favored Plaintiffs' joint employment theory. *Id*. at *62. As to the third factor – the right to hire, fire, or modify employment conditions – the Court ruled that, because CCLP required contractors to obtain H-2A labor and assigned work at a high level, but it did not help make human resources decisions as to specific workers, the third factor slightly favored Plaintiffs' joint employment theory. *Id*. at *63-64. The Court held that the remaining factors all weighed in favor of Plaintiffs' joint employment theory. Plaintiffs provided an integral service for CCLP by harvesting the fruit grown on CCLP property. As Plaintiffs completed the harvest, CCLP indirectly but extensively supervised them on a daily basis. CCLP also owned and operated the time-keeping equipment and was directly involved in payroll practices. Bearing in mind the totality of the circumstances, the Court readily concluded that Plaintiffs were economically dependent on CCLP. Accordingly, the Court found that CCLP was Plaintiffs' joint employer and was liable to them for wage violations.

***Hebron, et al. v. DirecTV, LLC,* 2015 U.S. Dist. LEXIS 142077 (N.D. Ill. Oct. 13, 2015).** Plaintiffs, a group of technicians, brought an action alleging that Defendants denied them minimum wage and overtime compensation in violation of the FLSA and Illinois state law. Defendant DirecTV, LLC, controlled and managed its service technicians by either employing them directly or through an employment network of service providers consisting of Home Services Providers, including Defendant DirectSat USA, LLC. *Id.* at *3. Defendants filed a motion to dismiss, and the Court granted the motion in part. Defendants first sought dismissal of Plaintiffs' FLSA claims on the basis that Plaintiffs did not show that an employer-employee relationship existed for the purposes of the FLSA. The Court acknowledged the test for joint employment, including whether the alleged employer: (i) had the power to hire and fire employees; (ii) supervised and controlled employee work schedules or conditions of payments; (iii) determined the rate and method of payment; and (iv) maintained employment records. *Id.* at *9. Defendants argued that Plaintiffs did not sufficiently allege that Defendants had the power to hire or fire them, determine the rate or method of their pay, and that they did not maintain records pertaining to their alleged employment. *Id.* at *10. Plaintiffs alleged that DirecTV supervised and controlled employee work schedules by issuing work orders through a database program known as SIEBEL. *Id*. Plaintiffs further contended that DirecTV determined the policies, procedures, practices, and performance standards for installing its service. *Id*. The Court observed that, whereas DirecTV determined what tasks were compensable and what tasks were not, Plaintiffs did not allege that Defendants determined their compensation. *Id*. In addition, the Court noted that Plaintiffs did not allege that DirecSat determined what tasks were compensable, or the rate of compensation. *Id*. Accordingly, the Court held that Plaintiffs failed sufficiently to allege that DirecTV and DirecSat were joint-employers for the purposes of the FLSA. *Id*. at *11. Similarly, the Court found that Plaintiffs relied on mere assertions without making any specific allegations as to their minimum wage and overtime claims, and granted Defendants' motion to dismiss those causes of action. The Court, however, denied Defendants' motion to dismiss based on the argument that Plaintiffs failed to state a claim under the FLSA for recovery beyond two-year period, finding that Plaintiffs had sufficiently alleged willfulness to extend the period to three years. *Id*. at *17. Accordingly, the Court granted in part Defendants' motion to dismiss.

***Mejia, et al. v. Brothers Petroleum, LLC,* 2015 U.S. Dist. LEXIS 74339 (E.D. La. June 9, 2015).** Plaintiffs, a group of employees, brought a collective action seeking overtime and minimum wages under the FLSA. Plaintiffs moved to conditionally certify a collective action consisting of all current and former non-exempt, hourly employees who were denied overtime and minimum wages. The Court granted the motion. *Id*. at *6. Plaintiffs filed an amended complaint to add 44 additional Defendants, including Lenny Motwani, LKM Convenience, and LKM Enterprises ("LKM Defendants"). *Id*. at *7. In this motion, Plaintiffs alleged that all Defendants worked together to operate and run a business that served a single common goal, and that Defendants were joint employers of Plaintiffs. *Id*. After the Court granted the motion, the LKM Defendants moved to dismiss the claims against them, which the Court granted. The LKM

Defendants contended that the complaint failed to adequately plead that they qualified as Plaintiffs' employers under the FLSA. *Id*. at *10. The complaint alleged that all Defendants worked in concert to operate and run businesses that served a single common goal, allowed Plaintiffs to work interchangeably between all stores operated by Defendants, and utilized the same method for paying all of Defendants' employees. *Id*. at *13. The LKM Defendants contended that those allegations were vague and conclusory. The Court remarked that based on the facts alleged in the complaint, Plaintiffs had adequately demonstrated that the LKM Defendants were Plaintiffs' employers under the FLSA. *Id*. Accordingly, the Court concluded that Plaintiffs had sufficiently pleaded that the LKM Defendants were their employers. The Court reasoned that FLSA was applicable to employees who were: (i) engaged in commerce or in the production of goods for commerce ("individual coverage"); or (ii) employed in an enterprise engaged in commerce or in the production of goods for commerce ("enterprise coverage"). *Id*. at *15. The Court noted that to sufficiently plead individual coverage, a Plaintiff must allege facts giving rise to a reasonable inference that he or she was engaged in commerce or in the production of commerce. *Id*. The Court observed that the complaint was devoid of facts or allegations regarding Plaintiffs' relationship to instrumentalities or facilities of interstate commerce. *Id*. at *16. The Court remarked that the only allegations in the complaint regarding Plaintiffs' work duties were that Plaintiffs worked as hourly cashiers, cooks, and store operators at Defendants' convenience stores. *Id*. The Court found that while these allegations provided a generic description of Plaintiffs' work, they did not show how the work was in interstate commerce. *Id*. Accordingly, the Court concluded that Plaintiffs failed to plead individual coverage under the FLSA. Similarly, the Court noted that to plead enterprise coverage, Plaintiffs must allege facts giving rise to an inference that Defendants constituted enterprise engaged in commerce or in the production of goods for commerce. *Id*. at *17. The Court opined that Plaintiffs' merely made conclusory allegation that Defendants were and continued to engage in interstate commerce. *Id*. at *18. Accordingly, the Court concluded that Plaintiffs failed to allege that Defendants engaged in enterprise commerce. The Court, therefore, granted the LKM Defendants' motion to dismiss without prejudice.

***Ochoa, et al. v. McDonald's Corp.,* 2015 U.S. Dist. LEXIS 129539 (N.D. Cal. Sept. 25, 2015).** Plaintiffs, a group of employees, brought a putative class action against Defendants, franchisees of McDonald's USA (the "Franchisee Defendants") and three McDonald's entities – McDonald's USA, McDonald's Corporation, and McDonald's California (the "McDonald's Defendants") – alleging that Defendants violated the California Labor Code by failing to pay Plaintiffs overtime and minimum wage, by failing to provide meal and rest breaks, by failing to provide legally adequate earnings statements, and by failing by reimburse employees for time required to maintain their uniforms. *Id.* at *2-4. The McDonald's Defendants moved for summary judgment, arguing that they were not joint employers of Plaintiffs and, therefore, could not be held liable for any of the various violations Plaintiffs allegedly suffered at the hands of the Franchisee Defendants. The Court applied the joint employer test from the California Supreme Court's decision in *Martinez v. Combs,* 49 Cal. 4th 35 (2010), and granted in part the McDonald's Defendants' motion for summary judgment. Plaintiffs submitted evidence that the McDonald's Defendants controlled their franchisees through their power to terminate franchise agreements, provided recommendations on crew scheduling and staffing, monitored customer service metrics, owned or leased all locations, furnished franchisees with employee time-keeping software, and sent business consultants to counsel franchisees and their employees. *Id.* at *17-25. The Court found that Plaintiffs' evidence did not establish a genuine issue of disputed material fact as to whether the McDonald's Defendants, as franchisors, had the authority to make hiring, firing, wage, and staffing decisions at the Franchisee Defendants' restaurants. *Id.* at *26. The Court, however, found that the McDonald's Defendants could be held liable as joint employers under an alternative ostensible agency theory. An ostensible agency exists where: (i) the person dealing with the agent does so with reasonable belief in the agent's authority; (ii) that belief is generated by some act or neglect of the principal sought to be charged; and (iii) the relying party is not negligent. *Id.* at *29. Plaintiffs submitted declarations stating that they believed that the McDonald's Defendants were their employers, in part because they wore McDonald's uniforms, served McDonald's food in McDonald's packaging, received pay stubs and orientation materials marked with the McDonald's name and logo, and applied for jobs through McDonald's website. *Id.* Because there was evidence from which a jury reasonably could conclude that the McDonald's Defendants and the Franchisee Defendants shared an ostensible agency relationship, the Court concluded that the McDonald's Defendants' potential liability as joint employers under an ostensible

agency theory should be resolved at trial. *Id.* at *30. Accordingly, the Court granted in part and denied in part the McDonald's Defendants' motion for summary judgment.

(xxi) Litigation Of Tip Pooling And Tip Credit Claims Under The FLSA

***Allision, et al. v. Dolich,* 2015 U.S. Dist. LEXIS 163553 (D. Ore. Dec. 7, 2015).** Plaintiffs brought a collective action under the FLSA alleging that Defendants violated the FLSA by requiring Plaintiffs and the collective action members to participate in a mandatory invalid tip pool and failed to pay them the federal minimum wage. *Id.* at *7. Defendants moved for summary judgment and asserted that current case law from the Ninth Circuit and the U.S. District Court for the District of Oregon prohibited Plaintiffs' tip pool claims and that Plaintiffs failed to support their minimum wage claim based on late paychecks. The Court granted Defendants' motion and found that Defendants did not take a tip credit, and therefore were not subject to the tip pooling restrictions under the FLSA, and that Defendants had paid Plaintiffs the federal minimum wage in a timely manner. *Id.* at *2. Defendants required Plaintiffs to contribute their tips to a tip pool that included employees not customarily tipped, including managers. Plaintiffs did not dispute that Defendants did not take a tip credit, and the arrangement clearly supported that Defendants paid Plaintiffs an hourly wage that exceeded the federal minimum wage. *Id.* at *23. The Court concluded that the inclusion of manager in a tip pool did not violate the FLSA when Defendants paid Plaintiffs more than the minimum wage. *Id.* at *32. The Court therefore granted summary judgment to Defendants to the extent Plaintiffs' claim relied on a tip pool. Because Plaintiffs failed to present any evidence to support their claim that Defendants violated the FLSA by failing to pay them in timely manner, the Court also granted summary judgment to Defendants on this claim. *Id.* at *36. The Court also denied Plaintiffs' motion for additional discovery, finding that additional discovery was not warranted because Plaintiffs had access to evidence establishing their wage rate well before filing this action, and could have offered such evidence through pay stubs, declarations, or deposition testimony. *Id.* at *38-39. Accordingly, the Court granted Defendants' motion for summary judgment and denied Plaintiffs' request for additional discovery.

***Conners, et al. v. Catfish Pies, Inc.,* 2015 U.S. Dist. LEXIS 18422 (E.D. Ark. Feb. 13, 2015).** Plaintiffs brought an action challenging Defendants' tip pooling policy that paid waiters less than the minimum wage. Prior to 2013, Ben Biesenthal and Tim Chappell each individually owned an interest in Catfish Pies, Inc., Pizza Profits, Show Me Pies, Three Buddies, Inc., and Gusano's Pizzeria n/k/a Hendrix Brand, Inc. *Id.* at *2. Biesenthal is now the president of Crazy Pies, Pizza Profits, and Show me Pies, and in 2013, Chappell became sole owner and president of Hendrix, and conveyed his interests in the other entities. *Id.* Defendants used similar employee handbooks, which included a tip pooling policy under which the wait staff had to tip-out a percentage of their sales to kitchen, hostess, and bar staff. *Id.* at *3. Plaintiffs moved for summary judgment, which the Court granted in part. First, regarding Plaintiffs' claim that cooks were not tipped employees, the Court noted that an employee is a tipped employee only if she is engaged in an occupation in which she regularly and customarily receives at least $30 in tips per month. *Id.* at *5. Although the cooks occasionally assisted with orders, bussed tables, and sometimes received tips from customers, the Court remarked that this was insufficient to make them employees who customarily and regularly received tips. Further, because Defendants' description of cooks' duties did not indicate that they were required to interact with customers more than occasionally, the Court ruled that the cooks were not tipped employees, and granted summary judgment on this claim. *Id*. at *6. Second, regarding the mandatory tip pooling policy, the Court noted that the employee's handbook stated that the wait staff was required to tip-out a percentage of its sales to kitchen, hostess, and bar staff personnel. However, some employees who said they were required to tip-out testified that they never read the handbook and some testified that they were told they were not required to tip-out. Given the conflicting evidence as to whether tipped employees were actually required to share tips with non-tipped employees, the Court denied summary judgment on this claim. Further, the Court denied summary judgment on Plaintiffs' claim that tip pool was invalid because managers participated in it. The Court observed that participation in a tip pool by management-level employees who qualify as employers under the FLSA renders a tip pool agreement invalid. *Id.* at *7-8. Here, because it was unclear whether the kitchen managers were employers, the Court left that issue for the jury to determine. Regarding employer status, the Court noted that Biesenthal did not hire the hourly employees, but he hired and fired the managers, and advised them occasionally regarding termination of hourly employees. Although Biesenthal controlled the manner in which work was performed,

the Court found this insufficient to support a grant of summary judgment on Plaintiffs' claim that Biesenthal was their employer. *Id*. at *11. Similarly, the Court also denied summary judgment on Plaintiffs' claim that Chappell was their employer. Besides Hobbs, no other Plaintiff worked at Hendrix and although Hobbs alleged that Chappell hired and fired her and he had control over the daily operations at Hendrix because he was an owner, Chappell denied these allegations. *Id*. at *12. Finally, the Court noted that Three Buddies created and supplied the employee's handbooks for all establishments, supplied the tip-out agreement in question, and did the payroll of all the employees. Although Defendants contended that Three Buddies had no control over the restaurants employees, and only provided them with administrative services, Plaintiffs alleged that Three Buddies controlled the rates and methods of payment and indirectly controlled the hiring and firing of employees. Thus, because of a genuine dispute of facts on these issues, the Court denied summary judgment on Plaintiffs' claim that Three Buddies' was their employer.

***Inclan, et al. v. New York Hospitality Group, Inc.,* 2015 U.S. Dist. LEXIS 39342 (S.D.N.Y. Mar. 26, 2015).** Plaintiffs, a group of former waiters at a restaurant operated by Defendants, brought an action under the FLSA and the New York Labor Law ("NYLL") alleging Defendants paid them an hourly wage below the minimum wage without fulfilling the federal and state law requirements to take a tip credit allowance. *Id.* at *2. Throughout their employment at the restaurant, Defendants paid Plaintiffs a "tip credit minimum wage rate" of $5 per hour. *Id.* at *5. Plaintiffs alleged that they did not receive notice of the restaurant's intent to take a tip credit or a wage notice form from the restaurant. Plaintiffs also alleged that Defendants failed to pay them the proper minimum wage for their overtime hours. Following conditional certification of an FLSA collective action, Plaintiffs moved for summary judgment. The Court granted the motion in part. Defendants provided no evidence that they complied with the tip credit notice requirements, and therefore the Court found that Defendants were liable under the FLSA and the NYLL for Plaintiffs' unpaid minimum wages without a tip credit allowance. *Id.* at *12-13. The Court also determined that Defendants were liable to the extent that they failed to pay the minimum overtime wage, without a tip credit allowance, to Plaintiffs for their hours worked in excess of 40 per week, as the evidence demonstrated that on some occasions, Defendants paid an unlawfully low wage for overtime hours. *Id.* at *15-16. Plaintiffs contended that they were entitled to statutory damages for Defendants' failure to provide them, at the time of their hiring and annually thereafter, with notice of Defendants' intent to take a tip credit, and to furnish them with regular wage statements that met the requirements of New York's Wage Theft Prevention Act ("WTPA"). Although Plaintiffs only referred generally to the NYLL rather than specifically to the WTPA, the Court found that Plaintiffs had adequately described the substance of Plaintiffs' WTPA claims, and their failure to cite a statute in no way affected the merits of their claim. *Id.* at *18-19. The Court, nonetheless, denied summary judgment to Plaintiffs on WTPA wage notice claim at the time of hiring on the basis that Defendant hired all Plaintiffs before the WTPA took effect on April 9, 2011, and the WTPA does not apply retroactively. *Id.* at *21-22. Because the WTPA required Defendants to provide annual notice of the tip credit to its employees on or before February 2012, and because two of the named Plaintiffs remained employed with Defendants after that date, the Court held that those Plaintiffs could recover applicable statutory damages. *Id.* at *22. The Court further ruled that Plaintiffs also could recover the applicable statutory damages for Defendants' failure to state the amount of tip credit allowance in pay statements. *Id.* Defendants also admitted that they failed to pay Plaintiffs a spread-of-hours premium when Plaintiffs' workday exceeded ten hours per day, and therefore the Court found Defendants liable for unpaid spread-of-hours premiums where applicable. *Id.* at *25. The Court, however, declined to find that Plaintiffs were entitled to cumulative liquidated damages under the FLSA and the NYLL, since "the distinction between compensatory and punitive for characterizing liquidated damages under the FLSA and the NYLL [is] semantic, exalting form over substance." *Id.* at *32-33. Accordingly, the Court granted Plaintiffs' motion for summary judgment in part.

***Kim, et al. v. Kum Guang, Inc.*, 2015 U.S. Dist. LEXIS 39095 (S.D.N.Y. Mar. 19, 2015).** Plaintiffs, a group of current and former restaurant workers, brought an action alleging that Defendants failed to pay them minimum wage and overtime compensation, unlawfully shared in their tip pools, and required them to distribute some of their tips to non-tipped kitchen staff employees in violation of the FLSA and the New York Labor Law ("NYLL"). As to their minimum wage and overtime claims, Plaintiffs contended that, at least until 2011, Defendants required them to work overtime regularly but paid them daily rather than hourly

at rates ranging from $25 to $65 depending on the job assignment and length of service per day. *Id*. at *15. After a bench trial, the Court entered judgment in Plaintiffs' favor. First, the Court concluded that Defendants were not entitled to take a tip credit. The Court observed that, to be eligible to take a tip credit, an employer must inform its employees of the statutory requirements governing tip credits. The Court found that Defendants never advised any Plaintiffs that Defendants were applying a tip credit in the calculation of Plaintiffs' wages or that Plaintiffs had the right to undiminished wages if the restaurant diverted some of the tip pool. *Id*. at *81. Second, as to Defendants' failure to pay minimum wage and overtime compensation, the Court credited Plaintiffs' account of the number of hours that they worked during the relevant time period. Plaintiffs testified in detail about their history of hours worked and their rates of overtime pay. Defendants did not retain records of Plaintiffs' work hours other than a handful of timecards that pertained to a few weeks of work by four Plaintiffs and, in part, reflected only the employees' starting times. The Court noted that credible evidence demonstrated that Defendants had created a large volume of fraudulent timecards for use in connection with an investigation conducted by the U.S. Department of Labor ("DOL"), and Defendants apparently hid those timecards after their return by the DOL. *Id*. at *85. Third, the Court ruled that restaurant managers improperly diverted portions of the various tip pools from the waiters and bussers to the restaurant itself and to the kitchen employees. The Court observed that, in calculating the amount improperly taken from the credit card tip pool, an employer is entitled to deduct a sum reasonably calculated to cover credit card processing fees. *Id*. at *89. The Court held that a 3% withholding of credit card tips was reasonable and, accordingly, ruled that Plaintiffs were entitled to recover the amount of tips diverted from the credit card tip pool less 3%. Fourth, the Court concluded that equitable tolling saved Plaintiffs' claims that otherwise would have been barred by the FLSA and NYLL statute of limitations. *Id*. at *121. Plaintiffs asserted that Defendants acted willfully, triggering the three-year limitations period under the FLSA, and that in any event all of Plaintiffs' claims, which arose as early as 1997, should be deemed viable by application of equitable tolling. *Id*. at *103. The Court concluded that Defendants not only persisted in paying the workers grossly substandard wages and diverting some of their tip income, but also – in violation of statutes and regulations – they made sure to deny the workers any information that would disclose the violations of their rights, whether through provision of a date-of-hire notice of pay, the distribution of wage statements on payday, or any other written or oral disclosure of minimum wage and overtime requirements. The Court opined that it had no reason to believe that Plaintiffs knew of the violation of their rights until sometime after 2011, about a year before they filed the action. Accordingly, the Court entered judgment in favor of Plaintiffs.

***Richardson, et al. v. Mountain Range Restaurants LLC,* 2015 U.S. Dist. LEXIS 35008 (D. Ariz. Mar. 20, 2015).** Plaintiff, a tipped employee, brought an action alleging that Defendant failed to pay her federal minimum wages in violation of the FLSA. Specifically, Plaintiff alleged that Defendant required her to work and spend a substantial amount of time performing related non-tipped duties, including working as a hostess, cashier, stocking ice, and non-related duties such as taking out trash, scrubbing walls, cleaning the back of the house, and vacuuming. *Id.* at *3-4. Plaintiff asserted that, because her related non-tipped work exceeded 20% of her server duties and her non-related duties constituted a different job classification, she was entitled to the federal minimum wage, and not the tip credit hourly wage rate Defendant used. *Id.* at *9-10. Defendant moved to dismiss, arguing that Plaintiff failed to state a minimum wage claim under the FLSA. Defendant contended that Plaintiff had not provided any degree of specificity as to any date she worked at the alleged related and non-related non-tipped duties, how long each took, or how often Plaintiff did such work. *Id.* at *10. Defendant also maintained that § 531.56(e) of the U.S. Department of Labor ("DOL") regulation specifically provides that servers may perform incidental duties in addition to their normal duties as a server without forfeiting the top credit, and that it always paid Plaintiff the federal minimum wage for all of her workweeks as a tipped employee. *Id*. The Court granted Defendant's motion. The Court found that no minimum wage violation occurs so long as the employer's total wage paid to an employee in any given workweek divided by the total hours worked in the workweek equals or exceeds the minimum wage rate. *Id.* at *14. Although Plaintiff alleged that Defendant paid her less than the minimum wage and her complaint pertained to examples of tasks that Defendant asked her to perform that allegedly were both related to and unrelated to her occupation as a server, the Court found that such allegations did not state a minimum wage claim because the pleading never alleged that during any particular week the average of her hourly wages was less than the federal minimum wage. *Id.* The

Court therefore held that Plaintiff failed to state a minimum wage claim under the FLSA. The Court also found that DOL regulation entitling employers to utilize tipped food service personnel to perform related and incidental task was not ambiguous. Although Plaintiff asked the Court to defer to § 30d00(e) of the DOL regulations – that allegedly limits the amount of related duties tipped employees can perform, and that if tipped employee spend a substantial amount of time, or more than 20% of their workweek engaged in non-tipping duties, they must be paid the full minimum wage for their time spent performing the non-tipped work – the Court noted that neither Congress, the U.S. Supreme Court, nor the Ninth Circuit has recognized a purported cause of action based on the DOL regulation. *Id*. at *16-17. Further, because the controlling regulation was not ambiguous, the Court declined to consider the proposed DOL's informal commentary found in the notes to the regulation. The Court opined that the informal commentary was not persuasive because it did not interpret the regulation, but purported to add additional requirements, and it was meant only to provide guidance for employees of the DOL's Wage & Hour Division charged with enforcing the FLSA. *Id*. at *18-21. Because the server occupation inherently includes side work, and the regulation does not identify the "duties" dichotomy or cap incidental duties at 20%, the Court found that Plaintiff's complaint lacked both a cognizable legal theory and sufficient facts to support a cognizable legal claim. *Id.* at *20-26. Accordingly, the Court granted Defendant's motion to dismiss.

***Trejo, et al. v. Ryman Hospitality Properties, Inc.,* 2015 U.S. App. LEXIS 13204 (4th Cir. July 29, 2015).** Plaintiffs, a group of hotel and restaurant servers, brought an action alleging violations of the tip credit provision of the FLSA, a collective bargaining agreement with Defendant, and Maryland's Wage Payment and Collection Law. *Id.* at *2. Plaintiffs contended that Defendant improperly took a portion of their tips – roughly 4% of their total daily food and drink sales – and redistributed those tips to bartenders, server assistants, bus boys, and food runners. *Id.* Defendants moved to dismiss, and the District Court granted the motion. The District Court concluded that the FLSA's tip credit provision, 29 U.S.C. § 203(m), had no bearing on the case because Plaintiffs did not allege that Defendants paid them below the minimum wage, or that Defendants forced them to work overtime without proper pay, and conceded that their base salary always remained above the minimum wage even absent tips. The District Court dismissed Plaintiffs' count based on an alleged breach of the collective bargaining agreement, finding that they failed to exhaust their administrative remedies. Finally, the District Court dismissed Plaintiffs' Maryland state law count because Plaintiffs agreed that a "tip" was not a "wage" under the Maryland statute. *Id.* Plaintiffs appealed, and the Fourth Circuit affirmed. Plaintiffs argued that Defendants violated the FLSA by requiring them to join the tip pooling arrangement and that the tip credit provision created a freestanding right to bring a claim for lost tip wages. *Id.* at *7-9. The Fourth Circuit disagreed. The Fourth Circuit held that the inclusion of improper employees within a tip pool and/or the failure to notify employees of a tip pooling policy does not give rise to a private cause of action under the FLSA when employees seek only the recovery of the tips, unrelated to a minimum wage or overtime claim. *Id.* at *10. The Fourth Circuit explained that § 203(m), when read in context of the minimum wage and overtime provisions of the FLSA as a whole, gives rise to a cause of action "only if the employer was using tips to satisfy the minimum wage requirements." *Id*. The Fourth Circuit, therefore, affirmed the District Court's order dismissing the complaint.

(xxii) Sanctions In Wage & Hour Class Actions

***Hernandez, et al. v. Best Buy Stores, L.P.,* 2015 U.S. Dist. LEXIS 154103 (S.D. Cal. Nov. 13, 2015).** Plaintiff, a salaried store manager, brought a class action alleging that Defendant misclassified him as an exempt employee, and thereby denied him overtime pay and meal and rest periods. Plaintiffs alleged that Defendant's managers did not meet the requirements for "exempt" employees under California law because they regularly spent more than 50% of their time performing non-exempt tasks and because their work did not regularly involve discretion or independent judgment. *Id.* at *2. Prior to moving for class certification, Plaintiff requested an order compelling Defendant to disclose contact information for putative class members. *Id.* at *3. Finding that Plaintiff was entitled to test his class allegations to determine whether certification was feasible, the Court granted Plaintiff's motion and ordered Defendant to provide Plaintiff with contact information for members of the putative class subject to a stipulated protective order governing exchange of confidential information. *Id.* at *4. Plaintiff did not file a motion for class certification by the scheduled deadline, and instead filed a motion for permissive joinder seeking to join "identical claims" on behalf of 30 individuals who were members of the putative class and to dismiss the class

allegations without prejudice as to absent class members. *Id.* at *5. Defendant opposed the motion, and filed a motion for contempt sanctions and disqualification. Defendant contended that Plaintiff's counsel did not use the contact information for putative class members to allow Plaintiff to gather information in support of a motion for class certification, but contacted them to improperly solicit new clients to join the action as additional Plaintiffs. *Id.* at *6. The Court denied Defendant's motion. Although the Court did not anticipate that Plaintiff's counsel would decide not to pursue class certification and instead seek dismissal of the class allegations and the joinder of additional Plaintiffs, the Court also noted that it did not specifically prohibit Plaintiff from following this course. *Id.* at *14. Contrary to Defendant's view, the Court explained that it did not intend to limit the options available to Plaintiff's counsel if he determined, based on the information discovered from members of the putative class, that moving for class certification was not "feasible" for whatever reason. *Id.* The Court therefore concluded that Plaintiff did not violate its previous order simply because he decided not to pursue class certification but instead requested permissive joinder of additional Plaintiffs and dismissal of the class allegations. The Court also found that Defendant's separate contention that Plaintiff's counsel had engaged in unethical and abusive conduct when contacting potential class members – by aggressively soliciting representation in the suit and harassing other potential Plaintiffs – was supported by weak evidence and only showed a "mere possibility of abuse." *Id.* at *25-30. In addition, the Court noted that the communications between potential Plaintiffs and attorneys for both parties that resulted from making contact information available achieved some favorable results for both sides, as certain class members identified themselves as either wanting to participate in the action or opting-out. *Id.* at *41-42. The Court therefore held that the parties' requests in the moving and opposing papers for additional discovery to resolve whether there was any improper solicitation or unethical conduct during communications with putative class members would further delay the litigation, and thus were not warranted. *Id.* at *43. Accordingly, the Court denied Defendant's motion for sanctions and disqualification.

***Zurita, et al. v. High Definition Fitness Center, Inc.,* Case No. 13-CV-4394 (E.D.N.Y. Mar. 24, 2015).** Plaintiffs brought an action against Defendants asserting claims under the FLSA and the New York Labor Law. Defendants failed to respond to the complaint or participate in discovery, and the Court issued a default. *Id*. at *1. Subsequently, an attorney, Ganet Getachew, filed a notice of appearance on behalf of Defendants, and Plaintiffs moved for a default judgment. Another attorney, Rita Dave, appeared in the Court explaining that she was "of counsel" to Getachew. *Id*. at *1-2. Plaintiffs then agreed to withdraw their default motion and proceed with discovery. The parties meanwhile began negotiating a settlement; however, Defendants stopped participating in discovery, and failed to participate in the mediation process. *Id*. at *2. Plaintiffs then moved to compel Defendants to answer the amended complaint and provide discovery. When the Court ordered Defendants to show cause why default sanctions should not be entered against them, Defendants again failed to respond. Plaintiffs then renewed their motion for sanctions against Defendants and their counsel. Dave then represented to the Court that although she was an "of-counsel," she was primarily responsible for the case, and that she did not appear before the Court because she was ill. *Id*. at *2. Dave filed a motion to withdraw even though she had never filed her appearance in the case. *Id*. at *3. Meanwhile, Defendants appeared before the Court and explained that no one represented them anymore and that the previous counsel had not served them with a copy of the Court's order to show cause for default sanctions. The Court granted Defendants time to find a new attorney, while Plaintiffs filed another motion for sanctions against Getachew and Dave requesting $3,500 in attorneys' fees incurred as a result of counsel's non-compliance with discovery. *Id*. Meanwhile, the parties entered into a settlement, wherein Defendants agreed to make three monthly payments to Plaintiffs. Defendant made only one of the required payments. *Id*. at *4. Plaintiffs renewed their motions for a default judgment and sanction. The Court granted Plaintiffs' motion for sanctions. The Court observed that in deciding a whether a sanction is merited, the Court need not find that a party acted in bad faith; rather, it is sufficient if a pre-trial order is violated, which thereby would support a sanction. *Id*. at *5. The Court, accordingly, granted Plaintiffs' request for attorneys' fees resulting from defense counsel's failure to comply with discovery. *Id*. The Court also granted Dave's motion to withdraw, but it was contingent upon full payment of sanction. *Id*. at *4.

(xxiii) Issues With Opt-In Rights In Wage & Hour Class Actions

***Adkins, et al. v. Illinois Bell Telephone Co.,* 2015 U.S. Dist. LEXIS 40246 (N.D. Ill. Mar. 24, 2015).** Plaintiffs, 82 individuals employed as cable splicers, brought an action against Defendant, one of the largest providers of local telephone services, alleging claims for unpaid overtime wages in violation of the FLSA and the Illinois Minimum Wage Law. Defendant required its cable splicers to record their daily time in an electronic system called job administration management ("JAM"). *Id.* at *16. Defendant gave cable splicers an "efficiency rating" based on how well they performed their tasks within the time increments set and calculated this using a system called management systems operations control ("MSOC"). *Id.* Plaintiffs asserted that they uniformly under-reported the time taken to complete their daily tasks in order to avoid being disciplined for failing to meet "efficiency goals." *Id.* at *21. Defendant moved to dismiss the complaint for misjoinder and to require individual suits. Defendant argued that the decertification order in a related decision entitled *Blakes v. Illinois Bell Telephone Co.,* Case No. 11-CV-336 (N.D. Ill. Jan. 17, 2011), barred joinder of Plaintiffs' claims in this action. In *Blakes,* seven named Plaintiffs brought an FLSA collective action seeking unpaid overtime wages. Although the Court initially granted conditional certification under the lenient first-stage standard, after extensive discovery, including depositions of 18 opt-in Plaintiffs, the Court decertified the collective action on all but Plaintiffs' post-shift timesheet entry claim. *Id*. The Court had determined that the differences in the opt-in Plaintiffs' testimony demonstrated that it would be impossible to resolve the question of whether the combination of the MSOC and JAM rating systems compelled cable splicers to work off-the-clock on a class-wide basis. *Id.* at *22. The Court had, however, found sufficient parallels among Plaintiffs' experience of working post-shift to support a finding of similarity with respect to their claim that Defendant required to complete timesheet post-shift without pay. *Id.* at *24. While Plaintiffs in *Blakes* were currently before the Court with a collective action for their post-shift timesheet entry claim and with individual actions joined together for their off-the-clock work claims, Plaintiffs brought this action on behalf of opt-ins in *Blakes* asserting those claims that the Court in *Blakes* denied in rejecting collective action certification. *Id.* at *25. Defendant argued that Plaintiffs were estopped from proceeding jointly because a Court had already found that Plaintiffs were not similarly-situated and that their claims were not suitable for collective action treatment. *Id.* at *28-29. The Court granted Defendant's motion to dismiss and found that Plaintiffs could not satisfy the similarly-situated standard under the FLSA. *Id.* at *31. The Court noted that the parties substantially litigated the similarity issue, conducting extensive discovery, hiring multiple experts and filing hundreds of pages of briefing, before the Court in *Blakes* and thus, Plaintiffs were collaterally estopped from joining all 82 individual Plaintiffs into one action based on their efficiency theory. *Id.* at *32. Although Plaintiffs here alleged additional different reasons for under-reporting their time, including that their supervisors told them not to report the time they worked pre-shift and post-shift or during lunch, the Court found that it would still need to engage in numerous individual inquiries to determine the extent of each supervisor's knowledge and assess each supervisor's decision to require off-the-clock work. *Id.* at *42. Thus, because Plaintiffs' claims did not arise out of the same transaction or occurrence, the Court concluded that Plaintiffs' claims were misjoined and must be severed. *Id.* at *45. Accordingly, the Court ordered severance of the claims of all Plaintiffs.

***Arocho, et al. v. Crystal Clear Building Services, Inc.,* 2015 U.S. Dist. LEXIS 38493 (N.D. Ohio Mar. 26, 2015).** Plaintiffs, a group of employees, brought a collective action alleging that Defendants failed to pay them overtime wages and/or minimum wages in violation of the FLSA. After the Court granted Plaintiffs' motion for conditional certification, 114 individuals opted-in to the collective action. *Id*. at *2. The parties cross-moved for summary judgment, and the Court denied Defendants' motion. According to Defendants, the named Plaintiffs were subject to the same requirement as putative collective action opt-ins in that the named Plaintiffs must opt-in via a written consent form. *Id*. at *3. Defendants argued that the named Plaintiffs never submitted a written consent, and therefore, under 29 U.S.C. § 216(b), their claims must be dismissed. Plaintiffs contended that they submitted their written consent, and attached the motion for conditional certification, where each named Plaintiff declared their consent to bring this action for themselves and for other similarly-situated employees. *Id*. Defendants responded that Plaintiffs' consents were filed before the action was conditionally certified, and hence they were entitled to summary judgment. The Court determined that Plaintiffs produced unrefuted evidence that they consented in writing to opt-in the collective action. *Id*. at *5. The Court found that nothing in the 29 U.S.C. § 216(b) requires a named

Plaintiff to file a written consent after conditional certification, as the statute indicates that a consent may be filed with the complaint. *Id*. Accordingly, the Court denied Defendants' motion for summary judgment.

***Kimbrel, et al. v. D.E.A. Corp.,* 2015 U.S. Dist. LEXIS 38364 (E.D. Tenn. Mar. 26, 2015).** Plaintiffs brought a collective action alleging that Defendants violated the FLSA. The Court allowed the parties' joint motion for conditional certification, and set October 20, 2014 as the deadline for the individuals who wished to opt-in. Three individuals; Keyshia Burns, Sara Hassan, and Brandy Hill, sought to join the collective action weeks after the deadline lapsed. *Id*. at *2. Plaintiffs moved to add the three as opt-ins, or in the alternative sought permissive joinder pursuant to Rule 20, which the Court granted in part. *Id.* at *3. At the outset, the Court noted that in *Hurt v. Commerce Energy, Inc.*, 2014 U.S. Dist. LEXIS 14842 (N.D. Ohio Feb 6, 2014), the Court set the following factors to determine when individuals wished to opt-in after the deadline passed: (i) whether good cause exists; (ii) prejudice to Defendant; (iii) how long after the deadline passed the consents were filed; (iv) judicial economy; and (v) the remedial purposes of the FLSA. *Id*. at *5. The Court noted that despite Plaintiffs offering no good cause for the untimeliness, *Hurt* found that the late opt-ins should be permitted to join the collective action because less than a month had passed since the opt-in deadline, judicial economy would be served by permitting one action, and that the other factors also favored joinder. *Id*. at *7. Here, the Court noted that Defendants' failure to disclose Burns, Hill, and Hassan's up-to-date address supported a finding for good cause for the delay. *Id*. Second, the Court remarked that there was little danger of prejudice to Defendants, because adding the opt-ins to the action would have virtually no effect on their potential liability. *Id*. Moreover, the Court noted that Defendants pointed to no evidence that supported their argument that other potential Plaintiffs would continue to present themselves and attempt to opt-in to this action. *Id*. at *8. To ensure that no other individuals opted-in, the Court ruled that that it would not accept any additional requests absent showing of extraordinary good cause. *Id*. The Court also found that the brief delay and the other two factors also weighed in favor of the joinder. Accordingly, the Court granted Plaintiffs' request to allow the three individuals to opt-in, and denied Plaintiffs' alternative prayer as moot.

***Lassen, et al. v. Hoyt Livery, Inc.,* 2015 U.S. Dist. LEXIS 63823 (D. Conn. May 15, 2015).** Plaintiffs brought an action alleging that Defendants failed to pay them overtime wages in violation of the FLSA and the Connecticut Minimum Wage Act ("CMWA"). The Court conditionally certified the collective action, and certified the CMWA claims under Rule 23. Fifteen individuals opted-in to the collective action, and 41 individuals opted-out of the CMWA class. *Id*. at *1-2. Defendants served document requests and interrogatories on each of the 15 opt-in Plaintiffs, and after several extensions to respond, only eight opt-in Plaintiffs responded to the request. Defendants then moved to dismiss all seven opt-in Plaintiffs with prejudice under Rule 41(b), which the Court granted in part. Of the seven opt-ins, five failed to respond to Defendants' requests ("unresponsive Plaintiffs"), and the remaining two opt-ins responded to the requests, but produced the responsive documents a month after the deadline passed. Plaintiffs conceded that the unresponsive Plaintiffs' FLSA claims were subject to dismissal, but their CMWA claims survived. *Id*. at *4. Defendants argued that the doctrine of *res judicata* dictated that the CMWA claims must be dismissed if the FLSA claims were dismissed under Rule 41(b), as a Rule 41(b) dismissal operates as an adjudication on the merits. *Id*. at *5. The Court rejected Defendants' position, and reasoned that claim and issue preclusion did not operate in such a manner. The Court remarked that Plaintiffs did not seek to initiate a new action on their FLSA claim; rather, they sought to continue an existing action on their CMWA claim. *Id*. Accordingly, the Court dismissed the unresponsive Plaintiffs' FLSA claims. The Court, however, refused to dismiss the claims of two Plaintiffs who responded to the request. The Court explained that Defendants were not prejudiced because although Plaintiffs produced the documents a month after the deadline to produce the documents had passed, the deadline for the completion of discovery was not until June 1, 2015, which was a month after the opt-ins produced the documents. Accordingly, the Court granted Defendants' motion in part.

***Randolph, et al. v. Centene Management, Co., LLC,* 2015 U.S. Dist. LEXIS 135740 (W.D. Wash. Oct. 5, 2015).** Plaintiff brought an FLSA collective action alleging that Defendant uniformly misclassified her and other case managers as exempt from the FLSA's overtime protections and also violated Washington's wage & hour laws. Plaintiff moved for leave to file an amend complaint and to file opt-in-

forms, which the Court granted. Previously, the Court had granted Plaintiff's motion for conditional certification of a collective action and set July 31, 2015 as the deadline for opting-in the suit. Plaintiff received four additional consent forms seeking to join the case after the July 31 deadline. *Id.* at *2. Subsequently, Plaintiff moved to amend her complaint to: (i) include individual opt-in Plaintiffs as additional named Plaintiffs in the case caption; and (ii) add Rule 23 state law overtime claims under California, Ohio, Missouri, and Illinois wage laws. *Id.* at *3. Defendant opposed Plaintiffs' motion on the ground that Plaintiff failed to satisfy Rule 23's numerosity requirement. The Court remarked that this argument was premature and better suited for an opposition to class certification, and, even though Plaintiff bore the burden of demonstrating that Rule 23's requirements were actually satisfied in this case, it declined to make that determination on this motion. *Id.* at *4-5. Defendant contended also that Plaintiff's proposed state law claims would substantially predominate over her FLSA claim and, as such the exercise of supplemental jurisdiction would be improper in this case. The Court, however, concluded that it was too early to decide that Plaintiff's state law claims would substantially predominate over her FLSA claim. *Id.* at *5. Consequently, the Court granted Plaintiff's motion for leave to amend the complaint. *Id.* at *6-7. Furthermore, regarding Plaintiff's motion to file four late consent forms, Defendant argued that Plaintiff had not shown good cause for the filing of late opt-ins. The Court remarked that in deciding whether late opt-in consent forms should be accepted, the case law authorities have generally considered five factors, including: (i) whether good cause exists for the late submissions; (ii) prejudice to Defendant; (iii) how long after the deadline were the consent forms filed; (iv) judicial economy; and (v) the remedial purposes of the FLSA. *Id.* at *8. Considering these factors, the Court found that Plaintiff failed to show good cause for the late submissions. *Id*. The Court, however, determined that all the other factors weighed in favor of allowing the late opt-in Plaintiffs to join this case. Accordingly, the Court nonetheless granted Plaintiff's motion to file the four consent forms, and the motion for leave to amend complaint and to file the late opt-in-forms.

***Regan, et al. v. City Of Charleston,* 2015 U.S. Dist. LEXIS 35524 (D.S.C. Mar. 23, 2015).** Plaintiffs, a group of current and former firefighters, brought an FLSA collective action against the City seeking unpaid overtime compensation. Following the conditional certification under 29 U.S.C. § 216(b), the Court permitted potential Plaintiffs to opt-in to the collective action by September 15, 2014. *Id*. at *5. Plaintiffs filed over 200 consent forms by that deadline. Shortly after the deadline, Plaintiffs' counsel sought the City's consent to file six untimely opt-in consent forms. Because the City did not give its consent to the joinder of the opt-ins, Plaintiffs filed a motion seeking the Court's leave to file the untimely opt-in consent forms. *Id*. at *6. The Court entered a text order directing Plaintiffs' counsel to procure from each of the potential Plaintiffs a detailed affidavit addressing the reasons for not timely filing a consent form. *Id.* at *7. Accordingly, Plaintiffs filed affidavits of the potential Plaintiffs and their consent forms within the time fixed in the text order. The Court observed that although the affidavits filed by Plaintiffs' counsel did not support a finding of "good cause" for each potential Plaintiff's failure to timely return and file a consent form, the other relevant factors weighed in favor of allowing the late submissions. *Id.* at *10. The Court noted that Plaintiffs filed the consent forms within one month of the September 15, 2014 deadline and immediately informed the City's counsel that those individuals, who represented less than two percent of the current collective action, wished to join the action. *Id*. Therefore, the Court found that as the one-month delay did not prejudice the City, the addition of those individuals would not disrupt the discovery process. Furthermore, the Court found that judicial economy would be best served by allowing the potential Plaintiffs to join the pending action because, even if the Court denied Plaintiffs' motion, the potential Plaintiffs might still be able to institute separate actions against the City and thus, the consequences of denying joinder would likely be the same. *Id*. at *12. Finally, the Court concluded that allowing the potential Plaintiffs to opt-in to the pending collective action was consistent with the FLSA's remedial statutory scheme. *Id.* at *13. Accordingly, the Court accepted the untimely opt-in consent forms.

***Rivet, et al. v. Office Depot, Inc.,* 2015 U.S. Dist. LEXIS 171175 (D.N.J. Dec. 22, 2015).** Plaintiffs, a group of former assistant store managers, brought a putative class and collective action under the FLSA and state wage & hour laws seeking overtime wages. After a number of individuals opted-in to the FLSA action, Defendant moved to dismiss claims of nine opt-ins under the doctrine of judicial estoppel on the grounds that they failed to disclose their claims against Defendant during the course of their bankruptcy

proceedings ("the Bankruptcy Opt-Ins"), and claims of the 13 opt-ins who failed to prosecute and to comply with an order to provide discovery ("Discovery Opt-Ins"). *Id*. at *2-3. The Court granted the motion. Considering the three elements laid down in *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp*., 337 F.3d 314, 319 (3d Cir. 2003), the Court found that application of judicial estoppel was appropriate against the Bankruptcy Opt-Ins. *Id*. at *7. First, the Court found that the Bankruptcy Opt-Ins had taken two positions that are irreconcilably inconsistent. Notwithstanding their affirmative decision to opt-in, none of the Bankruptcy Opt-Ins disclosed their contingent claims against Defendant during their bankruptcy proceedings. *Id*. at *9. Second, the Court found that the Bankruptcy Opt-Ins took their inconsistent positions in bad faith. The Bankruptcy Opt-Ins' knowledge of their claims was beyond dispute because they affirmatively agreed to join the FLSA litigation. Although they asserted that they were unaware of a duty to include their claims against Defendant in their bankruptcy disclosures, the Court remarked that the Bankruptcy Opt-Ins stood to gain from failing to disclose their claims in bankruptcy; this was because had their lack of disclosure gone unnoticed, they would have been able to pursue their claims against Defendant without having to make any future recovery available to their creditors. *Id*. at *11. Finally, the Court concluded that any lesser sanction would be inadequate. Although the Bankruptcy Opt-Ins proposed that their claims be stayed for 60 days so that they could re-open and/or amend their bankruptcy proceedings, the Court declined their request as it was not an adequate substitute for the application of judicial estoppel. The Court remarked that adopting the Bankruptcy Opt-Ins' proposal would encourage future debtors to take a "wait and see approach" in which they can conceal assets, hope no one notices, and if they do get caught, ask the Court to forgive their failure to disclose. *Id*. at *12. In analyzing whether the Discovery Opt-Ins' case should be dismissed pursuant to Rule 41(b) and Rule 37(b), the Court considered the six factors discussed in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984). *Id*. First, the Court found that the Discovery Opt-Ins were personally responsible as they did not respond to the discovery requests due in 2014. Second, by withholding discovery, the Discovery Opt-Ins had potentially frustrated Defendant's ability to receive information relevant to its defense in this litigation. Third, the Discovery Opt-Ins engaged in a continual pattern of non-responsiveness despite multiple reminders. Fourth, the Discovery Opt-Ins' non-responsiveness was willful, as the Magistrate Judge had explicitly warned them that a failure to engage in discovery might result in dismissal. *Id*. at *15. Fifth, the Court found that no alternative sanction would be appropriate because the Discovery Opt-Ins had already ignored the Court's order. Finally, although the sixth factor of *Poulis* (the meritoriousness of the claim or defense) could not be determined at that early stage of the litigation, the Court concluded that all other five factors weighed in favor of dismissal. *Id*. Accordingly, the Court granted Defendant's motions.

***Stevenson, et al. v. The Great American Dream, Inc.,* 2015 U.S. Dist. LEXIS 75915 (N.D. Ga. June 11, 2015).** Plaintiffs, a group of current and former adult entertainers at a nightclub, brought a collective action alleging that Defendants misclassified them as "independent contractors" and denied them minimum and overtime wages under the FLSA. *Id.* at *2. The Court conditionally certified the collective action pursuant to 29 U.S.C. § 216(b). After the discovery period ended, Defendants moved to decertify the collective action or to amend the conditional class, which the Court denied. Defendants argued that multiple opt-in Plaintiffs had either failed to provide verified discovery responses, or had failed to respond to discovery altogether. *Id*. at *3. Defendants requested the Court to either dismiss the claims of those opt-ins, or to set a firm deadline by which they must provide adequate responses to Defendants' discovery requests. *Id*. Although Defendants framed their motion as one for decertification or an amendment to the collective action, the Court stated that in reality it was simply a motion to impose sanctions against certain Plaintiffs and seeking dismissal of their claims for failure to comply with discovery requests. *Id*. While Defendants initially offered a less extreme alternative to dismissal, they later argued that dismissal with prejudice was necessary. *Id*. at *4-5. Defendants asserted that the non-responsive opt-in Plaintiffs willfully disregarded the discovery requests, and that a lesser sanction would be futile. *Id*. at *5. In support, Defendants referred to the fact that those opt-in Plaintiffs had thus far failed to respond, but did not submit any other evidence indicating that this failure was willful, or that a firm deadline would be futile. *Id*. Given that dismissal is the most severe Rule 37 sanction and is not favored, the Court concluded that it would not dismiss the opt-in Plaintiffs from this action. *Id*. The Court ruled that the non-responsive opt-in Plaintiffs would be given 30 days to respond to Defendants' discovery requests, and any opt-in Plaintiff who failed to

respond within the timeframe would be dismissed from the action. *Id*. Accordingly, the Court denied Defendants' motion to decertify or to amend the conditionally certified collective action.

***White, et al. v. Integrated Electric Technologies, Inc.,* 2015 U.S. Dist. LEXIS 90529 (E.D. La. July 13, 2015).** Plaintiffs, a group of technicians, brought an action alleging that Defendants classified them as independent contractors and denied them overtime in violation of the FLSA and the labor laws of Alabama, Mississippi, and Louisiana. Plaintiffs filed a motion for conditional certification of a collective action. The Court granted Plaintiffs' motion. Subsequently, 98 Plaintiffs opted-in, including the six named Plaintiffs. *Id.* at *4. Defendants moved for summary judgment and argued that 54 of the 98 opt-in Plaintiffs' claims were time-barred. *Id*. at *5. Plaintiffs asked the Court to apply an additional year of equitable tolling because of procedural complexities in this case and several delays. Defendants argued that there was no basis to apply equitable tolling because Plaintiffs failed to cite any evidence supporting their contention that opt-in Plaintiffs diligently pursued their claims. *Id.* at *6. The Court found that Plaintiffs failed to point to any evidence showing the opt-in Plaintiffs were unaware of their rights, barred from asserting their rights, or diligently pursued their rights but were prevented from joining the action due to reasons beyond their control. *Id.* at *11. Further, the Court remarked that Plaintiffs failed to offer any explanation for why those 54 opt-in Plaintiffs were unaware of their rights and deserved equitable tolling while the named Plaintiffs and 38 other opt-in Plaintiffs were able to discover their claims and diligently file within the allocated statute of limitations. *Id*. Accordingly, the Court ruled that Plaintiffs had failed to meet their burden of showing that there were extraordinary circumstances justifying tolling of the statute of limitations for the 54 opt-in Plaintiffs at issue and, therefore, granted Defendants' motion for summary judgment.

(xxiv) Trial Issues In FLSA Collective Actions

***Chen, et al. v. Chan,* 2015 U.S. App. LEXIS 9271 (2d Cir. June 4, 2015).** Plaintiffs brought suit against their former employer seeking unpaid minimum wage and overtime wages under the FLSA and the New York Labor Law ("NYLL"). The District Court awarded damages to Plaintiffs on their claims under the NYLL. Defendant appealed, and the Second Circuit affirmed in part. Defendant argued that the District Court erred in excluding evidence of a purported settlement agreement with Plaintiffs. Defendant claimed that the District Court excluded the settlement agreement as a discovery sanction, based solely on Plaintiffs' representation that Defendant's former lawyer failed to produce a copy of the agreement during discovery. *Id.* at *3. The Second Circuit noted that Defendant was left to proceed *pro se* on the eve of the trial, insisted that he had provided a copy of the agreement from his former attorney, and requested an opportunity to call his attorney to check whether the document had been produced. *Id*. at *4. The District Court denied those requests and prevented Defendant from utilizing potentially compelling evidence to refute Plaintiffs' representation. *Id*. The Second Circuit found the District Court's ruling erroneous and remanded with instructions to the District Court to conduct a further inquiry into whether Defendant produced the contested evidence. The Second Circuit ordered that, if the District Court found that Defendant produced the settlement agreement, it should order a new trial, and in the event the District Court determined that Defendant never provided the settlement agreement, it should reinstate the judgment as corrected on appeal. Defendant further argued that the District Court's damages calculation was erroneous because it relied on the full minimum wage rate without crediting a portion of Plaintiffs' tips. The Second Circuit held that Defendant failed to comply with the notice requirements under the NYLL, which applies to employers intending to claim a tip allowance, and as such, the District Court did not err by failing to apply a tip allowance. Defendant also claimed that there was evidence in the record that Plaintiffs received several meals a day while working, thereby entitling Defendant to a meal allowance under the NYLL. The Second Circuit, however, concluded that the District Court did not err by failing to apply a meal allowance because Defendant failed to notify Plaintiffs that he intended to count their meals against the minimum wage and Defendant did not keep records of the claimed allowances. *Id.* at *7. Defendant further argued that the District Court erred by calculating damages for Plaintiffs' periods of employment based on the federal minimum wage of $7.25, rather than New York's prevailing minimum wage of $7.15. The Second Circuit noted that, because New York's minimum wage rate increased to $7.25, the District Court did not err by using the higher amount. Finally, Defendant claimed that the District Court should have off-set its damages calculation by $8,000 because the named Plaintiffs Zu Guang Zhu, Shui Bing Zhu, You Huang Zhu, and Guo Ren Huang each received a payment of $2,000 from Defendant. The

Second Circuit opined that the District Court's failure to credit those payments in its damages calculation was error. *Id.* Accordingly, the Second Circuit vacated the judgment of the District Court in part and remanded for further proceedings.

***Olibas, et al. v. Native Oilfield Services, LLC,* Case No. 11-CV-2388 (N.D. Tex. Aug. 27, 2015).** In this consolidated action, Plaintiffs, a group of dispatchers and truck drivers, alleged that Defendants failed to pay them overtime wages in violation of the FLSA. After a trial, the jury found in favor of Plaintiffs. Defendants moved for judgment as a matter of law and for a new trial ("Defendants' post-judgment motions"), which the Court denied. Defendants first moved for judgment as a matter of law or a new trial based on the Motor Carrier Act exemption. Based on the minimal documentation offered by Defendants and the credibility of the witnesses offered by both sides at trial, the Court found that the Motor Carrier Act Exemption did not apply to Defendants or Plaintiffs, and thus denied Defendants' post-trial motions on this ground. *Id.* at 2. Defendants also moved for a new trial based on the jury's finding regarding the average number of unpaid overtime hours worked by Plaintiffs. Since Defendants failed to live up to their legal obligations to maintain adequate payroll records, the Court opined that the jury's reasonable approximation of Plaintiffs' average unpaid hours was not "against the great weight of the evidence," such that a new trial was warranted. *Id.* at 3. The Court also rejected Defendant's request for a new trial based on the argument that the Court erred in charging the jury with regards to the Motor Carrier Act exemption's "reasonable expectation" analysis. *Id.* Defendants took issue with a single sentence in the Court's two-page instruction to the jury on the Motor Carrier Act exemption, which stated that one way drivers can be considered to be "reasonably expected" to drive in interstate commerce was if interstate trips were indiscriminately distributed by the employer to the drivers as part of their continuing job duties. *Id*. The Court noted that although Defendants did not deny that indiscriminate distribution of interstate trips was a permissible factor to consider in determining whether drivers could be reasonably expected to drive in interstate commerce, they argued that the Court erred in including this factor to the exclusion of all other factors that go into the "reasonable expectation" analysis. The Court, however, ruled that Defendants had not shown sufficient prejudice from this single line of instruction to warrant a new trial, and therefore rejected Defendant's request for a new trial on this ground. Furthermore, the Court similarly rejected Defendants contention that a new trial was warranted in light of the Court's refusal to instruct the jury to determine Plaintiffs' hours worked and total compensation, as it had addressed similar contentions made by Defendants in its post-trial memorandum opinion and order. *Id.* at 4. Finally, the last two grounds asserted in Defendants' post-judgment motions – objections to Plaintiffs' post-trial declarations and the amount of attorneys' fees awarded to Plaintiffs – were also discussed and rejected by the Court in its post-trial memorandum opinion and order. Accordingly, the Court denied Defendant's renewed motion for judgment as a matter of law and motion for a new trial.

(xxv) Issues With Interns, Volunteers, And Students Under The FLSA

***Benjamin, et al. v. B & H Education, Inc.*, 2015 U.S. Dist. LEXIS 144351 (N.D. Cal. Oct. 16, 2015).** Plaintiffs, a group of students, brought an action alleging that Defendant failed to pay them minimum wage and overtime pay for their work in violation of the FLSA and the wage & hour laws of California and Nevada. Plaintiffs contended that they were cosmetology and hair design students at the Marinello Schools of Beauty, which Defendant owned and operated. *Id*. at *2. Plaintiffs stated that to become licensed cosmetologists in California or hair designers in Nevada, students received hundreds of hours of clinical training. As such, the Marinell schools had clinics where the students did hair styling and provided other services to customers. *Id.* Plaintiffs claimed that the money the customers paid for the services went to the school and they did not get paid for their clinical work. *Id.* Plaintiffs contended that they were employees during their time in the clinics and therefore should have received minimum wage and overtime pay for their work. Plaintiffs proposed a class action on behalf of all students who worked in Marinello's clinics. Before proceeding with discovery on class certification, the parties cross-moved for summary judgment on the named Plaintiffs' individual claims. The trial court granted Defendant's motion for summary judgment, and denied Plaintiffs' motion. The parties disagreed about the legal test that should apply when assessing whether the students were "employees" when they did their clinical work. The Court determined that the primary beneficiary test applied with respect to California law. *Id*. at *4. In connection with the cross-motions for summary judgment, Plaintiffs had submitted declarations from other former

Marinello students that provided details about efforts the schools made to subordinate the educational function of the clinics to the goal of making money. *Id.* at *6. Plaintiffs, however, failed to identify those third-party witnesses with names and addresses as required by Rule 26. *Id.* at *7. The Court, accordingly, found that Plaintiffs failed to comply with the Rule 26 requirement, and struck the declarations, leaving them with their own deposition testimony and some documentary evidence. *Id*. at *8. The Court found that Plaintiffs' evidence was too vague and sparse to overcome Defendant's motion for summary judgment. Plaintiffs also alleged that they performed some non-cosmetological work, which the Court found to be too vague to support a conclusion that the schools required them to do an excessive amount of this work. *Id*. Likewise, the Court reasoned that the mere fact that the clinics charge customers for services rather than offering them for free could not, on its own, support a jury finding that Marinello's clinics subordinated their educational purpose to their business function. *Id*. at *10. The Court, therefore, held that the evidence Plaintiffs provided would not allow a reasonable jury to conclude that the schools subordinated the educational function of the clinics in favor of making money. *Id.* Accordingly, the Court granted Defendant's motion for summary judgment.

***Guy, et al. v. Casal Institute Of Nevada, LLC,* 2015 U.S. Dist. LEXIS 1191 (D. Nev. Jan. 5, 2015).** Plaintiff, a student, brought a collective action alleging that Defendant failed to pay minimum and overtime wages in violation of the FLSA. Defendants operated a for-profit cosmetology and esthetics services school, the Aveda Institute Las Vegas ("Aveda"), which trained paying students to learn and practice the trades of cosmetology and esthetic services. *Id*. at *3. Plaintiff contended that Defendants required their students to perform cosmetology and esthetic services for their "for-profit" business without compensation, thereby violating the FLSA and Nevada law. *Id*. Defendants moved to dismiss, which the Court granted in part. Defendants first sought dismissal of the individual Defendants. The Court noted that the only theory by which the individual Defendants could be held liable in this action was by piercing the corporate veil, *i.e.*, the unity of interest and ownership between the corporation and the individual Defendants was so close that they no longer existed as separate entities. *Id.* at *7. The Court found that although Plaintiff alleged that the individual Defendants signed contracts on behalf of the LLC and not in their individual capacities, a mere signing of a contract the corporation's behalf was insufficient to show that the corporation was the alter ego of the individual Defendants. *Id.* In addition, the Court observed that individual corporate managers are not personally liable, as employers, for unpaid wages. *Id.* Accordingly, the Court dismissed the individual Defendants in their personal capacity. Defendants also sought dismissal, arguing that Aveda was barred as a matter of law from compensating its students. The Court observed that § 644.190(2) of the Nevada Revised Statutes ("NRS") provides that it is unlawful to engage in the practice of cosmetology, whether for compensation or otherwise, unless the person is licensed in accordance with the provisions of that chapter. *Id.* at *8. The Court, however, noted that this chapter does not prohibit any student in any school of cosmetology established pursuant to the provisions of the chapter from engaging, in the school and as a student, in work connected with any branch or any combination of branches of cosmetology in the school. *Id.* Thus, the Court opined that the statute does not bar the compensation of students, and that § 644.190 or § 644.145 of the NRS did not bar Aveda from compensating Plaintiff or those similarly-situated. *Id.* Finally, Aveda contended that Plaintiff was a student, and not an employee within the meaning of the FLSA. Plaintiff countered arguing that Aveda was evading wage & hour laws by classifying her and others similarly-situated as students rather than employees. Plaintiff also alleged that Aveda was able to charge far less than its competitors for salon services because it does not compensate its student-workers, thereby immediately profiting from the student-workers' services. *Id*. at *11. The Court opined that these allegations satisfied the pleading requirement of the FLSA, and that Plaintiff had stated a plausible claim under the FLSA. Accordingly, the Court denied Aveda's motion in this regard.

***Hollins, et al. v. Regency Corp.,* 2015 U.S. Dist. LEXIS 145813 (N.D. Ill. Oct. 27, 2015).** Plaintiff, a cosmetology student, brought an action under the FLSA and Illinois and Indiana wage & hour laws seeking to recover unpaid wages for performing various cosmetology services for paying customers. *Id.* at *1. Defendant operated state-licensed and accredited cosmetology schools throughout the country, and Plaintiff enrolled as a full-time cosmetology student at Defendant's Indiana location. Defendant divided its 1,500-hour curriculum into three periods, including: (i) the workshop phase; (ii) the rehearsal phase; and (iii) the performance phase. *Id.* at *3. The performance floor was designed to replicate a salon where

students performed cosmetology services for paying customers, described and recommended products and services, and booked appointments. *Id.* Plaintiff alleged that her performance services made her an employee, which entitled her to wages under the FLSA. *Id.* at *7. Defendant moved for summary judgment, arguing that its students did not fall within the purview of the FLSA and related state laws. The Court granted Defendant's motion. The Court employed a balancing test that weighed the benefits to both Defendant and the student, and found that the students were the primary beneficiaries of Defendant's clinical program, and any benefits Defendant received was not obtained in a way that "takes unfair advantage of or is otherwise abusive toward the student." *Id.* at *23. The Court noted that the clinical work performed by the students was not only consistent with what was statutorily required to be performed at a cosmetologist school, but also Defendant was the sort of vocational school where the students were required by law to be trained. *Id.* at *23. Plaintiff argued that some of the tasks the students performed lacked educational value because they were not closely related to the practice of cosmetology. The Court, however, pointed out that Defendant's students received academic credit for every minute of work they performed, and this illustrated that the economic reality of the relationship between Defendant and the students was that of a student-trainer, not an employee-employer. *Id.* at *28-31. Although the Court acknowledged that the for-fee services were a major part of the student's training program, it also found that the for-profit work was primarily performed for the benefit of the students to prepare them to pass the exam to become a licensed cosmetologist. *Id.* at *37-38. Thus, according to the Court, the fact that Defendant made some profits from Plaintiff's service alone did not alter her status as a student or made the FLSA applicable because the fundamental reality remained that the work performed by students was mandated by law if they wished to obtain a license to work as a cosmetologist, and they were therefore the primary beneficiaries of the arrangement that allowed them to complete that legal requirement. *Id.* at *48. Accordingly, the Court granted Defendant's motion for summary judgment.

***Jeung, et al. v. Yelp, Inc.,* 2015 U.S. Dist. LEXIS 107427 (N.D. Cal. Aug. 13, 2015).** Plaintiffs, a group of individuals who wrote reviews on Defendant's website, brought an action seeking to establish that Defendant had a legal duty under the FLSA to treat them as employees and provide compensation. Defendant filed a motion to dismiss the complaint and a motion to strike under California's "Anti-SLAPP" statute, which the Court granted. At the outset, the Court noted that Rule 8 provides that to state a claim, a pleading must contain a short and plain statement of the claim showing that Plaintiff is entitled to relief. *Id*. at *2. Here, Plaintiffs alleged that Defendant hired them as writers, were directed how to write reviews, and were given other such employee type direction from Defendant. The Court observed that a reasonable inference drawn from the complaint was that Plaintiffs used the term "hired" to refer to the process by which any member of the public can sign up for an account on Defendant's website and submit reviews, and used the term "fired" to refer to having their accounts involuntarily closed. *Id*. at *4-5. The Court remarked that a further reasonable inference was that Plaintiffs and the class may contribute under circumstances that either could not reasonably be characterized as performing a service to Defendant at all, or that at most would constitute acts of volunteerism. *Id*. at *5. The Court concluded that although the statutory definition of "employee" is exceedingly broad, it did not include volunteers such as Plaintiffs and members of the putative class. *Id.* Accordingly, the Court concluded that Plaintiffs' conclusory allegations that they were hired and fired by Defendant were insufficient to state an FLSA claim and dismissed the complaint. Defendant next argued that Plaintiffs' state law claim represented a Strategic Lawsuit Against Public Participation ("SLAPP"), which was designed to allow dismissal of meritless and harassing claims seeking to chill protected expression. *Id*. at *8. The Court concluded that the requirement of the anti-SLAPP statute were met and granted Defendant's motion to strike. *Id*. at *9-10.

***Marshall, et al. v. UBS Financial Services, Inc.*, 2015 U.S. Dist. LEXIS 88048 (S.D.N.Y. July 7, 2015).** Plaintiff, an unpaid intern, brought an action alleging that Defendant failed to pay him minimum wages, and wages due to him under the FLSA and the New York Labor Law ("NYLL"). Plaintiff claimed that he interned with Defendant for four months in 2012, and worked between four to five hours per day, two days per week. *Id*. at *3. Plaintiff claimed that he performed tasks necessary to the operation and maintenance of Defendant's business, and that Defendant would have hired additional employees or required existing staff to work additional hours absent his contribution. *Id*. Defendant moved to dismiss Plaintiff's complaint, which the Court granted in part. Defendant contended that Plaintiff had failed to allege the existence of an

employment relationship between the parties. *Id.* at *4. The Court found that although Plaintiff did not allege that he expected compensation from his internship, he did state the place he worked and provided his dates of his employment. *Id*. at *8. Accordingly, the Court concluded that the complaint sufficiently stated the existence of employment relationship under the FLSA and the NYLL. Defendant also argued that complaint did not allege willful violations of the FLSA and the NYLL. The Court noted that the statute of limitations for wage claims under the FLSA extends from two to three years for willful violations, and six years for under the NYLL. *Id*. at *9. The Court reasoned that Plaintiff would have stated a claim for willful violation if the complaint alleged a willful violation and the existence of a policy or practice consistent with willful conduct. *Id*. Here, because Plaintiff alleged that Defendant's unlawful conduct was pursuant to a corporate policy of minimizing labor costs by denying wages in violation of the FLSA and the NYLL, the Court ruled that the allegations met the threshold for pleading of a willful violation. *Id*. at *10. Finally, because Plaintiff sought to withdraw his overtime and failure to make timely payment claims, the Court dismissed them with prejudice.

(xxvi) Tolling Issues In Wage & Hour Class Actions

***Atkinson, et al. v. TeleTech Holdings, Inc.*, 2015 U.S. Dist. LEXIS 23630 (S.D. Ohio Feb. 26, 2015).** Plaintiffs brought a putative collective action alleging that Defendants failed to pay their customer service agents ("CSAs") overtime compensation in violation of the FLSA. On December 4, 2014, Plaintiffs filed a pre-discovery motion for conditional certification of a collective action. *Id.* at *3. During a conference held on December 8, 2014, Defendants indicated a desire to take several depositions before responding to the motion for conditional certification, and agreed to voluntarily toll the limitations period for potential opt-ins during the period of delay resulting from that limited discovery. *Id.* at *3-4. The Court suggested that the parties draft a tolling agreement to that effect. During the conference on December 16, 2014, the parties failed to reach an agreement. *Id.* at *4. Plaintiffs wanted to take a Rule 30(b)(6) deposition, and then file an amended motion for conditional certification; however, Defendants were no longer willing to toll the limitations period as originally agreed, since that would cause additional delay that was attributable to Plaintiffs. *Id.* Plaintiffs then moved for equitable tolling, asking the Court to toll the statute of limitations governing the FLSA claims of the potential opt-in Plaintiffs from the date when they filed the motion for conditional certification until the end of the opt-in period, in order to prevent the claims of those potential opt-in Plaintiffs from eroding in scope or being extinguished altogether. The Court denied the motion without prejudice. *Id.* at *18-19. First, the Court observed that in contrast to a class action brought under Rule 23, the named Plaintiffs in a FLSA collective action do not represent anyone other than themselves; accordingly, the named Plaintiffs have no authority to move to equitably toll the claims of the potential opt-in Plaintiffs. *Id*. at *20. Moreover, the Court maintained that because the potential opt-in Plaintiffs do not become parties to the lawsuit until they filed their consent forms with the Court, it lacked jurisdiction to grant them equitable relief. *Id.* at *21. The Court found that Plaintiffs also had not established that equitable tolling of the claims of the potential opt-in Plaintiffs was warranted at that juncture. The Court noted that in equitably tolling the statute of limitations, case law precedents generally reasoned that: (i) until notice of the collective action is given, potential opt-in Plaintiffs lack actual notice of the filing requirement; (ii) although the FLSA itself provides constructive notice of the filing deadlines, that factor should be given little weight since it applies in every case; (iii) failure to file an earlier claim does not demonstrate a lack of diligence, because diligence is measured by whether potential Plaintiffs opted-in once given notice and the opportunity to do so; (iv) because the lawsuit is filed as a collective action, Defendant is not prejudiced by equitable tolling; and (v) potential opt-in Plaintiffs reasonably remained ignorant of the filing deadline, given their lack of notice of the collective action. *Id.* at *24-25. The Court disagreed with that analysis because it ignored the fact that, regardless of whether the potential opt-in Plaintiffs had notice of the collective action, they also had the option of filing their own lawsuit alleging violations of the FLSA. *Id.* at *25. Thus, it could not necessarily be said that the opt-in Plaintiffs lacked actual or constructive knowledge of their claims, that they diligently pursued their rights, or that they remained reasonably ignorant of the filing deadlines. *Id.* The Court reiterated that Congress chose not to automatically toll the statute of limitations upon the filing of a collective action and although equitable tolling may be justified in rare instances, it is an extraordinary remedy to be applied sparingly. *Id*. at *25-26. The Court concluded that to equitably toll the claims of all potential Plaintiffs from the date the collective action was filed (or even from the date Plaintiffs seek approval of the proposed notice) until the end of the opt-in period would transform that extraordinary

remedy into a routine, automatic one. For these reasons, the Court denied Plaintiffs' motion without prejudice. *Id*. at *26.

***Bacon, et al. v. Subway Sandwiches & Salads, LLC,* 2015 U.S. Dist. LEXIS 31477 (E.D. Tenn. Mar. 13, 2015).** Plaintiffs brought a collective action alleging that Defendants failed to compensate them and other similarly-situated employees for all hours worked in violation of the FLSA. After the Court granted in part Plaintiffs' motion for conditional certification, Plaintiffs moved for equitable tolling of the statute of limitations for potential opt-in Plaintiffs starting from either June 11, 2014, the date Defendants filed their first motion to dismiss, or on June 19, 2014, the date Plaintiffs filed their motion for conditional certification of a collective action. The Magistrate Judge granted the motion in part. Plaintiffs argued that Defendants' voluminous filings and periodic delays in the case had contributed to the probability that notice to potential opt-in Plaintiffs would not occur until six months or more after the initial filing of the complaint in this matter, through no fault of the named Plaintiffs or the potential opt-in Plaintiffs. *Id*. at *3. Plaintiffs thus asserted that equitable tolling should be provided because extraordinary circumstances existed to warrant the requested relief. *Id*. The Magistrate Judge found that the request for equitable tolling was well-taken. *Id*. at *4-6. First, the Magistrate Judge found that the potential opt-in Plaintiffs almost certainly lacked notice or constructive knowledge of the filing requirement and also lacked knowledge of their potential FLSA claims. *Id*. at *6. Second, the Magistrate Judge concluded that the named Plaintiffs had been diligent in pursuing their rights. *Id*. The Magistrate Judge, however, determined that the tolling of the statute of limitations should begin on the date when Defendants filed the motion to dismiss the amended complaint. The Magistrate Judge observed that the delay in the case became exceptional when Defendants moved to dismiss the amended complaint on July 16, 2014, and at that point, the case deviated from the usual timeline for a collective action. *Id*. at *7. Accordingly, the Magistrate Judge allowed equitable tolling from July 16, 2014.

***Barkley, et al. v. Pizza Hut Of America, Inc.,* 2015 U.S. Dist. LEXIS 111021 (M.D. Fla. Aug. 21, 2015).** Plaintiffs, a group of pizza delivery drivers, brought an action alleging that Defendant failed to reimburse them for driving-related expenses in violation of the Florida Minimum Wage Act ("FMWA"). Defendant moved to dismiss all claims that fell outside of the FMWA's five year statute of limitations, thus limiting the action to claims dated five years before the date the initial complaint was filed. Plaintiffs conceded that the FMWA had a five year statute of limitations, but argued that they were entitled to equitable tolling of the statute of limitations based on the fact that putative class members in this case were class members in other cases with similar overtime identical to FMWA claims, including: (i) *Smith, et al. v. Pizza Hut, Inc.*, Case No. 09-1632 (D. Colo.); (ii) *Hanna, et al. v. CFL Pizza, LLC*, Case No. 05-2011-CA-52949 (Fla. Cir. Ct.); and (iii) *Hanna, et al. v. Pizza Hut Of America, Inc.*, Case No. 12-CV-1863 (M.D. Fla.). *Id*. at *3. The Court noted that the "no piggy-back rule" for class actions mandates that the pendency of a previously filed class action did not toll the limitations period for additional class actions by putative class members of the original asserted class. *Id*. at *6. Accordingly, the Court ruled that Plaintiffs were not entitled to tolling of the statute of limitations for the putative class claims against Defendant. The Court, however, noted that the statute of limitations is tolled for the duration of a previously filed putative class action for Plaintiffs who chose to intervene in the action to pursue their individual claims. *Id*. at *8. Based on the each of Plaintiffs' date of the employment and their terminations, the Court found that their claims were within the five year statute of limitations under the FMWA, and that their claims were timely. Accordingly, the Court granted Defendant's motion in part.

***Gorskie, et al. v. Transcend Services, Inc.,* 2015 U.S. Dist. LEXIS 164294 (M.D. Fla. Dec. 8, 2015).** Plaintiff, a former employee, brought a putative collective action against Defendant alleging violations of the overtime provisions of the FLSA. Earlier, Plaintiff and twelve others had filed a putative collective action in the U.S. District Court for the Northern District of Illinois. After decertification, the Northern District of Illinois severed Plaintiff's claim. Plaintiff then voluntarily dismissed her individual case and filed this action. *Id*. at *2-3. Defendant moved to dismiss, which the Court granted by converting the motion as a motion for summary judgment. Defendant argued that the complaint was time-barred and Plaintiff's voluntary dismissal of her case in the Illinois action forfeited any tolling of the relevant limitations period. *Id.* at *4. Plaintiff argued that she was entitled to equitable tolling due to extraordinary circumstances beyond her

control, *i.e.,* her claim being severed from the Illinois collective action and reassigned to a Court that could not exercise personal jurisdiction. *Id.* at *6. The Court found that Plaintiff ceased working for Defendant in April 2012 and because she filed the complaint in June 2015, *i.e.*, after the three years statute of limitations ran, it was time-barred. *Id.* at *8. Further, the Court reasoned that although Plaintiff's participation in the Illinois collective action temporarily tolled the limitations period, her subsequent voluntary dismissal had the effect as if she never filed the suit. *Id.* The Court therefore ruled that Plaintiff's claims might only withstand Defendant's converted motion for summary judgment if she could show that she was entitled to equitable tolling. *Id.* The Court determined that Plaintiff's argument that she was forced to voluntarily dismiss her individual case in the Northern District of Illinois for lack of personal jurisdiction was without merit and did not warrant equitable tolling. The Court noted that Plaintiff had the procedural alternative of moving for transfer. Plaintiff's decision to voluntarily dismiss her case was not unavoidable or beyond her control, and moreover, Defendant had waived any objection to personal jurisdiction in the Northern District of Illinois. *Id.* at *9. Finally, the Court held that Plaintiff had not shown that she exercised diligence in pursuing her claims, as she filed the instant case more than three months after her case was voluntarily dismissed in the Northern District of Illinois. *Id.* Accordingly, the Court granted Defendant's construed motion for summary judgment and rejected Plaintiff's request for equitable tolling.

***Lopez, et al. v. Liberty Mutual Insurance Co.,* 2015 U.S. Dist. LEXIS 77723 (C.D. Cal. Mar. 6, 2015).** Plaintiffs, a group of claims adjusters, brought a putative class action alleging that Defendants misclassified them as exempt employees and thus denied them overtime pay and compensation for unused meal and rest periods in violation of the California Labor Code and other provisions of California law. *Id.* at *1-2. In 2001, employees of Defendants Liberty Mutual Insurance Co. and Golden Eagle Insurance Co. filed four lawsuits in seeking overtime pay. The cases, consolidated as the *Harris* class action, encompassed all non-management California employees classified as exempt by Liberty Mutual and Golden Eagle and employed as claims handlers and/or performed claims-handling activities. *Id.* at *3. The *Harris* action was eventually settled. In 2001, claims adjusters employed by Defendant, Safeco Insurance Co. of America, filed a class action seeking overtime pay and compensation for missed meal and rest periods ("the *Braun*" action). Liberty Mutual subsequently acquired Safeco and re-classified the claims adjusters as exempt employees, which led to denial of overtime, meal breaks, and rest break pay. *Id.* at *4. In 2014, Plaintiffs filed this similar action in California state court. Defendants removed it to the District Court pursuant to the CAFA and filed a joint motion to consolidate the two actions. Following consolidation, Defendants filed a motion to dismiss Plaintiffs' claims. It was undisputed that portions of Plaintiffs' claims were outside of the statute of limitations. As a result, absent any tolling of the statute of limitations, Plaintiffs' California Labor Code claims could extend back only to events that occurred on or after April 24, 2011, and their other statutory claim could only reach to April 2010. *Id.* at *11. Defendants sought to dismiss any claims based on events that occurred before these dates. *Id.* Plaintiffs argued that they should be considered as members of the *Harris* class for purposes of tolling the statute of limitations. Plaintiffs also argued that Defendants should be judicially estopped from claiming that Plaintiffs were not *Harris* class members because of the previous statements they made in the *Braun* proceedings. Specifically, Plaintiffs pointed out that Defendants, in support of their motions to stay in *Braun,* had argued that the *Braun* Plaintiffs fell within the definition of the *Harris* class and therefore the *Harris* case had subsumed their claims. *Id.* at *14. Even though the *Braun* Plaintiffs filed their claims four years after the termination of class period in *Harris,* Defendants had repeatedly argued that they were members of the *Harris* class. In this case, Defendants argued that the *Harris* class only encompassed employees who worked for Defendants between March 1997 and December 2004, and Plaintiffs were therefore not members of the class. *Id.* at *15. The Court granted Defendants' motion. The Court noted that Defendants' statements in *Braun* concerned only the *Braun* Plaintiffs, and when they made those statements, the *Harris* case had not been resolved. *Id.* at *16-17. The Court found that Defendants' assertion based on the class definition adopted in the *Harris* settlement was not clearly inconsistent as the two positions arose out of two distinct factual backgrounds and sets of circumstances, because the Court granted final approval to the settlement of *Harris* in 2014 with a defined class period. *Id.* The Court therefore rejected Plaintiffs' argument of judicial estoppel. Because Plaintiffs were never members of the *Harris* class, and in this action Plaintiffs asserted their first claims against Defendants, the Court opined that Plaintiffs could not assert equitable tolling to bring their claims within the applicable statute of limitations relying on *Harris* action. *Id.* at *29-31. The Court further

found that, even if Plaintiffs were asserted members of the *Harris* class because they fell within the class definition, any tolling ended when the state court decertified the class in 2006 and when it accepted the settlement limiting the scope of the class to the period from March 1997 to December 2004. *Id.* at *27. Accordingly, the Court granted Defendants' motion to dismiss Plaintiffs' claims and rejected Plaintiffs' position on tolling.

***Wiggins, et al. v. Illinois Bell Telephone Co.,* 2015 U.S. Dist. LEXIS 144445 (N.D. Ill. Oct. 22, 2015).** Plaintiff, a technician, brought an action under the FLSA and the Illinois Minimum Wage Law ("IMWL") alleging that Defendant did not pay him overtime compensation for the time that he worked before his shift started each day and for the time that he worked during his lunch breaks. *Id.* at *1. Plaintiff sought damages going back to September 6, 2008, arguing that a prior case – *Blakes v. Illinois Bell Telephone Co.,* Case No. 11-CV-336 ("*Blakes*") – litigated initially as an FLSA collective action and as a proposed IMWL class action, tolled the statute of limitations on his claims. *Id.* at *4. Defendant moved to dismiss all claims before February 28, 2011, contending that tolling did not apply as claims in the lawsuit exceeded the scope of the claims in the prior action. The Court denied Defendant's motion in part and granted it in part. Defendant argued that Plaintiff's current claims were never part of the original *Blakes* action. *Id.* at *6. At the outset, the Court observed that tolling in an FLSA collective action begins when Plaintiffs file a written consent and ends when certification has been denied. *Id.* at *10. Further, the Court found that tolling is applied when Plaintiff possesses a claim asserted in the prior class action and the prior claims are substantially similar to the ones brought individually. *Id.* at *12. The Court noted that the allegations in *Blakes* were substantially similar to Plaintiff's current lunch break claims and thus concluded that the statute of limitations was tolled for those claims. *Id.* at *16. Defendant argued that tolling was only appropriate for the lunch claims that were conditionally certified in *Blakes*, thereby excluding Plaintiff's allegations about completing on-the-job training during lunch. The Court, however, held that the statute of limitations was tolled for all of Plaintiff's lunch break claims regardless of the type of worked allegedly performed. *Id.* at *17. To determine Plaintiff's pre-shift claims, the Court found that the *Blakes* complaint did not contain pre-shift work allegations. *Id.* at *19. Plaintiff argued that the Court should nevertheless toll the statute of limitations because Plaintiffs in *Blakes* could have amended their complaint to include additional claims. The Court held that because Plaintiffs knew about the pre-shift claims before discovery, yet neglected to include them in the complaint, the statute of limitations was not tolled for Plaintiff's current pre-shift claims. *Id.* at *20. Accordingly, the Court granted Defendant's motion to dismiss in part as to Plaintiff's pre-shift claims and denied it as to Plaintiff's lunch claims.

(xxvii) Interlocutory Appeals In Wage & Hour Class Actions

***Garcia, et al. v. E.J. Amusements Of New Hampshire, Inc.,* Case No. 15-CV-8008 (1st Cir. April 22, 2015).** Plaintiffs brought an action alleging that Defendants paid them a flat rate based on a 40-hour workweek even though they regularly worked up to 14 hours per day, seven days a week, and sometimes longer, and also failed to reimburse them the immigration related expenses in violation of Massachusetts law and New Hampshire law. Non-party Centro de los Derechos del Migrante, Inc. ("CDM"), which described itself as a non-profit legal services organization, moved for permission to appeal, challenging the District Court's ruling requiring CDM to provide a privilege log responsive to a document request from Defendants. CDM also moved for stay pending appeal. The First Circuit dismissed the appeal, and denied the motion for stay pending appeal. At the outset, the First Circuit stated that discovery rulings are generally not immediately reviewable because they are not final decisions and orders of the District Court. *Id*. at 2. The First Circuit noted that this general rule applies even in cases where a District Court's ruling has the effect of compelling an individual or entity to produce documents or information that are subject to a privilege or are otherwise shielded from discovery. Further, the First Circuit opined that in such cases, one may be able to obtain appellate review before entry of a final judgment if the party disobeys a ruling to the point of being held in contempt and then appeals from the contempt order. The First Circuit stated that there is an exception for cases in which one asserts a privilege but is incapable of disobeying to the point of contempt because the party does not have control over the targeted documents. *Id*. Here, the First Circuit however, found that CDM retained control over the targeted documents and information. *Id*. Accordingly, the First Circuit dismissed the appeal pursuant to Local Rule 27.0(c), for lack of finality.

(xxviii) Amendments In FLSA Collective Actions

***In Re AutoZone, Inc. Wage & Hour Employment Practices Litigation,* 2015 U.S. Dist. LEXIS 80693 (N.D. Cal. June 19, 2015).** Plaintiffs brought a putative class action alleging that Defendant failed to provide meal breaks and off-the-clock compensation in violation of the California Private Attorney General Act ("PAGA"). Earlier, the Court had denied without prejudice Plaintiffs' motion to compel Defendant to designate a Rule 30(b)(6) witness on topics relating to changes in Defendant's policies and practices regarding meal breaks and off-the-clock work. The Court found it unclear whether a representative PAGA claim was alleged. In seeking to resolve the discovery dispute, the Court noted that Plaintiffs labeled the second amended complaint (the operative complaint) a class action complaint and brought allegations pursuant to Rule 23. Further, the Court observed that the complaint specifically alleged a PAGA class, but did not include a separate PAGA cause of action brought in a representative capacity; the only other reference to PAGA was Plaintiffs' request for civil penalties under that law. Subsequently, Plaintiffs moved for leave to amend the complaint to add a representative PAGA claim, an action they characterized as clarifying the current operative complaint. The Court denied the motion. While Plaintiffs argued that there had been no undue delay because they brought this motion shortly after the Court's discovery order, the Court found that Plaintiffs' request to add a representative PAGA claim came more than eight years after filing the original complaint, and after two amendments to that complaint, one of which removed this very claim. *Id*. at *4-6. The Court thus found that this constituted an undue delay. *Id*. at *6. Further, the Court determined that Defendant would be unduly prejudiced by the amendment. *Id*. Although Plaintiffs asserted that this cause of action would be based on the exact California Labor Code violations already alleged and the allegations already asserted in the operative complaint, they could not pretend to be proposing a mere cosmetic change. *Id*. The Court observed that in addition to requiring the designation of the Rule 30(b)(6) witness that gave rise to this discovery dispute, a new representative PAGA claim would result in the re-opening of discovery as to claims on which the Court denied class certification (like meal breaks and overtime) and as to which Plaintiffs never sought class certification (like split shifts). *Id*. Moreover, Defendant and the Court had operated on the understanding that the second amended complaint was the operative complaint in this case, and that, following the Court's order on class certification, this case was primarily about rest breaks. *Id*. at *6-7. The Court thus concluded that Plaintiffs' proposed amendment would defy that understanding and prejudice Defendant, and accordingly, denied Plaintiffs' motion. *Id*. at *7.

***Schaefer, et al. v. P.F. Chang China Bistro, Inc.,* Case No. 14-CV-185 (D. Ariz. Mar. 20, 2015).** Plaintiffs brought an action alleging that Defendant required them to perform non-tipped work unrelated to their tipped occupation at a sub-minimum wage, tipped rate of pay in violation of the FLSA. *Id.* at 3. Specifically, Plaintiffs alleged that Defendant labeled servers tipped employees, allowed them to receive enough tips to qualify as tipped employees, and then forced them to engage in maintenance work for a substantial portion of their workweeks without paying them minimum wage. *Id.* at 4. Plaintiffs also claimed that they performed non-tipped work related their tipped occupation during more than 20% of their regular 40-hour workweek. *Id.* Defendant moved to dismiss, contending that Plaintiffs failed to state viable claims under the FLSA. The Court dismissed the action without prejudice. Plaintiffs then moved to amend their complaint asserting that, in their dual jobs claim, they alleged a violation of minimum wage requirements of the FLSA. Plaintiffs relied on a regulation of the U.S. Department of Labor ("DOL") defining dual jobs and asserted that the Court owed deference to DOL's regulation providing that an employee is engaged in dual jobs when he or she spends a substantial part of his or her time, in excess of 20%, on non-tipped duties. *Id.* The Court denied Plaintiffs' motion, finding that Plaintiffs' dual jobs allegations did not state a claim for minimum wage violations under the FLSA. *Id.* at 8. The Court noted that Plaintiffs did not claim or allege that, as tipped employees, they received less than the minimum wage for any particular workweek. *Id.* at 5. Rather, Plaintiffs claimed that Defendant violated the FLSA's minimum wage provision by requiring them to perform related non-tipped duties and unrelated non-tipped duties while being paid at the tip credit rate of pay. *Id.* The Court held that it previously had considered and rejected similar arguments and that Plaintiffs' dual jobs theory – based on deference to the DOL's regulation – did not state an FLSA claim. *Id.* at 6-8. Accordingly, the Court denied Plaintiffs' motion for leave to amend their complaint.

(xxix) Foreign Worker Issues In Wage & Hour Class Actions

***Cuellar-Aguilar, et al. v. Deggeller Attractions, Inc.,* 2015 U.S. App. LEXIS 21646 (8th Cir. Dec. 15, 2015).** Plaintiffs, a group of H-2B temporary foreign workers, brought a class action alleging that Defendant breached its employment contracts, violated the Arkansas Minimum Wage Act, and fraudulently under-reported their income to the Internal Revenue Service ("IRS"). *Id.* at *2. The District Court dismissed the breach of contract and tax fraud claims, declined to exercise supplemental jurisdiction over the minimum wage claim, and denied Plaintiffs' motion to file a second amended complaint. *Id.* On appeal, the Eighth Circuit reversed and vacated the District Court's order. First, Plaintiffs argued that the District Court erred in dismissing their breach of contract claim based on its finding that no contract existed between the parties. *Id.* at *6. The Eighth Circuit noted that in order to state a claim under the Arkansas law, Plaintiffs needed to allege that they had employment contracts, which Defendant breached and caused them to incur damages. *Id.* at *7. Further, the Eighth Circuit opined that under Arkansas law, an employment relationship may be created by conduct, which showed that the parties recognized that one was the employer and that the other was the employee. *Id.* at *8. Here, the complaint's allegations demonstrated that Plaintiffs received offers to work for Defendant, which they accepted by traveling to the United States to perform the offered work; thus, it was sufficiently established that a contractual relationship existed between the parties. *Id.* Plaintiffs also alleged that Defendant breached the terms governing their relationship by failing to pay them the prevailing wage. The Eighth Circuit found that the U.S. Department of Labor regulations imposed upon Defendant a legal obligation to pay its H-2B employees no less than the prevailing wage. *Id.* at *10. Consequently, the Eighth Circuit held that the terms of the labor certification applications, including the agreement to pay the prevailing wage, represented the law in effect at the time contracts were made; therefore, under Arkansas law, these terms formed a part of Plaintiffs' contracts. *Id.* at *11. Thus, Plaintiffs' allegation that Defendant failed to pay the prevailing wage stated a valid claim for breach of their employment contracts. Plaintiffs further contended that the District Court erred in dismissing their claim for statutory damages under 26 U.S.C. § 7434, relative to their allegation that Defendant fraudulently under-reported their earnings to the IRS to reduce the business' tax obligations. *Id.* at *12. The Eighth Circuit found that the District Court's dismissal was based on its finding that Plaintiffs had failed to allege that any actual damages had resulted from Defendant's fraudulent filing. *Id.* The Eighth Circuit noted that in *Hammer v. Sam's E., Inc.,* 754 F.3d 492 (8th Cir. 2014), it had held that where a federal statute provided for either statutory damages or actual damages, Plaintiffs who failed to allege actual damages nonetheless satisfied both the injury-in-fact and redressability requirements of Article III standing by suing for statutory damages. *Id.* at *13. The Eighth Circuit further held that the availability of statutory damages showed that Plaintiffs' injury was redressable. *Id.* The Eighth Circuit remarked that because Plaintiffs alleged that Defendant intentionally filed fraudulent tax documents on their behalf, their complaint stated a claim for statutory damages under 26 U.S.C. § 7434(b). *Id.* at *14. Accordingly, the Eighth Circuit reversed the District Court's dismissal and vacated its decision not to exercise supplemental jurisdiction over the state law minimum wage claim.

***Ruiz, et al. v. Mercer Canyons, Inc.,* 2015 U.S. Dist. LEXIS 11511 (E.D. Wash. Jan. 23, 2015).** Plaintiffs, a group of vineyard workers, brought a putative class action alleging that Defendant failed to inform them about the availability of higher-paying H-2 visa vineyard jobs in violation of Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), the Washington Consumer Protection Act ("CPA"), and Washington state wage laws. Defendant had obtained approval to employ foreign workers under the H-2A program for vineyard labor from March 24, 2013 through September 1, 2013, and the clearance order authorized Defendant to hire up to 44 H-2A workers at $12 an hour. The order required Defendant to notify vineyard workers who had worked in 2012 about employment availability. Plaintiffs alleged that, in March 2013, Defendant incorrectly told Plaintiff Amador and two family members that no work was available, that Defendant paid Plaintiff Ruiz $9.88 per hour for work identified by the H-2A order as $12 per hour work, and that Defendant failed to inform Plaintiff Ruiz and others about available employment opportunities until September 2013. *Id*. at *2. Defendant moved for summary judgment. The Court denied the motion. First, the Court denied summary judgment as to Plaintiff Amador's claim. The Court found that, under § 1831(e) of AWPA, when a non-day-haul seasonal agricultural worker merely inquires about a job, the employer is not obligated to provide him written information, but when an employer provides false or misleading information concerning a job, including false or misleading information about the existence of a job, it

violates § 1831(e), regardless of whether it provided the information in writing or by other means. *Id.* at *9. The Court found a genuine dispute of material fact as to exactly what information Defendant provided and as to whether the information was "false or misleading." *Id.* at *10. Second, the Court denied summary judgment as to Plaintiff Ruiz's claim that Defendant violated § 1832(a) of AWPA by paying him $9.88 per hour rather than $12 per hour for over 600 hours of corresponding work. *Id.* at *11. The Court found that, because a seasonal agricultural worker can sue under the AWPA if an employer pays less than a statutorily defined minimum wage, Ruiz could use the AWPA to enforce other legal obligations regarding the wage rate, including provisions of the H-2A clearance order. *Id.* at *12. Third, the Court denied summary judgment on Plaintiffs' CPA claims that Defendant deceived employees and potential employees regarding the availability of $12 per hour jobs. The Court found that: (i) a putative class of people had been injured in the same fashion; (ii) it was undisputed that the allegedly deceptive acts occurred in Defendant's course of business; (iii) Defendant advertised to the general public, thereby affecting the public interest; and (iv) Plaintiffs had presented facts that raised a genuine dispute of material fact as to whether a causal link existed between any deceptive practices and injury suffered. *Id.* at *13-16. Accordingly, the Court denied Defendant's motion for summary judgment.

***Torres, et al. v. Mercer Canyons, Inc.,* Case No. 14-CV-3032 (E.D. Wash. Mar. 5, 2015).** Plaintiffs, a group of vineyard workers, brought a putative class action alleging that Defendant failed to inform local workers about the availability of higher-paying H-2 visa vineyard jobs. Defendant had obtained approval to employ foreign workers under the H-2A program for vineyard labor from March 24, 2013 through September 1, 2013, and the order provided permission for Defendant to hire up to 44 H-2A workers at $12 an hour. The order also required Defendant to notify previous 2012 vineyard workers about employment availability. In March 2013, Plaintiff Amador and two family members, inquired about employment opportunities, but Defendant told them that no work was available. Defendant never informed Plaintiff Ruiz, who worked as a vineyard laborer for Defendant until September 2013, of available positions and Defendant paid him $9.88 per hour for work identified by the H-2A order as $12 per hour work. Plaintiffs thus alleged that Defendants violated the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), the Washington Consumer Protection Act ("CPA"), and Washington state wage laws. Previously, the Court had denied Defendant's motion for summary judgment. Defendant then moved for partial reconsideration or in the alternative for interlocutory appeal and a stay of proceedings, which the Court denied. Defendant contended that Plaintiff Ruiz did not offer evidence that Defendant had actually provided him false or misleading information regarding the existence or terms of available jobs. *Id*. at 2. The Court, however, found that there was a dispute over the information Defendant had provided, and whether the information provided was false or misleading was a factual question to be determined by a jury. *Id*. While Defendant argued that the Court had committed clear error in failing to dismiss the migrant worker claims, the Court found that neither Plaintiff asserted individual migrant worker claims. The Court noted that the question of whether Amador or Ruiz could represent a class of migrant agricultural workers asserting such claims was best suited for a motion for class certification. *Id*. Although Defendant disagreed with the Court's interpretation of "seasonal agricultural worker," the Court noted that it had found that the text of the statute itself created an internal conflict. *Id*. at 3. The Court looked to the entire statute in determining the ambiguity and internal conflict of the definition of "seasonal agricultural worker" and found that it did not err in interpreting the law. *Id*. Further, Defendant reasserted its arguments regarding the CPA, and the Court found that there was at least a genuine dispute of material fact as to whether a causal link existed between an alleged deceptive practice and any injury to Amador. *Id*. at 4. The Court reiterated that the disputed facts indicated that Amador suffered injury from the allegedly deceptive practices. *Id*. Finally, Defendant argued that the Court's order created an intra-district split regarding the proper interpretation of the AWPA. The Court disagreed and found no such split. *Id*. Because no intra-district split existed and because there was no extraordinary reason compelling an immediate appeal, the Court declined to certify the issue for an interlocutory appeal, and accordingly denied Defendant's motion.

***Vallejo, et al. v. Azteca Electrical Construction Inc.,* 2015 U.S. Dist. LEXIS 11780 (D. Ariz. Feb. 2, 2015).** In this FLSA action for recovering unpaid wages and overtime, the Court, after findings on liability and before the bench trial on damages, found that unauthorized workers with claims for unpaid wages and overtime were not precluded from recovering liquidated damages under the FLSA. The Court noted that

most case law authorities have addressed the issue have concluded that an employer who violates § 206 or § 207 of the FLSA is liable to an unauthorized worker in the amount of unpaid minimum wages and/or unpaid overtime compensation for work actually and already performed. *Id*. at *2. The Court observed that *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002), did not preclude an unauthorized worker's recovery under the FLSA. *Id*. In *Hoffman*, the U.S. Supreme Court held that the Immigration Reform and Control Act ("IRCA") made battling the employment of unauthorized aliens central to the policy of immigration law. *Id*. at *2-3. The Court reasoned that the question in *Hoffman* was not whether the National Labor Relations Act's definition of "employee" excluded unauthorized aliens, but whether the National Labor Relations Board's remedial power extended to awarding back pay to an unauthorized alien for work not performed. *Id*. at *3-4. The Court noted that case law authorities have found *Hoffman* "limited to precluding relief for work not yet performed, as opposed to work already performed." *Id*. at *4. The Court observed that although the purposes of FLSA and IRCA clash, and no statutory text tells which would prevail, several considerations tipped in favor of § 216(b) of the FLSA. *Id*. at *6. The Court found that enforcing § 216(b) would undercut the purpose of the IRCA by compensating work that is illegal and often gotten by criminal means. However, it would also serve the purpose of IRCA by removing the wage advantage of unauthorized workers who would work for less than the legal minimum wage. *Id*. The Court found that there was no unfairness to an employer in paying a legal wage for all work, and that the employer may not rely on the worker's deception to pay less than he should have paid to whomever he hired. Thus, the Court concluded that unauthorized workers were not precluded from recovering unpaid and underpaid wages under § 216(b). *Id*. The Court noted that liquidated damages are compensation for work actually and already performed and do not implicate *Hoffman* or the policy reasons for opposition to compensating unauthorized workers for work not performed. *Id*. at *8. Moreover, the Congress has mandated award of liquidated damages for violations of the FLSA except where an employer establishes both subjective and objective good faith. Thus, the Court concluded that at trial, Defendants could be excused from additional statutory liquidated damages by showing subjective and objective good faith. *Id*. Finally, the Court found that the doctrine of in *pari delicto*, which prevents a participant in wrong-doing from recovering damages has limited application to FLSA claims. *Id*. at *9. The Court explained that this doctrine is a defense to liability, not to the amount of damages, and that the Court had already granted Plaintiff summary judgment on liability and reserved the determination of damages for trial. *Id*. at *11-12. Because Defendants had no legal representation at the time of summary judgment, the Court allowed an in *pari delicto* defense as evidence at trial. *Id*. at *12. The Court, however, remarked that the circumstance alone that Plaintiff was an unauthorized worker did not establish that defense to the statutory damages. *Id*. The Court concluded that the trial on damages should consider the quantification of Plaintiff's damages and any defense of in *pari delicto*.

(xxx) Travel Time Issues In Wage & Hour Class Actions

***Jones, et al. v. Hoffberger Moving Services LLC,* 2015 U.S. Dist. LEXIS 36622 (D. Md. Mar. 24, 2015).** Plaintiffs, a group of "helpers" responsible for loading and unloading trucks, brought a putative class action and collective action alleging that Defendant, a commercial moving and storage company, violated the FLSA and the Maryland Wage & Hour Law by failing to compensate them for: (i) wait time at the warehouse each morning before travelling to jobsites; (ii) travel time from the warehouse to jobsites; (iii) wait time at jobsites before moving trucks and moving equipment arrived; and (iv) travel time after completing work at jobsites to pick up paychecks at the warehouse. *Id.* at *11. Defendant moved for summary judgment. The Court granted the motion in part and denied it in part. First, the Court found that Plaintiffs were not entitled to compensation for time spent waiting at the warehouse before travelling to jobsites. *Id.* at *13. The Court noted that Defendant employed Plaintiffs to load and unload trucks for Defendant's clients, and no reasonable jury could find that Plaintiffs' time spent waiting at the warehouse each morning was integral and indispensable to loading and unloading moving trucks for Defendant's clients. *Id.* at *12-14. Second, the Court held that Plaintiffs were not entitled to compensation for travel time to and from the warehouse, unless Plaintiffs performed a principal activity prior to the travel. The Court noted that Defendant never required Plaintiffs to meet at the warehouse to receive any instructions or to perform any work; rather, Defendant gave Plaintiffs job assignments before each workday and allowed Plaintiffs to go directly to jobsites. *Id.* at *18. Third, the Court determined that Plaintiffs were not entitled to compensation for time spent collecting paychecks. *Id.* at *21. The Court noted that no reasonable jury

could find that the time spent picking up paychecks was integral and indispensable to the work Plaintiffs performed for Defendant. *Id*. Fourth, the Court ruled that Plaintiffs were entitled to be paid for time spent at the jobsite each morning, waiting for Defendant's moving truck and equipment to arrive. *Id.* at *19. The Court observed that, after employees arrived at the day's jobsite, Plaintiffs' wait time became a principal activity, integral and indispensable to the performance of the work, and, therefore, Defendant owed them compensation for such time. *Id.* Finally, the Court opined that a genuine issue of material fact remained as to whether Defendant should pay Plaintiffs for work performed in the warehouse without completing a warehouse work timesheet. *Id.* at *15-16. Although both parties agreed that some employees occasionally worked at the warehouse lifting equipment into the moving trucks, and Defendant compensated them so long as they filled out warehouse work timesheets, an issue remained as to whether Defendant should compensate Plaintiffs if they worked but failed to complete timesheets. The Court noted that Plaintiffs should be compensated for time spent lifting and carrying moving equipment onto trucks regardless of whether Plaintiffs followed Defendant's time-keeping protocol, and Plaintiffs would be entitled to compensation for travel time if they performed work at the warehouse before traveling to jobsites. *Id.* at *16. The Court, therefore, held that Plaintiffs' claim for pre-travel warehouse work time would be subject to further fact-finding at trial. *Id.* The Court, therefore, granted summary judgment in part for Defendant and denied summary judgment in part.

***Local 589, Amalgamated Transit Union, et al. v. Massachusetts Bay Transportation Authority,* 2015 U.S. Dist. LEXIS 42178 (D. Mass. Mar. 31, 2015).** Plaintiffs, Massachusetts Bay Transportation Authority employees and their union, brought a putative class action alleging that Defendant improperly failed to compensate them for travel time in violation of the FLSA and Massachusetts state law. Plaintiffs asserted that, because their shifts began in one location and ended in another, Defendant should have paid them for travel time from the ends of their assigned routes back to the beginnings of those routes. *Id.* at *7. Plaintiffs contended that the time spent traveling back to the beginnings of their routes could not be considered work-to-home travel because employees often returned to their starting points to retrieve their cars before heading home and were not able to rely entirely on public transportation. *Id.* Defendant moved for summary judgment, and the Court granted the motion in part. The Court found that to the extent Plaintiffs sought start-end travel time, traditional commuting time is plainly excluded from the FLSA by the Portal-to-Portal Act, and Defendant never required Plaintiffs to return to their starting locations. *Id.* at *8. The Court further noted that Plaintiffs did not engage in any principal activity after completing their final routes of the day, and inconvenience or difficulty of a commute did not provide an exception to the Portal-to-Portal Act. *Id.* at *11-12. The Court, however, denied summary judgement to Defendant on Plaintiffs' claim that Defendant should compensate them for split shift travel time. Under the split shift travel schedules, Defendant assigned each employee a first route, followed by a break, and then a second route. Plaintiffs defined the split shift travel time as the time taken to travel from the end location of a first route to the starting point of a second route during a mid-day break. *Id.* at *17. Defendant compensated full-time employees who traveled during split shift breaks for 20 minutes of the travel as "swing-on time," but not for time spent traveling in excess of 20 minutes. *Id.* at *18. Defendant did not pay anything to part-time employees for travel that occurred during these breaks. *Id*. Because Plaintiffs did not seek compensation for the entire break period, but rather solely for the time spent traveling, and the lengths of the breaks were significantly larger than half-hour meal breaks, the Court found that a more helpful analogy to address the issue would be the compensable and non-compensable parameters of employee waiting time. *Id.* at *23. Although the Court noted two case law authorities that found travel time during split shifts compensable, significant gaps about the individual travel time and break schedules of Plaintiffs, as well as lack of information related to Defendant's custom and practice, prevented it from determining whether Plaintiffs' travel time during their split shift breaks was compensable or non-compensable. *Id.* at *29-30. Accordingly, the Court granted Defendant's motion for summary judgment as to start-end travel time and denied it as to split shift travel time.

***Margulies, et al. v. Tri-County Metropolitan Transportation District Of Oregon,* 2015 U.S. Dist. LEXIS 84672 (D. Ore. June 30, 2015).** Plaintiffs, a group of bus and train operators, brought a putative class action alleging that Defendant engaged in a pattern or practice of failing to pay them for all hours worked in violation of the FLSA and Oregon state law. Specifically, Plaintiffs alleged that Defendant failed to pay

them for: (i) non-commuted travel time between disparate start and end points of operators' scheduled runs; (ii) the differential between scheduled run times and actual run times; (iii) pre-departure time; (iv) mandatory medical examinations; and (v) any applicable overtime due for such compensable time. *Id.* at *4. Defendant moved for summary judgment on Plaintiffs' state law claims contending that, because the parties operated under a working and wage agreement ("WMA") and because public policy of the State of Oregon favored such agreements for public employees, the Court should conclude that the WMA defined the circumstances under which Defendant must pay wages and overtime. *Id.* at *16. Defendant also moved for summary judgment on Plaintiffs' FLSA claims, contending that they fully compensated Plaintiffs for their working hours consistent with the requirement of the FLSA, the Portal to Portal Act, and the terms of the WMA. *Id.* at *17. The Court granted in part and denied in part Defendant's motion. First, the Court granted Defendant's motion as it applied to the time that operators spent returning to a relief location from the end of their scheduled run. *Id.* at *29-30. Second, the Court granted Defendant's motion as it applied to "routinely late time," the difference between scheduled and actual run time. *Id.* at *35. The Court found Defendant accounted for this time under its time slip program and provided operators with due compensation as described in the WMA. *Id.* at *42. Third, the Court granted Defendant's motion as it applied to the licensing and certification aspect of medical examination time. The Court found that the parties had negotiated the existence of such examinations as reflected in the WMA, and found no basis under the FLSA for declaring that an employer must necessarily compensate its workers for medical examinations associated with common licensing requirements imposed upon employees. *Id.* at *54-55. The Court, however, denied Defendant's motion as it applied to the medical examination time related to compulsory examinations during the workday. The Court found evidence in the record establishing how frequently Defendant required operators to attend medical examinations during normal shifts, the duration of such examinations, the circumstances under which Defendant required medical examinations or the ordinary reasoning for the examinations. *Id.* at *53. The Court therefore found a question of fact as to whether the required medical examinations could constitute compensable work subject to overtime. *Id.* The Court also denied Defendant's motion as it applied to split shift travel time or the time spent by operators between two consecutive shifts travelling to geographically disparate start locations. *Id.* at *33-34. The Court found no evidence in the WMA to discern whether the parties did or did not intend to define this time as compensable work. *Id.* The split shift travel time did not amount to commute time under the Portal to Portal Act, therefore the Court also found that it could not be inherently excluded from compensable hours under the FLSA. *Id.* at *38. The Court further denied Defendant's motion as it applied to pre-departure time or the time operators spent at a relief location prior to making a relief finding that Defendant failed to provide any relevant provision of WMA that intended to define the compensability of this time. *Id.* at *49-50. The Court found a disputed factual question as to whether Defendant made operators wait at a location for excessive amounts of time, resulting in pre-departure time that should be compensated pursuant to the FLSA. *Id.* at *42. Finally, the Court denied Defendant's motion as it applied to meeting time, the time traveled from a relief location to a meeting, including meeting for payroll corrections. The Court found that WMA was silent as to the compensability of meeting time and there remained an unresolved question of material fact as to whether Defendant obligated such meetings due to which it could be compensable work under the FLSA. *Id.* at *49-51. Accordingly, the Court granted in part and denied in part Defendant's motion for partial summary judgment.

***Naylor, et al. v. Securiguard, Inc.*, 2015 U.S. App. LEXIS 16421 (5th Cir. Sept. 15, 2015).** Plaintiffs, a group of current and former security guards, brought a collective action seeking alleged unpaid overtime wages and liquidated damages under the FLSA. The U.S. Navy contracted with Defendants to provide guards at the Meridian Naval Air Station. The guards worked eight hour shifts, with two scheduled 30-minute meal breaks. *Id*. at *2. During the breaks, a relief officer relieved the guards, and the guards were then required to leave their post in Defendants' security vehicle to six locations where they could eat. During this time, the guards were also required to remain armed and in uniform, which included a bulletproof vest. *Id*. Treating the 30-minute break as a *bona fide* meal period under the FLSA, Defendants did not compensate the guards. *Id*. at *4-5. The U.S. Department of Labor investigated Defendants' determination, and assessed a civil penalty concluding that one meal break was compensable because it took place outside a regular meal time. *Id*. at *5. When the agency investigation did not result in back wages, 30 guards brought this action under the FLSA seeking damages. Defendants filed a motion for

summary judgment, which the District Court granted. On appeal, the Fifth Circuit affirmed in part. At the outset, the Fifth Circuit noted that a meal break often does not allow for eating during the entire break, and some time may be needed to move to another area of the workplace or to leave the workplace. *Id*. at *8. The Fifth Circuit explained that although office workers could eat at their desks and take full advantage of the 30-minute break, employees on the factory floor usually move to a break room before eating due to safety concerns. *Id*. The Fifth Circuit remarked that it had never addressed the legal effect of employer-mandated travel time that significantly eats into an otherwise non-compensable 30-minute meal period. The Fifth Circuit noted that typical meal break cases involved a situation where the employee is generally allowed to eat during the entire break period, but continued on "on call" or incurred work responsibilities during the period. *Id*. at *11. In those cases, the Fifth Circuit reasoned that the critical question in these situations was whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee. *Id*. at *11-12. Here, the District Court applied the predominant benefit test and concluded that the guards benefited from the meal breaks. *Id*. at *12. The Fifth Circuit remarked that the principle question here was how much time was available to employees during the break. *Id*. at *14. The Fifth Circuit found that a requirement that deprives the employee of the opportunity to eat during 40% of a 30-minute break struck at the heart of an employee's ability to use the time for his or her own purposes. *Id*. The Fifth Circuit thus concluded that the travel obligation was not a mere inconvenience as a matter of law. *Id*. at *15. The Fifth Circuit, however, affirmed summary judgment on Plaintiffs' claims to the extent the mandatory commute time to and from the gates was *de minimis*. Accordingly, the Fifth Circuit partially affirmed the summary judgment, and remanded the action.

(xxxi) Retaliation Issues In Wage & Hour Class Actions

***Arnaudov, et al. v. California Delta Mechanical, Inc.*, 2015 U.S. Dist. LEXIS 1644 (N.D. Cal. Jan. 7, 2015).** Plaintiffs, a group of former employees, brought a wage & hour action alleging failure to pay minimum and overtime wages, and failure to pay wages upon termination. Defendant moved for partial summary judgment on Plaintiffs' wrongful termination and retaliation claims, and the Court denied the motion. Defendant contended that Plaintiffs were unable to point to any specific facts of complaints they made to Defendant regarding their compensation. Further, Defendant argued that Plaintiffs could not provide evidence of pre-text to refute its contention that it had a legitimate, non-discriminatory reason to discharge Plaintiffs because they boycotted their job responsibilities without any prior notice. The Court, however, noted that Plaintiffs had presented evidence that they made complaints to Defendant prior to their discharge. Plaintiffs had sent e-mails to Defendant describing certain payroll concerns, including the fact that certain employees did not receive wages on time and did not receive pay stubs. *Id.* at *3. One of the named Plaintiffs had also sent a prior e-mail to his supervisor and to Defendant's dispatchers stating that Defendant illegally withheld his pay. *Id.* Defendant maintained that it never terminated the employees, and that the employees quit even after the regional manager, Gary Kolov, asked them to come back to work and committed to addressing their pay concerns. Plaintiffs asserted that after they reiterated to Kolov their refusal to go to work until the payment issues were fixed, Kolov made no reassurances to resolve their concerns, and he stated that those who refused to work would be fired and that Defendant would collect keys to Plaintiffs' work vehicles. *Id.* at *4. Considering the factual disputes and resolving all doubts in favor of the non-moving party, the Court opined that a reasonable jury could conclude that Defendant terminated Plaintiffs for raising concerns about compensation, and for engaging in a job action to protest violations of wage & hour laws. Accordingly, the Court denied Defendant's motion for partial summary judgment.

***Marlo, et al. v. United Parcel Service, Inc.*, 2015 U.S. App. LEXIS 6745 (9th Cir. April 23, 2015).** Plaintiff, a former employee, brought an action alleging that Defendant retaliated against him and wrongfully terminated him from his employment. Defendant challenged the jury verdict awarding Plaintiff $15.9 million (later reduced to $6.6 million) in punitive damages arising out of his wrongful termination, but the Ninth Circuit affirmed the verdict. Defendant first argued that evidence was insufficient to support jury's determination that Vice President and District Manager Tim Robinson was a "managing agent" under California law. *Id*. at *2. The Ninth Circuit noted that Robinson qualified as a managing agent under California law if he exercised substantial independent authority and judgment in his corporate decision-making so that his decisions ultimately determined the corporate policy. *Id*. Here, the evidence showed that Robinson was the highest-ranking supervisor in a 7,000-employee district that covered a vast

geographic area from downtown Los Angeles to the inland deserts to California's central coast, and managed supervisors and employees in charge of the various departments in his territory. *Id*. Further, Robinson viewed part of his role as maintaining a company policy of supervisors acting as owners subject to a salary, rather than the overtime pay sought by Plaintiff. *Id*. at *3. Plaintiff's lawsuit, which initially sought $400 million in class-wide damages, threatened to upend that culture, and Robinson discussed the potential impact of lawsuit with his senior staff and expressed his displeasure that other supervisors were filing similar lawsuits. *Id*. The Ninth Circuit noted that he viewed the lawsuit as a distraction that had a negative effect on employee morale. The Ninth Circuit concluded that the jury could reasonably conclude that Robinson's decision to terminate Plaintiff was a policy-making decision aimed at protecting the company culture. Accordingly, the Ninth Circuit affirmed the jury verdict.

Editor's Note: Though not a class action decision, the ruling in *Marlo* illustrates the damages that can impact employers when class members allege retaliation for filing or participating in class actions.

(xxxii) The First To File Doctrine In FLSA Collective Actions

***Henry, et al. v. JP Morgan Chase & Co.*, Case No. 14-CV-7176 (S.D.N.Y. May 11, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendants misclassified them as exempt and denied them overtime pay in violation of the FLSA. Three years before this action, in March 2011, eligible non-exempt employees brought an FLSA action in the U.S. District Court for the Central District of California in *Hightower v. JPMorgan Chase Bank, N.A.*, Case No. 11-CV-1802 (C.D. Cal.). *Id*. at *1. Since that action was filed, at least two other similar actions outside of California were filed and subsequently transferred to the Central District of California. The first transferred action was filed on July 20, 2011 in *Khutoretsky v. J.P. Morgan Chase & Co.*, No. 11-CV-4986 (S.D.N.Y.); and the second transferred action was filed in the U.S. District Court for the Northern District of Illinois on February 2, 2012 in *Gunn v. JP Morgan Chase & Co.*, No. 12-CV-743 (N.D. Ill.). *Id*. at *2. Following the transfers, Plaintiffs in *Hightower* filed a third amended consolidated class action complaint on October 3, 2013, incorporating the transferred cases. This action was filed on September 5, 2014, and Plaintiffs sought to proceed as a collective action representing five sub-classes, and a Rule 23 class action asserting New Jersey wage & hour claims on behalf of individuals who worked for Defendants in New Jersey. On a motion to dismiss, the Court concluded that this action substantially overlapped with the previously filed action in the Central District of California because both actions involved sub-classes of non-exempt employees who performed similar roles. Therefore, under the first-filed rule, the Court held this action should be transferred to Central District of California. Plaintiffs argued that this action was not identical to the *Hightower* action because the settlement in *Hightower* did not include any employees with the job positions that were included in this case such as assistant branch managers, relationship managers, loan officers, private client bankers, or lead tellers. *Id*. at *4. Moreover, Plaintiffs contended that the settlement did not include any exempt workers nor did it settle a New Jersey class. The Court observed that the term "teller" in this action, and the term "personal banker" were defined very similar to one another. *Id*. at *5. Accordingly, the Court concluded that Plaintiffs failed to convincingly explain how the two classes were entirely distinct. The Court found that because there was substantial overlap between the classes at issues in this putative FLSA collective and New Jersey wage & hour class action and the *Hightower* action, the two actions were substantially similar for the purposes of the first-filed rule. *Id*. at *6. Accordingly, the Court transferred this action to the Central District of California.

***Thomas, et al. v. Apple-Metro, Inc.,* 2015 U.S. Dist. LEXIS 14574 (S.D.N.Y. Feb. 5, 2015).** Plaintiff, a former restaurant employee, brought a putative collective action alleging violations of the FLSA. Defendants moved to dismiss Plaintiff's collective action claims pursuant to the "first-filed" rule, based on the prior filing of two substantially similar lawsuits – *Marin v. Apple Metro, Inc.* and *Dove v. Apple-Metro, Inc.* – which were pending as related cases in the U.S. District Court for the Eastern District of New York. *Id*. at *2. The Court granted Defendants' motion, and dismissed Plaintiff's collective actions claims. Plaintiff asserted that the first-filed rule was inapplicable because her case was not identical to the *Dove* or *Marin* actions. The Court found Plaintiffs' argument unpersuasive because case law authority in the Second Circuit frequently apply the first-filed rule to lawsuits that are similar, but not identical. *Id*. at *8. Further, the Court found that the lawsuits at issue sought identical relief, asserted nearly identical claims for

minimum wage, overtime, and tipping violations under federal law, and had been filed in a sister jurisdiction with respect to the same class of Plaintiffs as against the same group of Defendants. *Id*. at *9-10. The Court opined that the first-filed rule was well-suited to such circumstances. *Id*. at *10. Plaintiff also argued that the Court should use its discretion to preserve her suit because her unique assertion that Defendants violated the so-called "20% rule" made her case a more comprehensive and superior vehicle for litigating the FLSA claims at issue. *Id*. at *10-12. The Court noted that the U.S. Department of Labor's regulatory guidance has clarified that employers may not take advantage of the tip credit with respect to hours worked by employees performing non-tipped tasks to the extent that such employees spend more than 20% of their working time performing non-tipped work. *Id*. at *10-11. The Court, however, found that the fact that the *Marin* and *Dove* actions did not include Plaintiff's 20% rule claim did not justify departure from the first-filed rule. *Id*. at *12. The Court pointed out that Plaintiff was not required to opt-in to the *Marin* and *Dove* FLSA collective actions and she had the right to opt-out of any Rule 23 settlement class if she wished to preserve her 20% rule claim from being barred under the doctrine of *res judicata*. *Id*. The Court ruled that it had no reason to decide nearly identical questions of law and fact as those now being adjudicated in the *Marin* and *Dove* actions, with regard to the same requested relief, the same Defendants, and the same class of Plaintiffs. *Id*. Accordingly, the Court dismissed Plaintiff's collective action claims.

***Woodards, et al. v. Chipotle Mexican Grill, Inc.*, 2015 U.S. Dist. LEXIS 69606 (D. Minn. April 3, 2015).** Plaintiff, an hourly restaurant employee, brought an action seeking unpaid overtime compensation and other unpaid wages under the FLSA and the Minnesota Fair Labor Standards Act. The complaint in another action – *Harris v. Chipotle Mexican Grill, Inc.*, No. 13-CV-1719 – and the complaint in this action were identical with the exception of a few paragraphs that identified Plaintiff-specific information. *Id.* at *3. Counsel for Plaintiffs in *Harris* also represented Plaintiff in this action. After the Magistrate Judge recommended conditional certification of a nationwide collective action in the *Harris* case, Plaintiff filed an opt-in consent to join the proposed collective action in *Harris.* The Court in *Harris* declined to adopt the Magistrate Judge's recommendation, and limited the collective action to current and former employees at a single Minnesota store. Defendant then moved to dismiss this action, and the Magistrate Judge recommended denying the motion. Defendant contended that Plaintiff's class action and collective action claims should be dismissed based on the first-to-file rule. The Magistrate Judge noted that to conserve judicial resources and avoid conflicting rulings, the first-filed rule gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate Courts, to the party who first establishes jurisdiction. *Id.* at *13. Further, in cases of concurrent jurisdiction, the first Court in which jurisdiction attaches has priority to consider the case as a matter of federal comity. *Id.* The parties filed this matter and the *Harris* action in the same venue and they were assigned to the same Judge and Magistrate Judge. For this reason, the Magistrate Judge opined that the first-to-file rule was not applicable here. Additionally, the Magistrate Judge noted that the first-to-file rule is a venue or forum selection mechanism encouraging dismissal of a later filed suit in a different district, and is not intended to govern the resolution of two lawsuits filed in the same district and assigned to the same judge. *Id.* at *14. The Magistrate Judge found that the concerns about conserving judicial resources, avoiding conflicting rulings, and judicial comity are greatly minimized when two cases are pending in the same district and before the same judge. *Id.* Accordingly, the Magistrate Judge recommended denial of Defendant's motion to dismiss Plaintiffs' complaint.

(xxxiii) The Motor Carrier Act Exemption In FLSA Collective Actions

***Aikins, et al. v. Warrior Energy Services Corp.*, 2015 U.S. Dist. LEXIS 32870 (S.D. Tex. Mar. 17, 2015).** Plaintiffs, a group of 66 truck drivers, brought a collective action alleging that Defendant, an oilfield services company, failed to pay them overtime wages in violation of the FLSA. Plaintiffs operated heavy vehicles weighing more than 10,000 pounds, including coil tubing trucks, fluid pump trucks, and cranes to service oil wells. *Id.* at *2. As part of their work, they also regularly drove lighter Ford F-250 pickup trucks without a trailer to perform various duties. *Id*. at *2-3. Defendant moved for summary judgment on the ground that Plaintiffs, as operators of heavy vehicles weighing more than 10,000 pounds, fell within the Motor Carrier Act ("MCA") exemption to the FLSA's overtime pay requirements. Plaintiffs contended that under the Technical Corrections Act of 2008 ("TCA"), they qualified for overtime as long as their work "in part" involved lighter vehicles weighing 10,000 pounds or less. *Id*. Thus, the crux of the issue concerned the

applicability of the TCA's definition of "covered employee" to Plaintiffs. *Id.* at *11. In particular, the Court focused on the second and third elements of that definition, and whether the type and amount of work on "motor vehicles weighing 10,000 pounds or less" was sufficient to trigger FLSA coverage for drivers who would otherwise be exempted from the law by the MCA, and whether that work constituted Plaintiffs' "duties." *Id.* at *11-12. The Court declined to adopt a reading of the TCA that any significant use of vehicles weighing more than 10,000 pounds excluded an employee from FLSA coverage. *Id*. at *15. The Court held that because the TCA extends FLSA coverage to motor carrier employees whose work, even "in part" affects the safety of operation of motor vehicles weighing 10,000 pounds or less, the law did not exclude a motor carrier employee from FLSA coverage merely because his or her work also involved operating heavier vehicles. *Id.* at *16. The Court noted that was not the end of the statutory dispute, however, because there was a minimum threshold of the type or amount of work that employees must perform on vehicles weighing 10,000 pounds or less before the TCA afforded them FLSA overtime coverage. *Id.* The Court found that it need not resolve that question, however, because the "meaningful work" standard required no more than that covered employees' work on vehicles weighing 10,000 pounds or less be more than *de minimis*, and Plaintiffs' summary judgment evidence was sufficient to raise a fact issue even under that slightly more exacting standard. *Id.* at *18. The Court also examined another element of the TCA's covered employee definition in terms of whether Plaintiffs performed duties on motor vehicles weighing 10,000 pounds or less. *Id.* at *20-21. Although Defendant asserted that Plaintiffs' job descriptions did not include the operation of pickup trucks, the Court pointed out that it was the actual day-to-day job activities of the employee, not job descriptions, that were relevant in assessing an employee's entitlement to FLSA coverage. The Court held that because each of the Plaintiffs' declarations described their use of the pickup trucks as a duty, Plaintiffs' evidence was sufficient to raise a fact issue on the "duties" element of the TCA definition of covered employee. *Id.* Accordingly, the Court denied Defendant summary judgment on the MCA exemption.

***Resch, et al. v. Krapf's Coaches, Inc.*, 2015 U.S. App. LEXIS 7810 (3d Cir. May 12, 2015).** Plaintiffs, a group of transit division drivers, brought an action seeking unpaid overtime under the FLSA and the Pennsylvania Minimum Wage Act ("PMWA"). Defendant, a motor coach company based in Pennsylvania, had a transit division that provides bus and shuttle services on set routes. Since 2009, Defendant operated 32 such routes, four of which cross state lines. *Id.* at *1-2. After the District Court conditionally certified the FLSA action, Defendant moved for summary judgment on the grounds that Plaintiffs were ineligible for overtime under the Motor Carrier Act ("MCA") exemption to the FLSA and the PMWA. *Id.* at *3-4. Under the MCA exemption, the FLSA's overtime requirement does not apply to any employee with respect to whom the U.S. Secretary of Transportation has power to establish qualifications and maximum hours of service under the MCA. *Id* at *5. The District Court granted Defendant's motion for summary judgment. Plaintiffs appealed, and the Third Circuit affirmed. Although Defendant was a motor carrier subject to the DOT's jurisdiction, the issue involved was whether Plaintiffs, many of whom rarely or never crossed state lines, were members of a class of employees engaging "in activities of a character directly affecting the safety of operation of motor vehicles in the transportation of passengers or property in interstate commerce" pursuant to 29 C.F.R. § 782.2(a). *Id.* at *7. Based on the Supreme Court decision in *Morris v. McComb*, 332 U.S. 422 (1947), the Third Circuit observed that the relevant inquiry was whether Plaintiffs reasonably could have expected to drive interstate. *Id.* at *10-11. The Third Circuit answered that question by looking at, among other things, whether Defendant did any interstate work, assigned drivers randomly to that driving, and maintained a company policy and activity of interstate driving. *Id.* at *11. The Third Circuit found that during the relevant time period, 6.9% of all trips taken were interstate, as much as 9.7% of the transit division's annual revenues derived from interstate routes, and Defendant always operated at least one interstate route per month. *Id.* at *11-12. The Third Circuit noted that Defendant had a company policy of training drivers on as many routes as possible, retaining discretion to assign drivers to drive either interstate or intrastate routes, at any time, and disciplining drivers who refused. Accordingly, the Third Circuit held that there were no genuine dispute of material fact regarding whether Plaintiffs reasonably could have expected to drive interstate. *Id.* at *12. The Third Circuit concluded that the MCA exemption applied because Plaintiffs were members of a class of employees who could reasonably be expected to drive interstate routes as part of their duties. *Id.* at *13-14. Finally, the Third Circuit rejected Plaintiffs' attempted reliance on the *de minimis* exception given the undisputed facts concerning Defendant's

interstate operations, which accounted for 1% to 9.7% of its transit division's revenue, and Plaintiffs' occupation. *Id.* at *15-16.

(xxxiv) Davis-Bacon Act Issues In Wage & Hour Class Action Litigation

***In The Matter Of Barco Enterprises, Inc.,* 2015 DOL Ad. Rev. Bd. LEXIS 36 (DOL July 31, 2015).** The U.S. Department of Labor Wage & Hour Division ("WHD") brought an action alleging that Defendant, Barco Enterprises Inc., ("Barco"), violated the Davis-Bacon Act ("DBA") by improperly classifying its lead paint abatement employees as common/general laborers while performing lead paint abatement at the General Services Administration ("GSA") building. *Id.* at *3. The GSA, on Barco's behalf, filed a Standard Form (SF) 1444 – the form used to initiate a conformance request – requesting that Barco's lead abatement employees be paid at the common/general laborer wage and fringe benefits rates established under the DC4 Wage Determination applicable to the District of Columbia. *Id.* The WHD denied the application on the grounds that one of the existing job classifications, painters, already covered the workers at issue. *Id.* at *4. The WHD Administrator upheld the denial of Barco's request, treating it as a conformance request under 29 C.F.R. § 5.5(a)(1)(ii)(A). The WHD Administrator reasoned that Barco's request for the addition of a lead paint abatement classification to DC4 failed to satisfy the first criterion for conformance approval, *i.e.*, "that a classification cannot be conformed if the work is performed by a classification already on the wage determination." *Id.* at *5. Barco petitioned for review, and the Administrative Review Board ("ARB") vacated the WHD Administrator's decision. The ARB noted that, notwithstanding the fact that the GSA initiated Barco's request by filing the (SF) 1444, the WHD Administrator appeared to agree that Barco's conformance request did not seek to add a new classification to the DC4 Wage Determination, but to have its employees performing lead paint abatement work be paid at the common/general laborer rate already existing in the DC4 Wage Determination. *Id.* at *16. Barco repeatedly asserted in its request for review and reconsideration that common/general laborers performed the lead paid abatement. Barco did not argue for a new classification for lead paint abatement employees, but asserted that the common/general laborer classification already existing in the DC4 Wage Determination was the correct classification for its employees as opposed to the painter classification. *Id.* at *17. The ARB remanded the case to the WHD Administrator for a determination of whether Barco's request should be treated as a conformance request under 29 C.F.R. § 5.5, or as a request pursuant to 29 C.F.R. § 5.13, seeking clarification of which classification within the existing classifications of the DC4 Wage Determination its employees belonged. *Id.* at *19-20. The ARB also instructed that, regardless of whether the WHD Administrator treated Barco's request as a conformance request or a request seeking clarification, a local area practice survey would be necessary to establish which classification of workers listed in the DC4 Wage Determination predominantly performed work in the area similar to the work in dispute and to establish whether the work in question was performed by workers within the existing DC4 Wage Determination classification. *Id.* at *23-24. Accordingly, the ARB remanded the action to the WHD Administrator.

***Smith, et al. v. Clark/Smoot/Russel*, 2015 U.S. App. LEXIS 13961 (4th Cir. Aug. 10, 2015).** Plaintiff brought an action alleging that Defendants failed to pay him the required Davis-Bacon Act wages for work he performed on Defendants' projects. In support of his allegations, Plaintiff cited to the investigation of the U.S. Department of Labor ("DOL") where the investigator concluded that Defendants had not been paying Plaintiff appropriate wages under the Davis-Bacon Act. *Id.* at *4-5. Plaintiff contended that Defendants temporarily reassigned him to a residential contract that was not subject to the David-Bacon Act, which resulted in decreased wages, increased commuting costs, and a substantially longer commute. Accordingly, Plaintiff brought this False Claims Act complaint alleging that Defendants' certification of Davis-Bacon Act compliance on payrolls they submitted for payment constituted false claims because he had not received appropriate wages on Defendants' projects, and Defendants reassigned him in retaliation. As required by § 3730(b)(2) of the False Claims Act, Plaintiff's attorney filed the complaint under seal *in camera*. *Id.* at *5-6. Plaintiff's counsel, however, called Defendants' in-house counsel the next day to inform him that he had filed a False Claims Act case against Defendants, but did not provide him with a copy of the complaint because it had to remain under seal for 60 days. *Id.* at *6. When Plaintiff served the Government with a copy of the complaint, Defendants' attorney contacted the Government regarding the communications that his client had received from Plaintiff's attorney. Recognizing that there was little point in maintaining the fiction of the seal when Defendants were aware of the filing, the Government moved for

a partial lifting of the seal on the filing. The Government ultimately elected not to intervene in the case, and Defendants moved to dismiss all the 10 causes of action, which the District Court granted. Plaintiff appealed the dismissals of Count I (knowingly presenting false claims to Government); Count II (knowingly making false statements or records to the Government); and Count IV (violation of False Claims Act anti-retaliation provision), which the Fourth Circuit granted in part. Plaintiff argued that the District Court erred in dismissing Counts I and II based upon the "very serious matter" of the "violation of the statutory seal." *Id.* at *7. At the outset, the Fourth Circuit noted that the procedural requirements of violations of the False Claims Act does not *per se* require dismissal. The Fourth Circuit observed that the seal violation did not incurably frustrate the purposes of the False Claims Act, *i.e.*, to permit the government to determine whether it was already investigating the allegations, or to permit the government to investigate the allegation to decide to intervene etc. *Id.* at *9. Moreover, as the seal violation involved disclosures between the parties rather than the public, Defendants' reputations suffered no harm. *Id.* at *10. Accordingly, the Fourth Circuit concluded that the False Claims Act did not support dismissal. The District Court had offered two additional rationales for dismissing the case, based on the doctrine of primary jurisdiction, and Rule 9(b) pleadings deficiencies. The Fourth Circuit noted that the doctrine of primary jurisdiction is designed to coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional experience of judges or cases that require the exercise of administrative discretion. *Id.* at *11. The Fourth Circuit opined that such a referral of an issue to an administrative agency does not deprive the District Court of jurisdiction, it has discretion either to retain it, if the parties were not unfairly prejudiced, or to dismiss the case without prejudice. *Id.* The Fourth Circuit observed that based on the allegations in the complaint, it may appear proper for a District Court to invoke the doctrine of primary jurisdiction, and could either stay or dismiss the matter without prejudice pending an agency determination. *Id.* at *13. Since the District Court here dismissed the suit with prejudice, the Fourth Circuit found this to be an abuse of discretion, and reversed the District Court's order. *Id.* Similarly, the Fourth Circuit found that the District Court erred in dismissing Counts I and II for inadequate pleading under Rule 9(b). Finally, the Fourth Circuit found that the allegations of retaliation in Count IV more than satisfied the pleading requirements under the False Claims Act.

(xxxv) Stays In Wage & Hour Class Actions

***Bowerman, et al. v. Field Asset Services, Inc.,* 2015 U.S. Dist. LEXIS 126058 (N.D. Cal. Sept. 21, 2015).** Plaintiffs brought a class action alleging that Defendants misclassified them as independent contractors and failed to pay them overtime pay and wages due in violation of the California Labor Code. After the Court certified the class, Defendants moved for a stay pending the U.S. Supreme Court's judgment in *Bouaphakeo v. Tyson Foods Inc.*, 765 F.3d 791 (8th Cir. 2014), which the Court denied. Defendants first contended that a decision in *Tyson Foods* would provide guidance regarding Plaintiffs' plan to demonstrate liability and damages through representative testimony as well as statistical analysis. The Court observed that other than Plaintiffs' briefing on class certification, Defendants cited to no other evidence indicating that Plaintiffs' trial plan depended on the sort of statistical techniques at issue in *Tyson Foods*. *Id*. at *6. Accordingly, the Court concluded that Defendants failed to demonstrate that this was a case where liability and damages would be determined with statistical techniques that presumed all class members were identical to the average observed in a sample, as in *Tyson Foods*. *Id*. at *7. Defendants next argued that the class in this case included members who were not injured and had no legal right as in *Tyson Foods*. The Court noted that in *Tyson Foods*, the Eighth Circuit upheld a jury verdict for the class despite Defendants' argument that the class should have been decertified when evidence at trial showed that some class members did not work overtime and would receive no damages, even if the defendant under-compensated their donning and doffing. *Id*. at *8. Here, in contrast, the Court observed that Defendants did not identify any class members who would not be entitled to damages even if the class were to prevail on its misclassification claims. *Id*. at *8-9. Accordingly, the Court concluded that *Tyson Foods* would have little effect on this action, and denied the motion to stay.

(xxxvi) Settlement Bar And Estoppel Issues In Wage & Hour Class Actions

***Beauford , et al. v. ActionLink, LLC*, 2015 U.S. App. LEXIS 4539 (8th Cir. Mar. 20, 2015).** Plaintiffs, a group of "brand advocates," brought suit alleging that Defendant, a marketing agency, misclassified them

as exempt and denied them overtime compensation in violation of the FLSA. *Id.* at *2. Defendant hired the brand advocates to visit retail stores, to train the retail stores' employees on how LG electronics worked, and to convince those employees to recommend LG products to customers. *Id*. at *3. In 2011, the U.S. Department of Labor ("DOL") investigated a complaint that Defendant had misclassified some of its employees as exempt under the FLSA. Subsequently, Defendant re-classified those employees as non-exempt and paid them back wages. Plaintiffs sued Defendant claiming that they were entitled to additional pay under the FLSA. The parties filed cross-motions for summary judgment. The District Court granted the Plaintiffs' motion and declared them non-exempt. *Id*. at *3. Defendant then moved for summary judgment against all employees who had cashed the back wages checks, arguing that they had waived their rights for additional remuneration under 29 U.S.C. § 216(b). The District Court granted the motion, and both parties appealed. The Eighth Circuit affirmed the District Court's ruling that the employees did not fall within the outside sales exemption because they merely promoted products so that employees of retail stores could make sales, and they did not fall within the administrative exemption because they merely followed set scripts and well-established techniques, procedures, or other standards described in manuals or other sources. The Eighth Circuit also reversed the District Court's ruling that employees waived their rights to pursue additional claims by cashing their settlement checks. The Eighth Circuit noted that, although the issue of what constitutes a valid settlement was not before it, other case law authorities have held that the plain language of 29 U.S.C. § 216(c) requires an agreement by the employee to accept a certain amount of back wages and requires the employer to pay those wages. *Id*. at *22. This process also must be supervised. *Id*. In this case, however, when Defendant distributed the checks, the DOL investigator was on vacation, so he failed to approve the amounts of the checks until a month after the checks were distributed. *Id*. at *23. The Eighth Circuit also rejected Defendant's contention that the fine print on the checks constituted a waiver. *Id*. The language did not mention the FLSA, waiving legal claims, or any additional damages to which employees might be entitled. *Id*. at *27. Accordingly, the Eighth Circuit reversed the District Court's ruling in part and remanded for further proceedings.

***Bodle, et al. v. TXL Mortgage Corporation,* 2015 U.S. App. LEXIS 9091 (5th Cir. June 1, 2015).** Plaintiffs, a group of former employees, brought an FLSA action seeking unpaid overtime compensation. In a state court action between the same parties, Defendants had claimed that Plaintiffs, who had resigned from the company about a year previously, had begun to work for a direct competitor and had violated their non-competition covenants. *Id.* at *3. Subsequently, the parties settled the state court action, and the settlement agreement contained a clause which completely released Defendants from any and all actual or potential claims arising from Plaintiffs' employment with Defendant. *Id.* at *4. Defendants thus moved for summary judgment in the FLSA action, arguing that Plaintiffs' waiver in the prior state court action released all claims against them arising from the parties' employment relationship. Relying on *Martin v. Spring Break '83 Productions, LLC*, 688 F.3d 247 (5th Cir. 2012), the District Court granted the motion. It held that the release from the state court settlement was binding on Plaintiffs and thus barred their subsequent FLSA claims. On Plaintiffs' appeal, the Fifth Circuit reversed. The Fifth Circuit noted that in light of the FLSA's recognition of the unequal bargaining power between employers and employees, the FLSA forbids waivers of the right to statutory wages or to liquidated damages. *Id.* at *6. In *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946), the U.S. Supreme Court had held that even when there is a *bona fide* dispute as to whether certain employees are covered by the FLSA, and when that dispute has been settled in favor of paying the employees FLSA-required wages, the employees' right to recover liquidated damages cannot be waived. *Id*. The Supreme Court, however, left open the possibility that a settlement reached for a *bona fide* dispute over the number of hours worked or the applicable wage may be permissible. The Fifth Circuit had considered this question in *Martin* and found that a private settlement reached over a *bona fide* dispute regarding the FLSA claims was enforceable despite the general prohibition against the waiver of FLSA claims. *Id*. In reaching that conclusion, the Fifth Circuit had adopted reasoning from *Martinez v. Bohls Bearing Equipment Co.,* 361 F. Supp. 2d 608 (W.D. Tex. 2005), which held that parties may reach private compromises as to FLSA claims where there is a *bona fide* dispute as to the amount of hours worked or compensation due, and that a release of a party's rights under the FLSA is enforceable under such circumstances. *Id.* at *7. Although a settlement of an FLSA claim is prohibited in the absence of supervision by the U.S. Department of Labor or scrutiny from a District Court, the Fifth Circuit in *Martin* drew an exception to that general rule for unsupervised settlements that are reached due to a *bona fide*

dispute over hours worked or compensation owed. *Id.* at *10-11. In doing so, the Fifth Circuit reasoned that such an exception would not undermine the purpose of the FLSA because Plaintiffs did not waive their claims through some sort of bargain but instead received compensation for the disputed hours. *Id.* at *11. The Fifth Circuit opined that the *Martin* exception was inapplicable here because not only did the prior state court action not involve the FLSA, but also the parties never discussed overtime compensation or the FLSA in their settlement negotiations, and thus there was no factual development of the number of unpaid overtime hours or of compensation due for unpaid overtime. *Id.* Further, the Fifth Circuit reasoned that to deem that Plaintiffs had fairly bargained away unmentioned overtime pay based on a settlement that involved a compromise over wages due for commissions and salary would subvert the purpose of the FLSA, *i.e.*, the protection of the right to overtime pay. *Id.* at *12. Therefore, the Fifth Circuit ruled that the absence of any mention or factual development of any claim of unpaid overtime compensation in the state court settlement negotiations precluded a finding that the release resulted from a *bona fide* dispute under *Martin*, and thus the general prohibition against FLSA waivers applied here. For these reasons, the Fifth Circuit concluded that the releases did not serve as a settlement bar to Plaintiffs' FLSA claims.

***Brunet, et al. v. Senior Home Care, Inc.,* 2015 U.S. Dist. LEXIS 14018 (E.D. La. Feb. 5, 2015).** Plaintiffs, a group of FLSA collective action members in a similar action – *Beckworth, et al. v. Senior Home Care, Inc.*, Case No. 12-351 (N.D. Fla.) – brought this action after decertification of the collective action in *Beckworth*. *Id.* at *2. Defendant moved to dismiss and argued that judicial estoppel precluded the claims of named Plaintiffs Brunet and Wall. The Court granted the motion. Brunet opted-in to *Beckworth* before she filed for Chapter 13 bankruptcy, and did not disclose her FLSA claim in *Beckworth* in bankruptcy. *Id.* at *6. The Bankruptcy Court confirmed Brunet's bankruptcy plan after which it dismissed her Chapter 13 bankruptcy. Plaintiffs filed this action subsequent to the bankruptcy proceedings. Similarly, prior to this action, Plaintiff Wall filed a Chapter 13 petition for bankruptcy, which was confirmed, and subsequently she opted-in to *Beckworth*. *Id.* at *7. The Court noted three elements of judicial estoppel, including: (i) the party's position must be clearly inconsistent with its previous one; (ii) the Court must have accepted the party's earlier position; and (iii) the non-disclosure must not have been inadvertent. *Id.* at *11. First, the Court noted that a debtor in a bankruptcy proceeding is under a continuing duty to promptly disclose the existence of all pending and potential legal claims to the Bankruptcy Court even after a bankruptcy plan has been confirmed. *Id.* at *12. Here, because Brunet opted-in to *Beckworth* before she filed for bankruptcy, the Court remarked that she knew of the claim when she filed her bankruptcy petition, and that similarly, Wall also had knowledge of her claim, which she had the duty to disclose to the Bankruptcy Court. In this context, the Court observed that Plaintiff had knowledge of a claim when she is aware of the facts giving rise to the claim, even if she is unaware of the duty to disclose it. *Id.* at *13. Plaintiff Wall knew the facts giving rise to her FLSA claim before opting-in to *Beckworth* because this occurred after the Bankruptcy Court confirmed her Chapter 13 plan. The Court opined that Plaintiffs would not be judicially estopped from asserting their claims herein unless the Bankruptcy Court had accepted their previous inconsistent statements. Further, the Court observed that the "acceptance" element requires that the Court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition, which requirement is satisfied where a Bankruptcy Court has confirmed a debtor's bankruptcy plan in reliance on the veracity of his asset schedules. *Id.* at *14-15. Because in both Plaintiffs' cases, the Bankruptcy Court confirmed the bankruptcy plans of Plaintiffs, the Court remarked that this confirmation satisfied the second element of judicial estoppel. Finally, the Court noted that the final element of judicial estoppel requires that the party's non-disclosure was not inadvertent, and that a debtor's failure to satisfy his statutory duty of disclosure is only "inadvertent" where the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. *Id.* at *17. The Court opined that both Plaintiffs did not act inadvertently in failing to disclose their FLSA claims to the Bankruptcy Court, and that Plaintiff Brunet had knowledge of the undisclosed claim when she filed her bankruptcy petition and throughout the pendency of her first and second petitions. Likewise, the Court remarked that Plaintiff Wall knew of her claim while her duty to disclose was on-going, and that a debtor has knowledge for the purposes of this analysis if she knew of the facts giving rise to her claim whether or not she knew of the duty to disclose. *Id.* at *18. Plaintiff Wall knew of the facts giving rise to her claim before opting-in to *Beckworth* and before the discharge of her debts in bankruptcy, and she would not have opted-in if she had not worked unpaid overtime and been aware of that fact. Further, the Court remarked that both Plaintiffs had the requisite

motive to conceal the claim because their repayment obligations could be substantially alleviated if the Bankruptcy Court and their creditors were kept unaware of a potentially valuable asset. Thus, because Defendant satisfied all three elements of judicial estoppel, the Court granted Defendant's motion.

***Korenblum, et al. v. Citigroup, Inc.,* 2015 U.S. Dist. LEXIS 140211 (S.D.N.Y. Oct. 14, 2015).** Plaintiffs, a group of current or former information technology employees, brought a putative class action alleging that Defendant failed to pay them overtime wages in violation of the FLSA. Defendants moved to dismiss the complaint, arguing that a previous settlement between Plaintiffs and another party barred this suit. *Id.* at *2. The Court denied the motion in light of binding Second Circuit precedent. The Court observed that Plaintiffs were opt-in Plaintiffs in a prior, related FLSA suit against the Judge Group ("Judge"), a staffing agency that coordinated Plaintiffs' employment and paid their wages with Defendant. The Court, however, noted that in *Jones v. The Judge Technical Services*, *Inc.*, Defendant was not a party and was not mentioned in the settlement agreement. Four months after their suit was settled and Plaintiffs released all claims in the *Jones* litigation, Plaintiffs filed this instant case against Defendant seeking to recover unpaid overtime wages that were not included in the *Jones* settlement. *Id.* at *3. Defendant argued that Plaintiffs' suit was barred by *res judicata* in light of the *Jones* settlement. *Id.* at *4. The Court noted that *res judicata* is applicable in cases involving same parties or their privies. *Id*. The Court remarked that in cases such as this action where a party seeks to invoke claim preclusion on the basis of its privity with a party to a consent judgment, principles of contractual privity and *res judicata* should be applied only if the parties to the settlement agreement in the first suit intended to release the non-party. *Id*. at *5. The Court thereby denied Defendant's motion, and held that the principles of *res judicata* were not applicable in this action because Defendant was not a party in the previous action.

***In Re Wells Fargo Wage & Hour Employment Practices Litigation (No. III)*, 2015 U.S. Dist. LEXIS 149715 (S.D. Tex. Nov. 4, 2015).** In this multi-district litigation, a group of home mortgage consultants ("HMCs") alleged that Defendants failed to pay them overtime compensation under the FLSA. A majority of Plaintiffs settled their claims, and the remaining 1,516 plaintiffs were previously part of a class action settlement in the case of *Lofton v. Wells Fargo Home Mortgage*, Case No. CGC-11-509502 (Cal. Super. Ct.) ("California Plaintiffs"). *Id.* at *3-4. After settlement of the *Lofton* claim, and of the 1,516 Plaintiffs here, 233 received no compensation for failure to file proofs of claim, and none opted-out. *Id.* at *5. David Maxon, a client of Initiative Legal Group ("ILG"), which was pursuing claims on behalf of more than 600 California HMCs in 13 different cases, moved to intervene in the *Lofton* lawsuit. *Id.* ILG and counsel in the *Lofton* case mediated the *Lofton* settlement together, and they had agreed on a common fund to resolve the class action and a separate common fund to resolve the individual actions filed on behalf of ILG's clients. *Id*. Further, although ILG informed the judge in the *Lofton* action that ILG's clients would opt-out of the class action settlement, ILG's clients participated in the class action settlement. Maxon also moved for a temporary restraining order ("TRO") in the *Lofton* case, which was granted and affirmed on appeal because ILG misinformed the trial judge that 600 ILG clients were opting-out of the settlement, and their failure to opt-out diluted the anticipated recovery of other class members, and as the trial judge had not considered the reasonableness of the separate $6 million settlement fund being used as attorneys' fees for ILG. *Id.* at *7. Subsequently, the trial judge held that the funds in the separate ILG fund should be distributed to the *Lofton* class because if the payment was for class action attorneys' fees as ILG claimed, it should have been disclosed and approved. *Id.* at *8-9. Further, the trial judge declined to vacate the judgment. Defendants moved for summary judgment with regard to the California Plaintiffs' claims, prior to the appellate ruling that the trial judge did not abuse his discretion in entering a TRO relating to the ILG funds. Defendant argued that the final judgment approving the settlement, which included a release of all FLSA claims, prohibited Plaintiffs who were *Lofton* class members from pursuing their FLSA claims here. The Court granted the motion. The Court opined that so long as there were no due process issues with the *Lofton* judgment as it related to Plaintiffs here, then the release in the California settlement was binding. *Id.* Further, the Court noted that the class would be bound unless the party attacking the judgment showed that the class was inadequately represented. *Id.* at *17. Although in the *Lofton* settlement fund was diluted because the ILG Plaintiffs did not opt-out as originally expected, the Court remarked that this dilution impacted all class members, and that it was rectified when the trial judge required the ILG funds to be distributed to the class. *Id.* at *21. Finally, although Plaintiffs contended that the *Lofton* judgment was not

final for *res judicata* purposes because several issues were on appeal, the Court remarked that the appeal had no impact on the finality of the judgment. *Id.* at *23. Accordingly, the Court granted summary judgment motion in favor of Defendants.

(xxxvii) Intervention Issues In Wage & Hour Class Actions

***Bui, et al. v. Sprint Corp.,* 2015 U.S. Dist. LEXIS 80126 (E.D. Cal. June 19, 2015).** Plaintiff brought a class action on behalf of current and former employees alleging violations of the California Labor Code. A group of Interveners previously filed two other actions alleging similar claims, including *Guilbaud, et al. v. Sprint Nextel Corp.,* Case No. 13-CV-04357, and *Smith, et al. v. Sprint/United Management Company*, Case No. 14-CV-02642. *Id.* at *2-3. The Interveners filed a motion to intervene and dismiss, stay, or transfer. The Court denied the motion. The Interveners claimed that they had a significant protectable interest because Plaintiff in this action asserted the same California Labor Code violations and sought the same relief that they sought in the *Guilbaud* case and because Plaintiff sought certification of a class action that was entirely subsumed by the proposed class in *Guilbaud*. *Id.* at *4. The Court, however, noted that a class had not been certified either in this case or in the *Guilbaud* case, and therefore, the interest that the Interveners claimed to have was speculative. *Id.* Because the Interveners did not have a significant interest that would be impaired or impeded by the action, the Court denied the motion to intervene. The Court noted that under Rule 24(b), it may permit anyone to intervene who has a claim or defense that shares a common question with the main action. *Id*. at *6. Defendants argued that the Interveners' interest was to put an end to this action, and hence, they should not be permitted to intervene. Given the nature of the Interveners' interest, as well as the reasons the Court provided for denying intervention by right, the Court ruled that it would not permit intervention in this action. *Id*. at *7-8. Finally, the Interveners argued that this action must be transferred to the U.S. District Court for the Northern District of California because *Guilbaud* was the first-filed action. *Id.* at *8. The Court found that the interests in the case were ultimately those of Plaintiff and the putative class members, which were best served by the present case and the recent settlement. *Id.* Further, the Court held that a transfer of venue would cause delay as well as unnecessarily complicate the matter. Therefore, it declined to transfer the case. *Id.* at *9. The Interveners argued that the instant case should be transferred and the settlement denied because the instant case and *Guilbaud* were duplicative. *Id.* The Court found that the settlement expressly excluded any individual who had opted-in to the FLSA action conditionally certified in *Guilbaud*, and therefore it would not affect the Interveners' rights or raise the risk of conflicting judgments. *Id.* Accordingly, the Court denied the Interveners' motion to intervene.

(xxxviii) Portal-To-Portal Act Issues In FLSA Collective Actions

***Busk, et al. v. Integrity Staffing Solutions, Inc.,* 2015 U.S. App. LEXIS 11640 (9th Cir. July 7, 2015).** Plaintiffs, a group of former employees, brought an action alleging that Defendant made them pass through a security clearance at the end of each shift, and that they were not compensated for the time spent going through security in violation of the FLSA and state labor laws. Plaintiffs sought compensation under the FLSA and state labor laws for their entire 30-minute unpaid lunch periods as they spent up to 10 minutes of the meal period undergoing security clearances. The District Court had dismissed Plaintiffs' claims that they were entitled to compensation for time spent passing through security screening at the end of the workday. On appeal, the Ninth Circuit affirmed, and awarded costs to Defendant in the amount of $1,077.25.

(xxxix) Liquidated Damages In FLSA Collective Actions

***McFeeley, et al. v. Jackson Street Entertainment*, 2015 U.S. Dist. LEXIS 15661 (D. Md. Feb. 10, 2015).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendants failed to pay them minimum and overtime wages in violation of the FLSA and the Maryland Wage & Hour Law ("MWHL"). After the Court granted Plaintiffs' motion for partial summary judgment, finding that Plaintiffs were Defendants' employees, Plaintiffs' claims proceeded to trial for resolution of the compensation issue. *Id.* at *3. Although Plaintiffs established Defendants' violation of the both statutes, they could not recover twice for one injury. Accordingly, Plaintiffs sought compensatory damages under the MWHL because its statute of limitations is three years, whereas the FLSA statute of limitations is two years unless Plaintiffs proved that

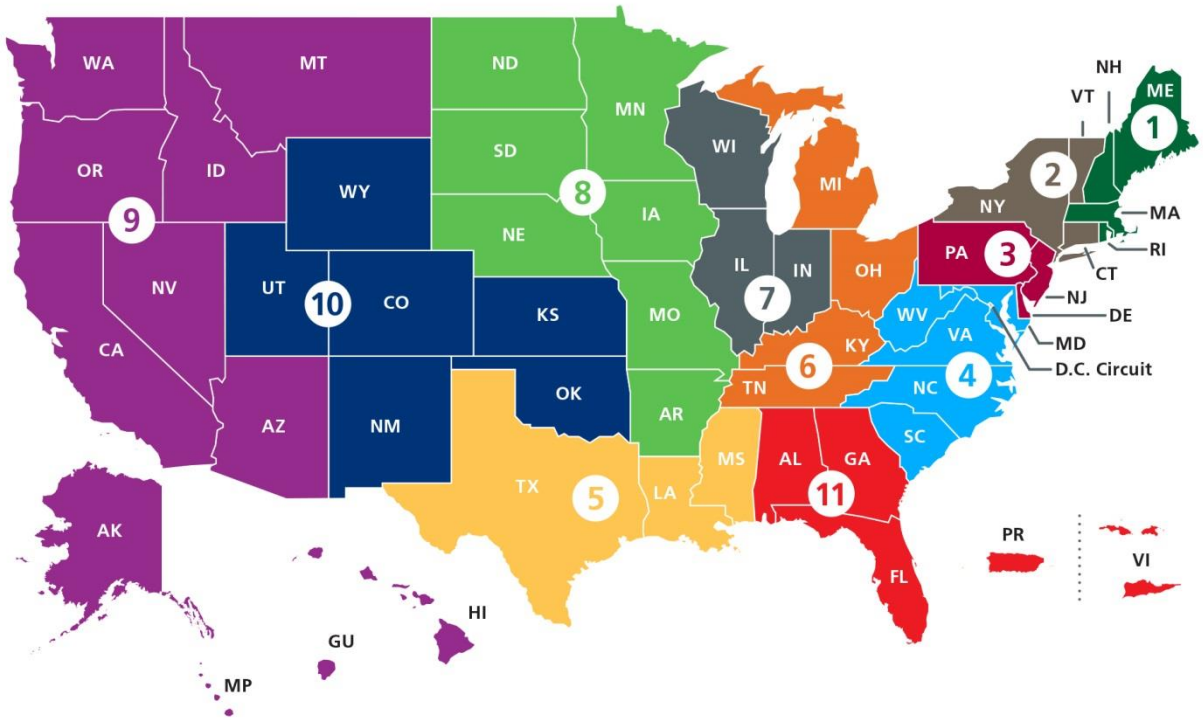
Defendants' violation of the FLSA was willful. Plaintiffs also sought liquidated damages under the FLSA. *Id.* at *3-4. The jury returned verdicts regarding the amount of damages to which each Plaintiff was entitled under the MWHL based on a three year statute of limitation. The jury also determined the amount of unpaid wages that were due to Plaintiffs for work performed within the two-year look-back period for the FLSA in order to award liquidated damages, which Plaintiffs had sought under the FLSA. Although the Court had reserved for trial the issue of whether Plaintiffs were entitled to liquidated damages in an amount equal to their unpaid wages, the Court pointed out that such issues should be determined by the Court rather than by the jury. *Id*. at *4. The Court thus determined Plaintiffs' entitlement to liquidated damages and found that although Defendants did not act in good faith prior to September 2011, their actions following September 2011 were taken in good faith and Defendants had reasonable grounds for believing that they were not violating the FLSA. *Id*. at *5. The Court held that Defendants had acted in good faith by consulting an attorney in or around September 2011 regarding their relationship with the dancers, and made each Plaintiff sign a "space/lease rental agreement ("Agreement") in mid-September 2011. The Court opined that based on their attorney's advice, Defendants had a reasonable basis for treating Plaintiffs as independent contractors and entering into these agreements. *Id.* Accordingly, the Court awarded Plaintiffs liquidated damages ranging from $529 to $35,000, based on the jury's determination of damages that accrued as of and after the FLSA's two year look-back-date, and which were reduced to account for Defendants' good faith following September 2011. The liquidated damages amounts were based on an assessment of what weeks each Plaintiff worked for Defendants between the beginning date of the FLSA look-back period and mid-September 2011. *Id*. at *6.

VI. Significant Class Action Rulings Under The Employee Retirement Income Security Act Of 1974

Class action settlements and decisions in 2015 under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), significantly impacted the direction of ERISA litigation. Among the more closely watched ERISA class actions, courts confronted class certification issues in cases involving challenges to continued employer stock investments in 401(k) defined contribution pension plans and employee stock ownership plans ("ESOP's"). Courts also continued to split on whether Plaintiffs who have received lump-sum distributions have standing to sue under ERISA, whether cash balance plans are inherently age-discriminatory, and whether employers may modify retiree health benefits. Plaintiffs also have filed repeated class actions challenging the reasonableness of investment management and other fees against some of the nation's largest 401(k) retirement savings plans.

In terms of geographic distribution, the ERISA certification rulings were as follows:

U.S. Courts Of Appeal – Analysis Of ERISA Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Certification Motions Granted	0	1	0	0	0	1	1	1	1	0	0	0
Certification Motions Denied	0	0	0	0	0	0	0	0	2	0	0	0

Total: 5 Granted / 2 Denied

A. Cases Certifying Or Refusing To Certify ERISA Class Actions

(i) First Circuit

No reported decisions.

(ii) Second Circuit

***Douglin, et al. v. GreatBanc Trust Co., Inc.,* 2015 U.S. Dist. LEXIS 75279 (S.D.N.Y. May 21, 2015).** In this action brought by home health aides employed by People Care Holdings against the trustee of their Employee Stock Ownership Plan ("ESOP"), Defendant GreatBanc Trust Co., Plaintiffs alleged that it breached its fiduciary duty under the ERISA and sought class certification. The Magistrate Judge recommended granting Plaintiffs' unopposed motion for class certification. Plaintiffs contended that the ESOP purchased 100% of People Care from the company's owners in 2008, and that the Plan suffered losses when the company's value diminished significantly thereafter from the purchase price of $80 million. *Id*. at *1. Plaintiffs moved to certify a class consisting of People Care ESOP participants, excluding the selling shareholders, officers, and directors of Defendant. *Id*. at *3. First, the Magistrate Judge found that the numerosity requirement was satisfied with the proposed class of more than 5,000 ESOP participants. *Id*. at *5. Second, the Magistrate Judge determined that the commonality requirement was met as Plaintiffs' claims arose from one common set of operative facts involving the ESOP's 2008 purchase of People Care's stock. *Id*. at *6. Third, the Court held that the typicality requirement was satisfied because Plaintiffs' claims were identical to those of each proposed class member. *Id*. at *7. Fourth, the Magistrate Judge noted that Plaintiffs met the adequacy requirement, as their motion included ample documentation of their attorneys' experience and success in comparable ERISA litigation and as their interests aligned with the class members. *Id*. at *7-8. Further, the Magistrate Judge found that certification was appropriate under Rule 23(b)(1) as actions for breach of fiduciary duties are "classic examples" of Rule 23(b)(1) cases, and as many case precedents have held that claims for breach of fiduciary duty brought under 29 U.S.C. § 1132(a)(2) are well suited to Rule 23(b)(1). *Id*. at *10-11. Further, the Magistrate Judge opined that certification under Rule 23(b)(2) was also permissible. *Id*. at *12. The Magistrate Judge noted that Plaintiffs sought a declaratory judgment to the effect that Defendant breached its fiduciary obligations to the ESOP and to its participants and beneficiaries and an injunction that would, in substance, prohibit Defendant from engaging in similar conduct in the future. *Id*. at *14-15. The Magistrate Judge recommended that Plaintiffs' motion for class certification be granted under Rule 23(b)(1) and that Plaintiffs' counsel be appointed as class counsel. *Id*. at *17-18.

(iii) Third Circuit

No reported decisions.

(iv) Fourth Circuit

No reported decisions.

(v) Fifth Circuit

No reported decisions.

(vi) Sixth Circuit

***International Union, United Automobile, Aerospace & Agricultural Implement Workers Of America, et al. v. Kelsey-Hayes Co.,* 2015 U.S. Dist. LEXIS 55057 (E.D. Mich. April 28, 2015).** In this putative class action alleging that Defendants breached a collective bargaining agreement ("CBA") in violation of Labor-Management Relations Act ("LMRA") and violated the ERISA in terminating Plaintiffs' health benefit plan, the Court granted Plaintiffs' motion for class certification. Plaintiffs asserted that the CBA and the ERISA plan entitled the retirees to a lifetime health benefits, and that Defendants replaced this benefit with less valuable health reimbursement arrangements ("HRAs") and unilaterally asserted their right to reduce or terminate the retiree healthcare benefits in the future. *Id*. at *10. In moving for certification, Plaintiffs proposed a class of employees who retired under the 1998 CBA from the UAW-represented unit at the now-closed Kelsey-Hayes/TRW Detroit, Michigan plant and the retirees' surviving spouses and other dependents eligible for company-paid retiree health benefits. *Id.* at *3. The Court granted class certification, finding that Plaintiffs met all Rule 23 requirements. First, the Court ruled that the proposed class fulfilled the numerosity requirement, as it consisted of approximately 100 retirees, surviving spouses, and other eligible dependents. *Id.* Second, Plaintiffs met the commonality requirement as the proposed

class members were all retirees subject to 1998 and 2001 CBAs promising company-paid retirement healthcare benefits and raised their claims under these CBAs. *Id.* at *6. Third, Plaintiffs met the typicality requirement as all Plaintiffs presented LMRA and ERISA claims seeking to enforce the 1998 and 2001 CBAs and challenged the imposed 2012 HRAs and Defendants' assertion of the unilateral right to reduce or terminate retiree healthcare in the future. *Id.* at 7. Fourth, Plaintiffs' counsel demonstrated their qualifications and experience by their work and successful prosecution of the arbitration in this action; Plaintiffs easily fulfilled the adequacy requirement of Rule 23(a)(4). *Id.* at *8-9. The Court also found that certification was proper under Rule 23(b)(2) as Plaintiffs sought to enforce the CBAs and the ERISA plan terms. *Id.* at *10. The Court further opined that individual adjudication could substantially impair or impede the interest of other retirees. *Id.* at 11. For these reasons, the Court granted Plaintiffs' motion.

(vii) Seventh Circuit

***Louisiana Firefighters' Retirement System, et al. v. Northern Trust Investments, N.A.,* 2015 U.S. Dist. LEXIS 170281 (N.D. Ill. Dec. 21, 2015).** In this putative class action, Plaintiffs alleged that Defendants breached contracts with and their fiduciary duties to Plaintiffs by improperly investing Plaintiffs' assets. Plaintiffs filed a motion for class certification and the Court granted Plaintiffs' motion. *Id.* at *5. Plaintiffs were direct participants in Defendants' securities lending program ("SLP"). *Id.* Plaintiffs participated in the SLPs by entering into securities lending authorization agreements ("SLAAs") with Defendants, giving Defendants the authority to lend out Plaintiffs' securities and invest the collateral received in one or more of four collateral pools. *Id.* Plaintiffs alleged that Defendants invested the collateral in highly leveraged and risky securities, including mortgage-backed securities of Lehman Brothers and CIT Group, and continued to hold those investments even after the sub-prime mortgage market, major hedge funds, and other financial institutions collapsed in 2007 and 2008. *Id.* at *8. In determining if Plaintiffs had established the elements necessary to certify the class, the Court noted that Defendants did not challenge the proposed class' numerosity, since the class size was estimated at 300 members. *Id.* at *16. However, Defendants argued that the Plaintiffs had not established the typicality or commonality requirements. *Id.* Specifically, Defendants claimed that Plaintiffs allegations of imprudent investments could not be resolved on a class-wide basis because prudence cannot be assessed with reference to the risk/reward profiles of individual clients in the SLP. *Id.* at *17-18. The Court disagreed, opining that Plaintiffs alleged Defendants made investments for the collateral pools based on the guidelines for each pool, not the risk/reward profiles of individual securities lenders. *Id.* at *18. Defendants also argued that commonality and typicality were lacking because Plaintiffs' SLAAs, unlike most of the proposed class members, were governed by Michigan, not Illinois, law and that 28 members of the SLAAs were governed by laws of eleven states other than Michigan and Illinois and an additional fourteen were governed by the laws of five other countries. *Id.* at *20, *22. However, the Court noted that Michigan contract law does not materially differ from Illinois contract law, and thus the proposed class could survive commonality problems by limiting class members to those with SLAAs governed by Michigan or Illinois law. *Id.* at *21-22. Further, Defendants argued that Plaintiffs could not meet the typicality requirement because the different collateral pools varied in risks, purposes, and guidelines. *Id.* at *23. The Court rejected this argument because Plaintiffs' allegations stated that Lehman, CIT, and mortgage-backed securities were not appropriate investments for any pool because they were not conservative, high-quality, or low-risk investments. *Id.* at *26. The Court also ruled that Plaintiffs had met the adequacy requirement despite Defendants' contention that some absent class members may be deprived of damages relating to mortgage-backed securities. *Id.* at *28. Finally, the Court held that Plaintiffs had established that common issues predominated because even though damages may have to be determined individually, the overarching questions in the case involved common questions, including whether Defendants imprudently purchased and retained the contested securities in the collateral pools. *Id.* Thus, the Court granted Plaintiffs' motion to the certify the proposed class.

(viii) Eighth Circuit

***Lanigan, et al. v. Express Scripts, Inc.,* 2015 U.S. Dist. LEXIS 1854 (E.D. Mo. Jan. 8, 2015).** In this ERISA class action alleging that Express Scripts Inc. ("ESI") retained undisclosed rebates from drug manufacturers, the Court denied Plaintiff's motion for class certification for failure to establish commonality, typicality, adequacy, and predominance. Plaintiff, a trustee of a multi-employer health fund, brought the

action on behalf of his fund and all other similarly-situated self-funded prescription drug plans that utilized ESI as a pharmacy benefits manager ("PBM"). Plaintiff alleged that the fund contracted with National Prescription Administrators, Inc. ("NPA") for prescription benefit management services, and that ESI purchased NPA and took over NPA's contractual obligations to fund and acted as its PBM. *Id.* at *12. Plaintiff's proposed class was comprised of all self-funded ERISA employee benefit plans ("ERISA Plans") for which NPA, at least initially, served as the ERISA Plans' PBM, and which utilized the NPA Select Formulary. *Id.* Although Plaintiff contended that standardized contracts were used with all plans, he failed to provide any proof of a standardized contract for all class members The Court noted that while some contracts were executed, some were not, and there were variations regarding how the contracts addressed rebates. Further, the Court reasoned that the issue of how rebates were received, disbursed, and retained by NPA could not be answered on a class-wide basis. *Id*. at *22. Further, the Court observed that Plaintiff's action was against ESI, not NPA, and while Plaintiff's plan had terminated the relationship with ESI, other proposed class members continued to be serviced by ESI. In the Court's view, this defeated the typicality requirement and raised conflict issues. *Id.* at *23. Moreover, because Plaintiff's plan no longer utilized the services of ESI, while others in the proposed class were still affiliated with ESI, the Court opined that in seeking recovery, Plaintiff's interests would conflict with those class members, thereby defeating their adequacy. The Court also concluded that predominance was lacking because of the individualized negotiations and relationships with each plan, and remarked that whether a fiduciary relationship existed had to be ascertained by analyzing the contracts and the contractual relationships between NPA and the plans. The Court also observed that it would have to examine each relationship, the manner of dealing between the parties, and the results thereof on a case-by-case basis to ascertain whether a breach of a fiduciary duty had occurred, which in turn precluded class certification. Finally, the Court ruled that the collective presentation of individual liability evidence would not advance the parties' interests, nor would judicial economy of administration result from certification. *Id.* at *28. The Court asserted that fiduciary duty and breach issues would have to be proven on an individual Plaintiff basis. *Id.* Because of the numerous individualized factual and legal issues, the Court remarked that it would be faced with a lengthy series of mini-trials for each claim and for virtually every element of those claims, which meant that class action was not the superior method for handling this litigation. Accordingly, the Court denied Plaintiff's motion for class certification.

(ix) Ninth Circuit

***Bryant, et al. v. Arizona Pipe Trades Pension Trust Fund,* 2015 U.S. Dist. LEXIS 7291 (D. Ariz. Jan. 22, 2015).** In this putative class action brought by a plan participant in the pipe trade profession, the Court partially granted Plaintiff's motion for class certification. Under the terms of the United Association Reciprocity Program for Pension Funds ("Program") and the subject Pension Plans, the full value of the out-of-state contributions made by participants who worked outside their local jurisdiction would be reciprocal, and therefore prorated between the Plans at the current contribution rates to protect employees from losing benefits. *Id.* at *5. Defendants amended the Plans twice, changing the way benefits were to be paid and Plaintiff alleged that the changes diminished his, and others, future benefits in violation of the Plans and the ERISA. Plaintiff sought class certification, proposing two classes and one sub-class, accounting for the timeframes during which the amendments were made. *Id*. at *9. The Court found that the classes were sufficiently tailored to common questions in the litigation, including whether Defendants breached their fiduciary duties owed to the classes and whether they miscalculated participants' individual account balances by not including employer contributions at the mid-year valuation date. The Court determined that common questions of law – such as whether class members accrued rights and benefits under the first amendment, whether Defendants violated the terms of the Plans and the ERISA by failing to provide adequate notice prior to adoption of second amendment, and whether Defendants' implementation of the second amendment amounted to a breach of fiduciary duty – predominated over individual issues that could arise in the calculation of damages. *Id.* at *13. The Court reasoned that the issues of whether Defendants breached their duties and whether they miscalculated participants' individual account balances by not including employer contributions at the mid-year valuation date also would facilitate disposition of all class members' claims. *Id.* at *17. The Court therefore granted certification on all of Plaintiff's class claims. The Court, however, denied certification with regard to Plaintiff's claim that Defendants provided

him with inconsistent and differing information concerning the amount of benefits paid, finding that it amounted to an individual claim for relief, and thus was not suitable to class resolution. *Id*. at *19-20.

***Reyes, et al. v. Bakery & Confectionery Union & Industry International Pension Fund,* 2015 U.S. Dist. LEXIS 126972 (N.D. Cal. Sept. 22, 2015).** In this class action brought by the participants in the Bakery and Confectionery Union and Industry International Pension Fund (the "Fund") alleging that Defendants failed to comply with the Pension Protection Act ("PPA") in adopting an amendment to a pension plan, the Court granted Plaintiffs' motion for class certification. The Fund was a multi-employer defined benefit pension plan that covered tens of thousands of participants and beneficiaries. Under the Fund, employers offered participants subsidized early retirement plans known as "Plan G" (the "Golden 80 Plan") and "Plan C" (the "Golden 90 Plan"). *Id*. at *3. Under the Plans, when a participant's age and service, in years and months, equaled 80 years under the Golden 80 Plan, and 90 years under the Golden 90 Plan, a participant would be entitled to retire at the full benefit level, except that participants who commenced participation after December 3, 1998, must have a minimum number of years of service. *Id*. at *3-4. Plaintiffs contended that in July 2010, the Fund's trustees amended the fund to eliminate the option to age into those benefits, and instead required that a participant be employed with a participating employer when they qualified for the Golden 80 or 90 benefits. *Id*. at *4. While the litigation was on-going, Defendants distributed a "Notice of Critical Status," which announced that subsidized early retirement benefits might be reduced or eliminated as a part of a rehabilitation plan. *Id*. at *4-5. In the rehabilitation plan, the trustees adopted an amendment identical to the July 2010 amendment, as a contingent measure because of a pending legal challenge to the earlier amendment. *Id*. In May 2014, the 2012 contingent amendment went into effect. *Id*. Plaintiffs alleged that the contingent amendment was void because it had neither been enacted nor effectuated in compliance with the ERISA's provisions. *Id*. Plaintiffs moved to certify a class of all participants in the Golden 80 or 90 Plans in the Funds. *Id.* at *6. The Court found that the Rule 23(a) requirements were satisfied because the parties agreed that there are thousands of affected pension plan participants who fell within the class definition. *Id.* at *9. The Court determined that the class met the commonality requirement because the challenge to the contingent amendment was applicable to all class members and did not require an inquiry into the circumstances of individual plan participants. *Id.* at *10. The Court also opined that the class met the typicality requirement because the class representatives' claims arose from the same practice and their claims were based on the same legal theory as the class they sought to represent. *Id.* *10-11. Further, the Court ruled that the class representatives met the adequacy requirement because there were no apparent conflicts with the proposed class and there was no reason to believe that they would not prosecute the actions vigorously or adequately protect the absent class members' interests. *Id.* at *12. Finally, as there were thousands of potential Plaintiffs affected by the challenged contingent amendment, and if each one filed a suit individually it ran a risk of inconsistent and varying adjudications, the Court concluded that Rule 23(b)(3) was satisfied. *Id*. at *13. Accordingly, the Court certified the class.

***Santomenno, et al. v. TransAmerica Life Insurance Co.*, 2015 U.S. Dist. LEXIS 6889 (C.D. Cal. Jan. 16, 2015).** In this action alleging that Defendants charged an excessive investment fee (the "investment management/administration" or "IM/Admin" fee), the Court deferred its decision on Plaintiffs' motion for class certification and required additional briefing. Plaintiffs alleged that the imposition of excessive fees violated the ERISA's fiduciary duty to act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan. *Id.* at *3. Because Plaintiffs failed to allege that the total fees the plans paid to Defendants were unreasonable, the Court remarked that the theory of fiduciary breach under which they sued was unclear. The Court noted that even if Defendants were under a legal obligation to distinguish investment-level expenses from plan-level expenses, it was unclear that such an obligation translated to a fiduciary duty under the ERISA. The Court also reasoned that it was unclear what the ratio of the IM/Admin fee to other fees was for purposes of Plaintiffs' case theory. Accordingly, the Court ruled that additional briefing was required on the primary theory by which Plaintiff wished to recover for Defendants' alleged breach of fiduciary duty as to fees. The Court concluded that this would assist it in determining whether common questions were likely to predominate over individual questions,

and whether a class action was superior mode of adjudication. The Court accordingly deferred its ruling on Plaintiffs' class certification motion.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

No reported decisions.

(xii) District Of Columbia Circuit

No reported decisions.

B. Other Federal Rulings Affecting The Defense Of ERISA Class Actions

Throughout 2015, federal courts issued a wide variety of rulings on procedural and substantive matters in ERISA class action litigation. These rulings included breach of fiduciary duty issues in ERISA class actions; ERISA class action litigation over retiree/employee benefits; attorneys' fees and costs in ERISA class actions; settlement approval issues in ERISA class actions; release issues in ERISA class actions; standing issues in ERISA class actions; cash balance plan issues in ERISA class actions; statute of limitations issues in ERISA class actions; ERISA stock drop class actions; equitable defenses in ERISA class actions; arbitration issues in ERISA class actions; vesting issues in ERISA class actions; preemption issues in ERISA class actions; damages issues in ERISA class actions; DOL and PBGC ERISA enforcement litigation; standing issues in ERISA class actions; and intervention issues in ERISA class actions.

(i) Breach Of Fiduciary Duty Issues In ERISA Class Actions

***Harris, et al. v. Amgen, Inc.*, 2015 WL 3372373 (9th Cir. May 26, 2015).** In this class action brought by a group of current and former employees who participated in two Amgen pension plans, alleging breaches of fiduciary duties under the ERISA, the Ninth Circuit denied rehearing *en banc*. This case was previously on remand from the U.S. Supreme Court for reconsideration in light of *Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), as the Ninth Circuit had earlier reversed the District Court's dismissal of the class action. *Id*. In *Fifth Third*, the Supreme Court held that there is no presumption of prudence for investments in employer stock. *Id*. The Ninth Circuit previously held that Plaintiffs sufficiently alleged that Defendants violated their duty of loyalty and care by failing to provide material information to plan participants about investment of the Amgen Common Stock Fund. *Id*. The Ninth Circuit panel issued this order to address criticisms contained in the dissenting opinion. The Ninth Circuit panel remarked that the dissent characterized its opinion as holding that withdrawing a fund as an investment option is appropriate because as a general matter, when the previously concealed material information about a company is eventually revealed, the stock price will invariably decline. *Id*. at *1. Based on that characterization, the dissent asserted that the majority ignored the *Fifth Third*'s instruction to consider whether there will be a net harm to plan participants. The Ninth Circuit clarified that its opinion contained no such general holding. The Ninth Circuit explained that in a separate class action pending before the same judge, the non-plan investors in Amgen stock asserted securities law violations and the District Court concluded that these investors had sufficiently alleged misrepresentations and omissions, and resulting economic loss sufficient to state claims under §§ 10(b) and 20(a) of the 1934 Exchange Act. *Id*. The Ninth Circuit remarked that this appeared to satisfy the Rule 8(a) requirement to state a plausible claim based upon the withholding of material information. The dissent contended that the majority imposed on fiduciaries an obligation to stop Plan investments in employer stock or force the sale of that stock based upon a mere suspicion of a violation of federal securities laws. *Id*. The majority clarified that this was not its intention, and that its opinion did not require a fiduciary to act based on a mere suspicion or arguable violation of federal securities laws; instead, it stated that a fiduciary's obligation to act is triggered only when he or she knew or should have known of a violation of the securities laws. *Id*. Finally, the majority noted that according to the

dissent, its opinion imposed on the ERISA fiduciaries greater disclosure obligations than those imposed under federal securities laws. *Id*. at *3. The majority explained that compliance with the ERISA would not have required Defendants to violate federal securities laws. In other words, if Defendants had revealed material information in a timely fashion to the general public (including to plan participants), thereby allowing informed plan participants to decide whether to invest in Amgen Common Stock Fund, they would have simultaneously satisfied their duties under both securities laws and the ERISA. *Id*. Alternatively, if Defendants had made no disclosures but had simply not allowed additional investments in the Fund with the price of Amgen stock artificially inflated, they would not have violated the prohibition against insider trading, for there was no violation absent purchase or sale of stock. *Id*.

***In Re Lehman Brothers Securities And ERISA Litigation,* 2015 U.S. Dist. LEXIS 90109 (S.D.N.Y. July 10, 2015).** In this class action brought on behalf of beneficiaries of the Lehman Brothers Savings Plan (the "Plan"), an ESOP that held stock of Lehman Brothers Holdings, Inc. ("Lehman"), Plaintiffs alleged that Defendant fiduciaries – including Lehman's former directors and members of Lehman's Employee Benefit Plans Committee – violated their duty under the ERISA to manage the Plan prudently. Defendants moved to dismiss the third consolidated amended complaint ("TCAC") on the basis that Plaintiffs failed to adequately allege that the Plan managers – many of whom were officers and directors – disloyally put Lehman's interests ahead of the Plan participants. In their TCAC, Plaintiffs alleged that the Plan Committee Defendants knew or should have known, based on public information, that investment in Lehman had become increasingly risky throughout 2008 and that these Defendants breached their fiduciary duty by continuing to invest in Lehman during this period. *Id.* at *10-11. Plaintiffs also alleged that there were "special circumstances affecting the reliability of the market price of Lehman stock as an unbiased assessment of Lehman's value," including orders issued by the U.S. Securities and Exchange Commission ("SEC") in July 2008 that prohibited short selling the securities of certain large financial services firms, including Lehman. *Id.* at *11. Plaintiffs further asserted that the Plan Committee Defendants breached their fiduciary duties by failing to investigate non-public information regarding the risks facing Lehman. *Id.* at *12. Finally, Plaintiffs claimed that Defendant Richard S. Fuld, Lehman's former chairman and chief executive officer, inadequately monitored the Plan Committee Defendants and possessed non-public information about the risks facing Lehman and breached an alleged duty to share it with the Plan Committee Defendants. *Id*. As in previous rulings, the Court found that Plaintiffs failed to plausibly allege that the Plan Committee Defendants breached their duty of prudence based on public information. *Id.* at *16. While the Court acknowledged that "changed circumstances" – like the collapse of Bear Stearns in 2008 – could trigger a fiduciary's obligation to review the prudence of an investment, it also noted that Plaintiffs failed to sufficiently allege the circumstances that actually changed and that the failure to make such a review injured the Plan. *Id.* at *22-23. Thus, notwithstanding the July 2008 SEC orders, the Court found that the TCAC did not allege facts or circumstances sufficient to have alerted the Plan Committee Defendants that Lehman was an imprudent investment. *Id.* at *25. As to the alleged duty to investigate Lehman's deteriorating financial condition, the Court opined that the TCAC still did not explain how Plaintiffs' hypothetical investigation would have uncovered the alleged inside information so that the fiduciaries could have warned the Plan participants. *Id.* at *35-36. The Court further questioned how it should evaluate claims about whether an ESOP fiduciary's actions would have caused "more harm than good" to ESOP participants, noting that this question ought to be a matter for expert proof and thus inappropriate for disposition on a motion to dismiss. *Id.* at *38. The Court was also highly skeptical that terminating the Plan as an investment option or disclosing the alleged inside information would have helped the Plan more than hurt it, but concluded that it need not resolve the question given that Plaintiffs' basis for a duty to investigate claims was insufficient. *Id.* at *39. Finally, the Court found that the duty to monitor claims against Lehman's directors failed because the TCAC failed to plausibly allege any primary breach of fiduciary duty on the part of the Plan Committee Defendants. *Id.* at *40-42. Plaintiffs' separate claim that Defendant Fuld violated a fiduciary duty to provide the Plan Committee Defendants with non-public information therefore failed as a matter of law. *Id.* at *44. Accordingly, the Court granted Defendants' motion to dismiss all of Plaintiffs' claims.

***Kruger, et al. v. Novant Health, Inc.,* 2015 U.S. Dist. LEXIS 124171 (M.D.N.C. Sept. 17, 2015).** Plaintiffs, current and former participants of two 401(k) Plans sponsored by a major hospital system,

brought a putative class action alleging that the Plans' fiduciaries breached their fiduciary duties of loyalty and prudence by making excessive payments to service providers and brokers and by failing to monitor the Plans to rectify such overpayments. *Id.* at *6-7. Defendants moved to dismiss, and the Court denied the motion. First, Defendants argued that Plaintiffs failed to allege facts regarding the services provided, why the fees were excessive, or how the fees charged to the Plans were excessive in light of the services provided. The Court found that Plaintiffs' allegations that Plan fiduciaries were utilizing imprudently expensive investment options to the detriment of the Plans were sufficient to state a claim for breach of fiduciary duty. *Id.* at *20. The Court further determined that the facts that Defendants contested were the types of facts that warranted discovery, and therefore dismissal at the pleading stage was not appropriate. *Id.* at *25. Second, as to the broker, the Court found that it would be impossible to deduce whether the broker's compensation was reasonable without discovery into facts about the broker, including what exactly it did, how exactly Defendants paid it, and whether Defendants evaluated its compensation prudently. *Id.* at *26. Third, Defendants sought dismissal of Plaintiffs' claim that Defendants breached their fiduciary duties by retaining higher fee share class investment options in the Plans when far lower cost funds with the identical managers, investment styles, and stocks were available. *Id.* at *9-10. Under the prudence standard, the Court found it difficult to conclude that Plaintiffs' allegations were not sufficient to state a claim. Plaintiffs did not argue that Defendants had a duty to scour the market to find and offer any cheaper investment; rather, they alleged that lower cost funds with the identical managers, investments styles, and stocks should have been considered by the Plans. Plaintiffs alleged that the Plans, comprised of very large pools of assets, had the ability to obtain institutional class shares of mutual funds but offered only retail class shares, which charged significantly higher fees than institutional shares for the same returns on investment. According to the Court, Plaintiffs stated enough of a claim for breach of fiduciary duty based on the imprudent retention of retail class funds. *Id.* at *17. Accordingly, the Court denied Defendants' motion to dismiss.

***Pfeil, et al. v. State St. Bank & Trust Co.,* 2015 U.S. App. LEXIS 19536 (6th Cir. Nov. 10, 2015).** In this action alleging that Defendant State Street Bank & Trust Co., the independent fiduciary for the company stock fund in General Motor's ("GM") 401(k) plan, breached its duty of prudence when it failed to halt purchases of GM stock, and delayed divesting the GM common stock fund of GM stock, as the company headed toward bankruptcy, the Sixth Circuit held that Defendant's continuous and extensive monitoring and review of the plan's investment in GM stock constituted a "prudent process," and therefore, Defendant satisfied its duty of prudence as a matter of law. Defendant served as a fiduciary of certain pension plans for employees of GM, including the Common Stock Plan (the "Plan"), which held GM common stock. The Plan lost money in 2008, as GM faced severe business problems that culminated in the company filing for bankruptcy. Defendant continued to buy GM stock until November 8, 2008, and did not divest the Plan of the GM stock until March 31, 2009. *Id.* at *2-3. Plaintiffs, a group of GM employees who elected to invest in the Plan, claimed that Defendant's decision to continue to buy and to hold GM stock was imprudent under the ERISA. *Id.* at *3. The District Court originally dismissed Plaintiffs' action under the *Moench* presumption (from *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)). *Id.* Plaintiffs appealed, and the Sixth Circuit reversed and remanded, holding that the presumption of prudence did not apply earlier than the summary judgment stage. *Id.* On remand, the District Court certified the class, but then granted Defendant's motion for summary judgment based on the presumption of prudence. *Id.* Plaintiffs again appealed, and the Sixth Circuit affirmed the grant of summary judgment. The Sixth Circuit acknowledged that, even though it no longer presume that ESOP fiduciaries were prudent, in *Fifth Third Bancorp v. Dudenhoeffer,* 134 S. Ct. 2459 (2014), the U.S. Supreme Court had suggested that the correct "understanding of the prudence of relying on market prices" would lead to a similar result. *Id.* at *14. The Sixth Circuit noted that *Dudenhoeffer* made clear that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was overvaluing or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances," because fiduciaries do not act imprudently by failing to outsmart a presumptively efficient market. *Id.* at *15-16. The Sixth Circuit explained that a Plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss. *Id.* at *16. The Sixth Circuit found that, during the class period, Defendant "repeatedly discussed at length whether to continue the investments in GM," and Defendant's employees continuously discussed the

performance of GM, both its stock and its business, and factors that might have affected the performance of the stock. *Id.* at *22. Defendant had an Independent Fiduciary Committee that held more than 40 meetings during the nine months at issue to discuss whether to retain GM stock. *Id*. Defendant's experts presented evidence to the District Court to support the finding that its process for monitoring GM's stock was prudent. *Id.* Moreover, other experts, *i.e.*, fiduciaries of other pension plans and of non-pension plan investment funds, also decided to hold GM stock during the same time that Plaintiffs claimed it was imprudent for Defendant to do so. *Id.* Thus, in light of the prudent process in which Defendant engaged and Plaintiffs' failure to establish any special circumstances affecting the reliability of the market price of GM stock, the Sixth Circuit concluded that Plaintiffs could not demonstrate a genuine issue regarding whether Defendant satisfied its duty of prudence under the ERISA. *Id.* at *23. Accordingly, the Sixth Circuit affirmed the District Court's order granting summary judgment to Defendant.

***Smith, et al. v. Delta Airlines Inc.*, 619 Fed. Appx. 874 (11th Cir. 2015).** In this ERISA class action, a plan participant alleged that plan fiduciaries breached their duty to prudently manage the plan's assets through their decision to maintain employer stock as a plan investment. On remand from the Supreme Court, the Eleventh Circuit dismissed the action for failure to state a claim in light of *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The Eleventh Circuit had previously rejected the claim prior to *Dudenhoeffer*. In *Dudenhoeffer*, the Supreme Court held allegations based on over-valuing or under-valuing stock are "implausible as a general rule, at least in the absence of special circumstances." *Id.* at 876. The Supreme Court concluded that a fiduciary usually is not imprudent to assume that a major stock market provides the best estimate of the value of the stocks traded on it that is available to him. *Id*. In holding that *Dudenhoeffer* did not save Plaintiff's claim, the Eleventh Circuit found that Plaintiff's prudence claim fell squarely within the class of claims the Supreme Court deemed "implausible as a general rule." *Id.* Plaintiff alleged that the Delta fiduciaries should have foreseen that Delta stock would continue to decline. There was no allegation, however, that the fiduciaries had material inside information about Delta's financial condition that was not disclosed to the market, nor was there any allegation of a special circumstance that rendered reliance on the market price imprudent, such as fraud, improper accounting, illegal conduct or other actions that would have caused Delta stock to trade at an artificially inflated price. Absent such circumstances, the Eleventh Circuit found that the Delta fiduciaries could not be held liable for failing to predict the future performance of the airline's stock.

(ii) ERISA Class Action Litigation Over Retiree/Employee Benefits

***Barnes, et al. v. AT&T Pension Benefit Plan,* 2015 U.S. App. LEXIS 19776 (9th Cir. Nov. 13, 2015).** In this class action brought by a participant in the AT&T Pension Benefit Plan (the "Plan") alleging that the Plan violated his rights and the rights of others similarly-situated by failing to pay full pension benefits in violation of the ERISA, the Ninth Circuit affirmed the District Court's decision granting summary judgment to Defendant. Plaintiff asserted that the Plan owed the class members additional benefits pursuant to § 3.4(a) of the Plan document. *Id.* at *2. The Ninth Circuit remarked that it would review the Plan's decision denying Plaintiff and other "lump sum" class members' additional retirement benefits for an abuse of discretion with skepticism. *Id*. at *1-2. The Ninth Circuit opined that Plaintiff's arguments as to why it should review the Plan's decision *de novo* were unpersuasive. *Id.* at *2. The Ninth Circuit explained that contrary to Plaintiff's assertion, the Plan did interpret § 3.4(a) of the Plan Document, when it initially evaluated Plaintiff's claim, and in its denial letter, paraphrased § 3.4(a) in explaining why the benefits were being denied. *Id*. at *2-3. Even if the Plan waited to first interpret § 3.4(a) until after Plaintiff sued, no case law authority supported Plaintiff's argument that a plan fiduciary was foreclosed from issuing subsequent interpretations of the Plan once a beneficiary commences litigation. *Id*. at *3. Third, the Ninth Circuit found that any variation in the Plan's interpretation of § 3.4(d)(3) did not require a *de novo* review. *Id*. The Ninth Circuit determined that the plain language of the Plan did not entitle Plaintiff to benefits since the lump sum payees like Plaintiff were eligible to receive only cash balance benefits upon their second retirement pursuant to § 3.4(a). *Id.* at *3-4. The Ninth Circuit held that because the Plan's language was ambiguous and the Plan issued a reasonable, good faith, interpretation of the Plan's terms, it did not abuse its discretion and, as such, Plaintiff's alternative interpretations of these provisions did not prevail over the Plan's interpretation. *Id.* at *4-5. Accordingly, the Ninth Circuit affirmed the judgment of the District Court.

***Carter, et al. v. General Motors Hourly-Rate Pension Plan,* 2015 U.S. Dist. LEXIS 81037 (S.D. Ind. June 23, 2015).** In this class action brought by former employees of Allison Transmission, Inc. ("Allison"), and participants of the General Motors Hourly-Rate Pension Plan (the "GM Plan"), alleging that Defendants denied them benefits, the Court granted summary judgment to Defendants. Prior to 2007, Allison was a division of GM and participated in the GM Plan which provided pension benefits for employees who reached age 65, ceased employment with GM, and met certain other requirements. *Id*. at *4-5. In 2007, GM sold Allison to Clutch Operating Co., Inc. ("Clutch"). *Id*. at *5. In 2009, GM, Clutch, and Plaintiffs' representative union entered into a Memorandum of Understanding ("MOU") relating to the transition of workers from GM-Allison to Clutch-Allison. *Id.* The MOU also provided for the transition of pension benefits to Clutch-Allison. *Id.* at *7-8. The parties did not dispute that in 2007, Plaintiffs were qualified for either normal or early retirement from GM, but they continued to work for Clutch-Allison. *Id.* at *10-11. In late 2013 or early 2014, however, Plaintiffs requested to retire from GM and to begin receiving GM Plan benefits, but to continue their employment with Clutch-Allison. *Id*. at *11. GM denied their request, stating that in order to commence their GM Pension benefits, they must terminate their employment with Clutch-Allison. *Id*. at *11-14. Plaintiffs filed suit for benefits under § 502(a)(1)(B) of the ERISA; and for equitable relief under § 502(a)(3)(A) of the ERISA. *Id.* at *14-15. The parties cross-moved for summary judgment. *Id.* at *15. Plaintiffs argued that the MOU did not amend the GM Plan because there was never an amended plan document, and that the GM Plan and the MOU did not specify how the GM Plan was amended. *Id*. at *19. Defendants responded that the GM Plan contemplated that GM and the union would execute additional MOUs from time to time to deal with secondary pension issues, and that such memoranda were automatically incorporated into the GM Plan by reference. *Id*. The Court, however, found that the MOU was part of the GM Plan based on the terms of the GM Plan itself. *Id.* at *21. The Court explained that the Plan stated that GM and the union may enter into the MOU and that the provisions set forth in such a memorandum were made part of the GM Plan. *Id*. at *21-22. Plaintiffs also argued that a provision in the GM Plan requiring an employee to terminate employment with a successor company did not bar their claim for benefits because Clutch-Allison was not a successor to GM (in its entirety). *Id*. at *24. The Court noted that the successor provision specifically referred to an employee accepting employment with a successor company through a sale, divestiture, or joint venture transaction. *Id*. at *28. The Court also observed that divestiture was defined as the loss or surrender of an asset or interest. *Id*. Under the circumstances, the Court concluded that Clutch-Allison was a successor company, and that Plaintiffs must terminate their employment with Clutch-Allison in order to receive benefits under the GM Plan. *Id*. at *29. Plaintiffs further argued that the MOU did not bar them from receiving GM Plan benefits because they were not retiring from Clutch-Allison. *Id.* In other words, Plaintiffs argued that the MOU's language kicked in upon termination from Clutch-Allison. *Id*. at *29-30. The Court rejected this argument and found that the MOU's purpose was to resolve those GM-union, and Clutch-union issues concerning the transition of hourly transferred employees. *Id.* at *30. The Court remarked that Plaintiffs were the transferred employees referenced in the MOU, and the language of the MOU must be read in tandem with the GM Plan language. *Id*. The Court observed that the language in the MOU showed that GM, Clutch, and the union intended to provide Allison employees with a seamless transition from GM to Clutch, while continuing their same positions at Allison with the same benefits. *Id*. at *31. The Court found that the MOU also indicated the intent of GM and Clutch for Allison employees to receive benefits seamlessly, paid for by both GM and Clutch according to how many years the employee worked for GM-Allison and Clutch-Allison. *Id*. at *32. Additionally, the MOU provided that all GM Pension Plan benefit rates would be those in effect as of the date of retirement from Clutch-Allison. *Id*. at *33. This meant that GM would not know how Plaintiffs' benefits should be calculated under the GM Plan if they were allowed to receive those benefits immediately, because they were not ceasing employment with Clutch-Allison. *Id*. at *33-34. Accordingly, the Court granted summary judgment to Defendants.

***Knowlton, et al. v. Anheuser-Busch Co., LLC,* 2015 U.S. Dist. LEXIS 88234 (E.D. Mo. July 8, 2015).** In this ERISA class action seeking enhanced benefits under a pension plan, the Court granted Plaintiffs' motion for partial judgment on the pleadings. Plaintiffs were former employees of Busch Entertainment Corp. ("BEC"), which was a member of the "Controlled Group" of Anheuser-Busch Companies, LLC ("ABC"). Under the Pension Plan, a salaried participant whose employment with the Controlled Group was involuntarily terminated within three years after a "change in control" was entitled to an enhanced pension

benefit that added an additional five years of credited service and five years of age to the benefit calculation (resulting in at least a 15% benefit increase). *Id*. at *3. Anheuser-Busch InBev, N.V. ("InBev") acquired ABC in November of 2008, leading Plaintiffs to allege that the transaction was a change in control under the Plan. *Id*. Before November 2009, InBev announced that it was selling BEC to the Blackstone Group and that the transaction would be finalized on December 1, 2009. *Id.* at *4. Plaintiffs asserted that the BEC sale involuntarily terminated their employment with the Controlled Group within three years of the change of control. *Id.* However, in November 2009, ABC informed BEC employees that they would not be eligible for the +5/+5 enhancement upon termination of employment with BEC after the sale was finalized. *Id*. at *4. Plaintiffs alleged that when they filed a claim for the enhanced benefits, the Plan Administrator denied the claim. *Id*. The Court noted that *Adams v. Anheuser-Busch Companies, Inc.,* 758 F.3d 743 (6th Cir. 2014), which presented the identical issue, reversed the Plan Administrator's decision denying Plaintiffs' claims. *Id*. at *5-6. Plaintiffs urged the Court to follow the Sixth Circuit's reasoning, and, based solely on the pleadings, to grant partial judgment leaving only the matter of benefit calculations. *Id*. Plaintiffs asserted that the Court could apply the doctrine of non-mutual collateral estoppel to prevent Defendants from further defending this matter in light of the *Adams* decision. *Id*. Defendants' primary objection to making a determination on the pleadings was that they insisted on a full review of the administrative record. *Id*. at *7. The Court, however, found that this was unnecessary. *Id*. at *6-7. The Court observed that the Plan Administrator believed that "involuntarily terminated" required a loss of employment. *Id*. at *7. Plaintiffs argued that "involuntarily terminated" must be read in the context of their employment with the Controlled Group and did not require an actual loss of employment. *Id*. The Court agreed with the Sixth Circuit's analysis, and accordingly, granted Plaintiffs' motion for partial judgment on the pleadings. *Id*. at *10.

***Lehman, et al. v. Warner Nelson,* Case No. 13-CV-1835 (W.D. Wash. April 24, 2015).** The Court granted Plaintiff's motion for damages in this putative class action brought to recover reciprocal contributions to a pension plan that Plaintiff alleged were improperly withheld by the multi-employer plan trustees. Plaintiff, an electrician, was a participant in the Puget Sound Electrical Workers Pension Trust (the "Puget Sound Trust" or the "Home Fund"). Plaintiff's profession frequently required him to perform work for employers outside of the jurisdiction of his Home Fund, including in a region for which the typical fund was the IBEW Pacific Coast Pension Fund (the "Pacific Coast Fund"). In prior proceedings, the Court had granted summary judgment to Plaintiff, in part, finding that the class members were entitled to a transfer to their Home Fund of reciprocity contributions wrongfully withheld by Defendants, as well as earnings thereon. *Id*. at 1. Plaintiff subsequently sought an award of damages consisting of $1,911,116.49 in wrongfully withheld funds and $562,016.28 in the Pacific Coast Fund's earnings on those amounts. At the outset, the Court found the method of calculating damages appropriate. *Id*. at 2. The Court stated that damages for the class would equal $2,473,132.77 as of February 28, 2015, which would represent $1,911,116.49 in pension contributions made on Plaintiffs' behalf that Defendants had wrongfully withheld, and $562,016.28 in earnings thereon. *Id*. Further, the Court ruled that earnings would continue to accrue on the damages award at the actual rate of earnings by the Pacific Coast Fund through the date that Defendants made payment on the damages awarded by this order. *Id*. Finally, the Court clarified the future rights of the class and concluded that if Defendants or the Pacific Coast Fund continued to withhold contributions inconsistent with the Court's orders, along with all earnings as determined by the actual rate of return, this would constitute further damages owed to Plaintiffs. *Id*.

***M&G Plymers USA, LLC v. Tackett, et al.*, 135 S. Ct. 926 (2015).** Plaintiffs, a group of retires, brought a class action alleging that Defendant's decision to require retirees to contribute to the cost of their health care benefits breached both their collective bargaining agreement and other agreements in violation of the Labor-Management Relations Act ("LMRA") and the ERISA. M&G Polymers USA, LLC, entered a master collective bargaining agreement and a Pension, Insurance, and Service Award Agreement ("P & I agreement") with Plaintiffs' Union, which stated that for the duration of this agreement thereafter, the employer will provide the following program of hospital benefits, hospital-medical benefits, surgical benefits, and prescription drug benefits for eligible employees and their dependents. *Id.* at 931. Following the expiry of those agreements, Defendant announced that it would require retirees to contribute to the cost of living of their health care benefits. *Id.* Plaintiffs brought this action alleging that the P & I agreement

created a vested right to lifetime contribution-free health care benefits. The District Court dismissed the complaint for failure to state a claim. Based on *International Union, United Auto, Aerospace, & Agricultural Implement Workers of America v. Yard-Man, Inc.*, 561 F.3d 478 (6th Cir. 2009), the Sixth Circuit reversed. *Id.* at 932. *Yard-Man* inferred that parties to collective bargaining would intend retiree benefits to vest for life because such benefits are not mandatory or required to be included in collective bargaining agreements, are typically understood as a form of delayed compensation or reward for past services, and are keyed to the acquisition of retirement status. *Id. Yard-Man* held that these inferences outweighed any contrary implications about the termination of retiree benefits derived from general termination clauses. *Id.* On further appeal, the U.S. Supreme Court reversed. The Supreme Court stated that collective bargaining agreements, including those establishing ERISA plans, are interpreted according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. *Id.* at 933-34. The Supreme Court reasoned that *Yard-Man*'s assessment of likely behavior in collective bargaining was speculative and far removed from the context of any particular contract to be useful in discerning the parties' intention. *Yard-Man*, however, relied on no record evidence indicating that employers and unions in that industry customarily vested retiree benefits, and relied in part on the premise that retiree health care benefits are not subjects of mandatory collective bargaining. *Id.* at 935. The Supreme Court observed that parties can and do voluntarily agree to make retiree benefits a subject of mandatory collective bargaining. The Supreme Court opined that application of the *Yard-Man* presumption distorted the text of the agreement and was in conflict with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties. *Id.* at 936. Additionally, the Supreme Court observed that the Sixth Circuit misapplied other traditional principles of contract law, including the illusory promises doctrine, so as to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract. *Id.* at 937. The Supreme Court thus rejected the *Yard-Man* inference as inconsistent with ordinary principles of contract law, and vacated the judgment of the Sixth Circuit. *Id.* at 938.

***Severstal Wheeling, Inc., et al. v. WPN Corp.,* 2015 U.S. Dist. LEXIS 104645 (S.D.N.Y. Aug. 10, 2015).** Plaintiffs brought suit alleging that Defendants failed to prudently and loyally manage and diversify the assets of Defendants' retirement security plan and salaried employees' pension plan and breached their contract with the plans by failing to obtain fiduciary insurance covering claims for breach of fiduciary duty under the ERISA. The Court entered judgment in Plaintiffs' favor and ordered disgorgement of $9,710,438, plus $5,305,889.74 as pre-judgment interest for the period from July 16, 2009, to August 10, 2015, for a total judgment of $15,016,327.74. *Id.* at *80. The action arose from the transfer of certain employee benefit plan assets from a pooled employee benefit plan trust to a separate trust for the plans. *Id.* at *3. Defendants only transferred a single account to the new trust rather than transferring a diversified portfolio of combined assets. *Id.* at *22. Eventually Defendants liquidated the transferred assets to reallocate them, by which time, Plaintiffs alleged, the assets had lost value as a result of Defendants' failure to diversify. *Id.* at *53-54. Plaintiffs further alleged that, if Defendants had invested the plans' assets in a manner consistent with the strategy of the original trust, the resultant trust would have experienced a net gain of $9.6 million rather than a loss in value of approximately $4.7 million. *Id.* at *56. The Court held that, although the mere transfer of an undiversified portfolio might not be a breach of fiduciary duty, creating such a transfer under circumstances in which the transferee plan would have to hold the assets indefinitely absent the creation of new trading arrangements or the prompt and decisive use of Defendants' investment management authority was imprudent because Defendants subsequently failed to take any effective action to liquidate and diversify the portfolio to minimize the risk of large losses. *Id.* at *65. The Court, therefore, found that Defendants breached their fiduciary duties by failing to structure the division of trust assets in a manner that was prudent under the circumstances and by failing to manage the assets of the trust in a manner consistent with their contractual and fiduciary duties. *Id*. at *66-68. The Court further ruled that the investment manager should have taken pro-active steps to overcome the logistical obstacles faced in this case. *Id.* at *71-72. The Court, therefore, concluded that the losses suffered by the plans were properly chargeable to Defendants. *Id.* at *74. The Court held Defendants liable for the trust's loss of approximately $4.7 million, as well as for the net gain of $9.6 million that the plan could have achieved if invested consistently with the original trust. *Id.* at *76. The Court also found Defendants liable for the disgorgement of $110,438 in investment management fees paid to them during the relevant period as well

as pre-judgment interest due to their "near-total dereliction of their duties." *Id.* at *78. Accordingly, the Court entered judgment against Defendants for total damages of $15,016,327.74. *Id.* at *80.

***Slack, et al. v. International Union Of Operating Engineers*, 2015 U.S. Dist. LEXIS 32151 (N.D. Cal. Mar. 16, 2015).** Plaintiffs, five members of Operating Engineers Local 3, brought a class action against the Trustees of three different Trusts alleging that Defendants breached their fiduciary duties and engaged in prohibited transactions under the ERISA. *Id.* at *1-2. Plaintiffs alleged that Defendants engaged in misconduct by: (i) deciding that the Pension Fund should invest in the Longview Ultra Construction Loan Investment Fund, which resulted in a $50 million loss; (ii) allowing employers who were signatories to collective bargaining agreements ("CBAs") to engage in improper double-breasted operations; and (iii) allowing employers to write off millions of dollars in contributions owed to the Trusts without any legitimate basis. *Id*. at *2. The Court granted Defendants' motion to dismiss in part. The Court noted that Plaintiffs' claims for improper double-breasting were actually based on two different theories, including: (i) that certain non-signatory employers should have been making contributions to the Trusts because the non-signatory employers were alter egos of signatory employers; and (ii) that certain signatory employers should have been making contributions to the Trusts based on the work of non-union employees because, although non-union, the employees performed covered work as defined by the CBAs. *Id*. at *8. The Court noted that a double-breasting operation occurs when owners of one company that is a party to a labor agreement own a second non-signatory company that is non-union. *Id*. at *8-9. The Court observed that, although Plaintiffs indicated that some work was diverted from a signatory employer to a non-signatory employer, it could not be said that this was a sham effort to avoid collective bargaining obligations because the signatory company made contributions for its employees who worked on non-signatory company projects. *Id*. at *18-19. Accordingly, the Court dismissed with prejudice Plaintiffs' improper double breasting claims. *Id.* at *19. As to their CBA circumvention theory, Plaintiffs focused only on the signatory employer and argued that the employer should have been making contributions to the Trusts based on the work of non-union employees. *Id.* at *19-20. The Court refused to dismiss the CBA circumvention claim, finding that Plaintiffs had alleged that they were covered employees for whom the signatory employer was not making contributions. *Id*. at *22. Defendants also sought dismissal of Plaintiffs' claims for improper write-offs. The Court denied Defendants' motion to dismiss on this ground finding that Plaintiffs sufficiently had alleged a gross disparity in write-offs. *Id.* at *24. Defendants also contended that Plaintiffs' claims for double-breasting and write-offs should be dismissed because Plaintiffs named multiple Defendants and failed to identify with any factual support what each Trustee allegedly knew or did. *Id*. at *24. The Court found that Plaintiffs made sufficient allegations to hold the Union Trustee Defendants liable but did not make sufficient allegations against the Management Trustee Defendants. *Id*. at *26-27. The Court, therefore, dismissed Plaintiffs' claims based on CBA circumvention theory as to Management Trustee Defendants. *Id.* at *27. Accordingly, the Court granted in part and denied in part Defendants' motion to dismiss.

***Teamsters Local Union No. 340, et al. v. Eaton,* 2015 U.S. Dist. LEXIS 10778 (D. Me. Jan. 30, 2015).** Plaintiff, a labor union, brought a class seeking a declaratory judgment that it could modify the retiree health insurance benefits of certain former employees under the ERISA. The Magistrate Judge issued a recommendation to grant Plaintiff's motion for judgment on the administrative record, and the Court adopted the recommendation. *Id.* at *1-2. Defendants argued that the Magistrate Judge failed to address their detrimental reliance arguments and pointed to an excerpt in their motion in which they argued that they relied on representations regarding their retiree health insurance coverage. *Id.* at *2. The Court noted that, to properly raise an argument, a party must do more than seed the record with references to key arguments and that it must spell out arguments squarely and distinctly. The Court reasoned that Defendants' single sentence reference that failed to cite authority did not suffice. *Id.* at *3. Here, the Court found that the passing reference in Defendants' motion to their reliance on representations regarding their benefits, made as part of their argument that they had vested contractual rights, did not squarely and distinctly raise the quasi-contractual theory of detrimental reliance or promissory estoppel as a basis for relief. *Id.* at *3. Further, because detrimental reliance was not presented to the Magistrate Judge for consideration, the Court found that Defendants failed to preserve their right to raise the issue as part of the

Court's *de novo* review. *Id.* at *3-4. Accordingly, the Court adopted the recommendation of the Magistrate Judge and granted Plaintiff's motion for judgment on the administrative record. *Id.* at *4.

(iii) Attorneys' Fees And Costs In ERISA Class Actions

***Abbott, et al. v. Lockheed Martin Corp.,* 2015 U.S. Dist. LEXIS 93206 (S.D. Ill. July 17, 2015).** In a class action alleging that Defendants breached their fiduciary duties in managing two retirement savings plans, the District Court granted Plaintiffs' motion for attorneys' fees and awarded $20,666,666 to class counsel. The parties had settled the class action for $62 million for the benefit of about 181,000 participants in two 401(k) plans, as well as affirmative relief designed to reduce plan fees and improve investment offerings. *Id.* at *3. Class counsel sought a fee award of one-third of the monetary settlement obtained. *Id.* The Court noted that under the common fund doctrine, class counsel is entitled to a reasonable fee drawn from the commonly held fund created by a settlement for the benefit of the class and that attorneys' fees based on the common fund doctrine are appropriate in ERISA cases. *Id.* at *5. Here, class counsel did not agree to a settlement after the agreement was reached on monetary terms, but instead sought substantial non-monetary relief as a condition of the settlement. *Id.* at *6. The Court opined that such insistence on widespread affirmative relief added tremendous material value to the 401(k) plans. *Id.* Further, the Court observed that in common fund cases, the measure of what is reasonable is what an attorney would receive from a paying client in a similar case. *Id*. The Court also noted that the Seventh Circuit uses the percentage basis rather than a lodestar or other basis, and that a one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law. *Id.* at *7. The Court reasoned that the fee application was reasonable insofar as it comprised 33.3% of the monetary recovery, and only 20.4% of the settlement's value when non-monetary relief was considered. Further, the requested fee was actually far less than the market rate in national ERISA litigation. *Id.* Moreover, the Court noted the risk undertaken by class counsel who brought this case when no one else had, and aside from demonstrating willingness to pursue this action over more than eight and a half years of intense, adversarial litigation, had ensured enormous value of the plan improvements and future relief. *Id.* at *8. Additionally, class counsel performed substantial work for over a year before filing the lawsuit, including investing hundreds of hours of attorney time in a pre-suit investigation. *Id.* at *9. Moreover, class counsel spent 20,124 attorney hours and 4,960 hours of non-attorney professional time on the litigation, and that by handling the matter without separately-appointed local counsel, they were able to provide additional value to the class without extra expense. *Id.* at *11. The Court also noted that class counsel would spend substantial time over the next three years because they were committed to monitor compliance by Defendants, and would bring an enforcement action if needed without cost to the class. *Id.* Finally, the Court determined that class counsel's hourly rate was reasonable, noting that the lodestar value for their services with no enhancement for risk would be $15,541,544, and that the fee request for $20,666,666 represented a risk multiplier of less than 1.33. *Id.* at *12. Guided by the mean multiplier of 1.85 used in analogous class actions, the Court concluded that class counsel's request was reasonable. *Id.* Accordingly, the Court granted Plaintiffs' motion for attorneys' fees and awarded $20,666,666, or one-third of the monetary settlement.

***Lawrence E. Jaffe Pension Plan, et al. v. Household International, Inc.,* Case No. 02-CV-5893 (N.D. Ill. Nov. 5, 2015).** In this class action brought by Plaintiffs under the ERISA, the Court awarded Defendants over $13 million in costs and fees following a reversal of judgement in favor of Plaintiffs and appellate remand. *Id.* at *1. Defendants moved the Court for fees and costs pursuant to Rule 39, which states that if a judgement is reversed, costs are taxed against the appellee, including supersedeas bonds and the fees for filling the notice of appeal. *Id.* Plaintiffs argued that the costs were unreasonable. *Id.* Specifically, Plaintiffs stated that the supersedeas bond premiums were unreasonable costs because a less-costly alternative, an escrow account with a guaranty by Defendant's parent corporation, was available to Defendant. *Id.* at *1-2. The Court rejected Plaintiffs argument because it found no previous case stating that an appellant must forego recovery of bond costs if it could have obtained a less expensive form of security. *Id.* at *2. Plaintiffs argued that the case was so close and difficult and they litigated in good faith that it should factor against an award of costs. *Id.* at *3. The Court noted that good faith and difficult cases do not justify denying costs to Defendants. *Id.* Finally, Plaintiffs argued that a cost award would chill future litigation and inequitably burden lead Plaintiffs, who, if they succeed, will recover only a fraction of the total

judgement. *Id.* Despite the fact that such a ruling may put representative Plaintiffs in a financially risky position, the Court disagreed since even if such Plaintiffs are burdened by a costs award, it does not follow that a prevailing Defendant must bear the costs. *Id.* at *4. Moreover, the Court noted that Plaintiffs had carefully considered and rejected the bond alternative offered by Defendant, an escrow account without a third-party guaranty, though the Plaintiffs knew they could be held liable for the bond premiums if they lost on appeal. *Id.* The Court reasoned that Plaintiffs must now live with the decision of opting for a bond with full awareness of the potential consequences. *Id.* Thus, the Court granted Defendant's motion for costs and ordered Plaintiffs to pay Defendant a total of $13,281,282.00 in appellate costs. *Id.* at *5.

Editor's Note: The order in *Household International* is believed to be the largest cost award of 2015.

***Pierce, et al. v. Visteon Corp.*, 791 F.3d 782 (7th Cir. 2015).** In this action alleging that Defendant failed to provide timely notice under COBRA, which requires employers to offer discharged workers an opportunity to continue health insurance at their own expense within 44 days, the Seventh Circuit affirmed the District Court's award of attorneys' fees. *Id.* at 783-84. After the bench trial, the District Court found for Plaintiffs, awarded them compensation, and ordered Defendant to pay class counsel $302,780 in attorneys' fees under 29 U.S.C. § 1132(g), plus costs of about $11,000. *Id.* at 784. Class counsel, Ronald Weldy, appealed on the basis that the fee was too modest, and that he was additionally entitled to a supplemental award from the class. *Id.* at 786. Although Weldy asserted that the District Court should have treated this as a common fund case, the Seventh Circuit observed that this case was litigated under a fee-shifting statute. *Id.* The Seventh Circuit remarked that there was no good reason why, in the absence of a contract, counsel should be entitled to money from the class on top of or in lieu of payment by the losing litigant. *Id*. Further, the Seventh Circuit noted three reasons why the common-fund approach should be limited to cases outside the fee-shifting context. *Id.* First, the Seventh Circuit observed that the common-fund doctrine is part of the common law, devised as a matter of necessity when there was no other way to compensate the lawyers for work that bestowed a substantial benefit on the class. *Id.* Because common law doctrines yield to statutes, the Seventh Circuit remarked that the fee-shifting provision in the ERISA is a statutory replacement for the common law. *Id.* Second, because the fee-shifting statutes are designed to ensure that the victims of wrong-doing retain full compensation, while the wrongdoer pays the lawyers, the Seventh Circuit reasoned that such an interest would be disserved by transferring some of the class' money to its lawyer in lieu of, or on top of, the award under the fee-shifting statute. *Id.* Finally, the Seventh Circuit observed that § 1132(g)(1), like most other fee-shifting statutes, provides for the award of a reasonable fee, which the District Court here had fixed at $303,000. *Id.* The Seventh Circuit remarked that if Weldy were to pocket substantially more than that, his compensation would by definition be unreasonably high, which would in turn be a misuse of the judicial power to award a lawyer an unreasonably high fee just because funds were available to be tapped. *Id.* Accordingly, the Seventh Circuit affirmed the District Court's fee award.

***Tussey, et al. v. ABB, Inc.*, 2015 U.S. Dist. LEXIS 164818 (W.D. Mo. Dec. 9, 2015).** Following a trial in 2010, the Court found that Defendants breached their fiduciary duties under the ERISA, and awarded Plaintiffs $35.2 million damages, including $13.4 million on Plaintiffs' record-keeping claims, $21.8 million in losses due to Defendants' mapping the Vanguard Wellington Fund to the Fidelity Freedom Funds, and $1.76 million for float income retained by Fidelity. *Id*. at *4. The District Court also awarded Plaintiffs attorneys' fees in the amount of $12,947,747.68, calculated as based on 25,160 hours of work at a blended rate of $514.60 per hour. *Id*. at *4. On Defendants' appeal, the Eighth Circuit affirmed as to the record-keeping claims, but remanded as to the other claims. On remand, the District Court found that Defendants breached their fiduciary duties, but did not award any actual damages to Plaintiffs. *Id*. at *5. On Defendants' further appeal, the Eighth Circuit found that the District Court did not abuse its discretion in awarding the rate used in calculating attorneys' fee, but remanded the action and directed the District Court to recalculate the fee award and apply the generous attorney rate to only attorneys' work, and not to administrative, clerical, or paralegal work. *Id*. at *5. Subsequently, Plaintiffs sought an award of $10.9 million for pre-appeal work, and $1.3 million for time spent on the appeal, which the District Court granted in part. At the outset, the District Court noted that it had the discretion to award attorney fees under the ERISA's fee-shifting provision, *i.e.*, an ERISA claimant need only show some degree of success on the

merits to receive fees. *Id*. at *6. The District Court remarked that Plaintiffs were prevailing parties on their record-keeping claims, Defendants' conduct was particularly reprehensible because Defendant was a fiduciary to the Plan, and Defendants were not merely negligent but rather motivated by their self-interest. *Id*. at *7. In addition, many of the questions involved were novel and most were complex, both factually and legally. *Id*. at *8. Moreover, the District Court observed that Plaintiffs' counsel undertook significant risks in pursuing the case and that Defendants had the ability to pay a substantial award. *Id*. at *8. Accordingly, the District Court concluded that Plaintiffs were entitled to a substantial attorneys' fee award under these circumstances. In its lodestar calculation, the District Court noted that Plaintiffs used the same blended rate of $514.60, but reduced their hours worked to 23,484. *Id*. at *9-10. The District Court also noted that in addition to re-classifying 1,577.1 hours of administrative work, Plaintiffs excluded 1,600 hours related to float claim and other issues on which Plaintiffs were not successful, as well as entries that arguably contained insufficient detail. *Id*. at *13. The District Court reasoned that Plaintiffs achieved complete success on their record-keeping claim, which resulted in a $13.4 million judgment. *Id*. at *14. As for the mapping claim, the District Court opined that while Plaintiffs were not the prevailing party, the evidence relevant to the mapping claim was largely relevant to the record-keeping claim. *Id*. at *15. The District Court noted that this evidence ultimately helped explain why Defendants failed to actively monitor record-keeping fees and used the size of the Plan to achieve rebates for the participants. *Id*. However, while Plaintiffs' global damage theory applied equally to the mapping claim and the record-keeping claim, Plaintiffs presented some evidence applicable only to their mapping claim. *Id*. at *16. The District Court, therefore, reduced the lodestar by $200,000 to reflect the difference. The District Court further found that any hours to be reduced to the dismissed float claim were included by class counsel in their reduced hours, and were properly excluded. *Id*. at *17-18. Accordingly, the District Court concluded that an award of $10,768,474 was appropriate. *Id*. at *18. The District Court also reaffirmed its earlier award of costs and incentive fees contained in the previous award, $489,985.65 in taxable costs, $1,712,834.85 for non-taxable costs to be paid out to the class damages, and $25,000 to each of the three named Plaintiffs as an incentive award. *Id*. at *22. The District Court likewise, awarded $900,000 as an appropriate appellate fee to the class counsel.

(iv) Settlement Approval Issues In ERISA Class Actions

***Amos, et al. v. PPG Industries, Inc.,* 2015 U.S. Dist. LEXIS 106944 (S.D. Ohio Aug. 13, 2015).** Plaintiffs, retirees of PPG Industries, brought a putative class action challenging Defendants' unilateral modifications to collectively-bargained retiree health benefits. The parties reached a settlement, and the Court granted final approval of the settlement agreement and release. *Id.* at *4. The settlement agreement provided Plaintiffs and their spouses and dependents with post-retirement health benefits through December 31, 2025, the amount and form of which differed based on the Medicare eligibility of the settlement class members. *Id.* at *9-10. The Court found that the amount and form of the relief, balanced against Plaintiffs' questionable likelihood of success on the merits, weighed in favor of approving the settlement agreement because the agreement provided immediate certainty to Plaintiffs by securing their medical and prescription drug benefits for a ten-year period. *Id.* at *10. The Court also noted that the parties had been litigating for over ten years and that further delay due to continued litigation could impose a substantial detriment to the settlement class, which consisted primarily of elderly and/or disabled members. *Id.* at *11-12. The record further reflected that the parties had been afforded an adequate opportunity to conduct sufficient discovery to be fully apprised about the legal and factual issues presented as well as the strengths and weaknesses of their cases. *Id.* at *12. Additionally, the Court determined that class counsel had evaluated the strength of Plaintiffs' claims and Defendants' defenses before reaching the agreement, and that the agreement was non-collusive and reached in good faith. *Id.* at *14. Further, the Court opined that the settlement agreement provided the same relief to the class representatives and the unnamed class members, and it affected similarly-situated class members in the same fashion. *Id.* at *15-16. The Court also observed that the class members had been afforded adequate opportunity to file objections and that none had been filed. *Id.* at *16. The Court, therefore, concluded that the settlement agreement was fair, reasonable, and adequate. The Court also certified the settlement class, holding that the class of more than 1,600 individuals met the Rule 23(a)(1) numerosity requirement. *Id.* at *18. The Court ruled that the common question of unilaterally reducing or eliminating retiree medical benefits met the Rule 23(a)(2) commonality requirement. *Id.* at *19. The Court also held that the class representatives'

claims were typical of the class' claims and arose from the same course of conduct sufficient to meet the Rule 23(a)(3) typicality requirement. *Id.* at *21. Finally, the Court determined that there was no antagonism between the class members and class representatives and that class counsel was qualified to represent the class, thus fulfilling the Rule 23(a)(4) adequacy requirement. *Id.* at *22-23. Additionally, the Court held that certification of the class was appropriate under Rules 23(b)(1) and 23(b)(2). *Id.* at *24-25. Having certified the class, the Court also granted Plaintiffs' motion for an award of attorneys' fees in the amount of $200,000 pursuant to the settlement agreement. *Id.* at *33. Plaintiffs argued that their actual fees amounted to to $257,942.75 and that their costs totaled $8,584.54, but they sought only $200,000 in fees and costs. *Id.* at *25-26. Plaintiffs further submitted that their attorneys expended 570.18 total hours litigating the case, excluding the additional time expended completing their brief in support of the motion for final approval of the settlement agreement. The Court found that the amount sought, the hourly rate, and the hours expended were reasonable, given counsel's detailed timesheets and a lodestar of $257,942.750. *Id.* at *31. Accordingly, the Court granted final approval of the settlement agreement.

***Johnson, et al. v. Meriter Health Services Employee Retirement Plan,* 2015 U.S. Dist. LEXIS 158859 (W.D. Wis. Jan. 5, 2015).** In this ERISA class action brought by a group of participants in a cash balance plan sponsored by Defendant, Plaintiffs alleged that they had not been credited with all pension benefits to which the plan entitled them. The parties subsequently settled, and Plaintiffs moved for approval of the class action settlement. The Court granted Plaintiffs' motion for final approval of the settlement, plan of allocation, and an award of attorneys' fees and costs. The settlement agreement created a settlement fund of $82 million for approximately 5,800 members of 11 classes or sub-classes, which were each defined in an order certifying the class and further modified by the order preliminarily approving the class settlement. *Id.* at *2. The plan of allocation divided the net settlement proceeds on an individualized basis through a formula that took into account the relative value of each claim in light of litigation risks and distributed the net settlement on a *pro rata* basis in proportion to each individual's determined value of his or her claim. *Id.* The Court granted approval to the settlement, finding that it was fair, reasonable, and adequate. *Id.* at *4. The Court determined that settlement approval was proper based on the strength of Plaintiffs' case compared to the amount of Defendants' settlement offer, an assessment of the likely complexity, length, and expense of the litigation, an evaluation of the amount of opposition to the settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement. *Id.* at *4. Particularly, the Court noted that Defendants' statute of limitations defense could have created a complete bar to recovery for all or a significant portion of the class members, and that Plaintiffs' counsel and Defendants' counsel did a remarkable job of arriving at a fair and reasonable settlement of highly contentious and uncertain claims. *Id*. at *4-6. The Court also found that the fact that the action involved seven different causes of action spanning a 25-year period of administration of the plan at issue supported its conclusion that the settlement was fair and reasonable. *Id.* at *7. The Court also ruled that Plaintiffs' motion for payment of incentive awards of $5,000 each to the named Plaintiffs was reasonable and fair, as the named Plaintiffs were consulted throughout the years the action was pending, generally stayed abreast of the litigation, and approved the settlement. *Id*. at *9. Finally, the Court granted attorneys' fees of $22.55 million. *Id.* at *14. The Court noted that the class counsel had faced a fairly significant risk of non-payment given the statute of limitations defense, especially in light of the fact that the case covered a 25-year period, and that the $82 million settlement represented a significant victory for the class on the eve of trial in the face of a difficult hurdle relative to Defendants' statute of limitations defense. *Id.* at *11-12. Moreover, class counsel submitted detailed time records, which reflected 37,000 hours of work over the four and a half years and represented a lodestar value of more than $12 million using counsel's actual billing rates. *Id.* at *13. Thus, in light of the risk of non-payment, the significant amount of time and resources necessarily committed by class counsel over four and a half years, and the quality of representation, the Court concluded that an award in range of 27.5% or $22.55 million was fair and reasonable. *Id.* at *14. Because the expenses were adequately documented, and reasonably incurred in connection with the prosecution of the action, the Court also approved the reimbursement of costs in the total amount of $1,774,629.36. *Id.* Accordingly, the Court granted final approval of the settlement agreement. *Id.* at *14-15.

***Vu, et al. v. The Fashion Institute Of Design & Merchandising,* Case No. 14-CV-8822 (C.D. Cal. Dec. 14, 2015).** Plaintiff, a participant and beneficiary of Fashion Institute of Design & Merchandizing 401(k) Plan (the "Plan"), brought a class action alleging that Defendant violated duties imposed under the ERISA by failing to provide an accurate statement of her vested interest in the Plan and by refusing her the benefits owed under the terms of the Plan. The parties subsequently settled, and Plaintiff brought a motion seeking preliminary approval of the class settlement. The Court denied Plaintiff's motion for preliminary approval of the class action settlement. The settlement required Defendant to make a payment of $135,000 to class counsel, out of which $100 would be paid to all class members before withdrawing further funds. *Id.* at 4. The settlement further provided an enhancement fee payment to Plaintiff not to exceed $15,000, and attorneys' fees and costs not to exceed the remainder of the funds. *Id.* The parties reached a settlement agreement after a considerable amount of documents were produced in discovery, through arms' length negotiations between Plaintiff and Defendant, with the assistance of counsel experienced in class actions. Thus, the Court found that the settlement appeared reasonable in that it accounted for the uncertainty surrounding Plaintiff's ability to prevail on each of claims at trial. The Court, however, raised concerns about the attorneys' fees provided to class counsel, Plaintiff's enhancement payment, the settlement amount provided to each member of the class, and the absence of an opt-out clause in the settlement agreement. *Id.* at 6. The Court found it problematic that Plaintiff did not provide any documentation to make a determination regarding the reasonableness of attorneys' rates. The Court noted that, assuming that each of the 80 class members received a $100 payment and Plaintiff received a $15,000 enhancement fee, a full $112,00 or 83% of the settlement fund would remain available to cover administration costs and attorneys' fees, which could potentially be paid to class counsel. *Id.* at 7. The Court noted that the settlement amount available to compensate class counsel, which approximated 83%, was double or triple the benchmark under applicable case law, and the Court found no exceptional circumstances that could justify such an amount. *Id*. The Court further noted that, because each class member would only receive $100, there was an explicit disparity between the proposed incentive payment to Plaintiff and the average recovery available to class members. *Id.* at 8. The Court thus concluded that the attorneys' fees and enhancement payment were excessive. *Id.* The Court also raised concern as to "one-size-fits-all approach" where the settlement did not take into account that the benefits in the retirement account vested at differing levels depended upon the duration of the employees' service, which caused a potential disparity of harm. *Id.* The Court explained that while a class member with two years of service would only have acquired vested rights to 20% of the amount in his or her account, a class member with six years of service would have acquired vested rights to the full amount, and the settlement agreement did not account for the potential disparity of harm under this system. *Id*. The Court therefore ruled that the settlement agreement was not fair, adequate, and reasonable, and accordingly, denied Plaintiff's motion for preliminary approval of class action settlement.

(v) Release Issues In ERISA Class Actions

***Colaco, et al. v. The ASIC Advantage Simplified Employee Pension Plan,* 2015 U.S. Dist. LEXIS 129502 (N.D. Cal. Sept. 24, 2015).** Plaintiffs brought a class action under the ERISA seeking benefits under a Simplified Employee Pension Plan ("SEP"). Although Plaintiffs had signed separation agreements releasing their claims against Defendants, Plaintiffs asserted that the agreements did not bar their claims for SEP contributions because Defendants did not rely on Plaintiffs' separation agreements as a basis for their initial denials or their decisions on appeal. Defendants raised Plaintiffs' releases as an affirmative defense as to all claims. *Id*. at *7. Plaintiffs moved for partial summary judgment, arguing that Defendants waived the affirmative defense by failing to wield it during the administrative process. Plaintiffs alternatively contended that Plaintiffs did not knowingly and voluntarily waive their claims under the ERISA and that Plaintiffs could not release their SEP benefits because the benefits had vested and Plaintiffs' rights to the benefits had accrued before Defendants notified Plaintiffs of their lay-offs. *Id.* at *7. The Court granted in part Plaintiffs' motion for partial summary judgment, finding that Defendants waived their ability to claim Plaintiffs' release of claims in a separation agreement as a basis for denying the SEP benefits, but that Defendants could raise the separation agreements as an affirmative defense to the suit. *Id.* at *2-3. The Court agreed with Plaintiffs that Defendants could not raise the releases at trial as a reason for denying benefits because Defendants did not rely on the separation agreements as a reason for denying the ERISA claims during the administrative process. *Id.* at *16. The Court, however, also held that Defendants' failure

to assert the releases during the administrative process did not bar Defendants from arguing that the releases applied to Plaintiffs' action as a whole. *Id.* at *16. Because triable issues of fact remained as to whether Plaintiffs knowingly and voluntarily released their ERISA claims, the Court found summary judgment inappropriate on that issue. *Id.* at *18-19. Similarly, because genuine issues of material fact remained as to whether Plaintiffs' SEP benefits vested before they signed separation agreements, and as to whether the scope of the separation agreements encompassed the SEP benefits, the Court denied summary judgment on those issues as well. *Id.* at *28-29. Accordingly, the Court granted in part Plaintiffs' motion for summary judgment.

(vi) Standing Issues In ERISA Class Actions

***Cox, et al. v. Blue Cross Blue Shield Of Michigan*, 2015 U.S. Dist. LEXIS 120436 (E.D. Mich. Sept. 10, 2015).** In this class action brought by beneficiaries of plans administered by Defendant, Plaintiffs alleged that Defendant breached its fiduciary duty under the ERISA by charging Plaintiffs' respective ERISA plans "hidden fees." Defendant was a non-profit healthcare corporation that administered and processed claims for various welfare benefit plans, including self-insured (or "self-funded") health benefit plans. *Id*. at *2. Plaintiffs were either employees of Genesys Regional Medical Center ("Genesys"), or members of Operating Engineers Local 324 ("Operating Engineers"). *Id*. Both Genesys and Operation Engineers entered into Administrative Service Contracts ("ASCs") with Defendant to provide healthcare coverage. *Id*. Plaintiffs contended that Defendant began secretly misappropriating funds under the ASCs, and took higher fees, by disguising the overcharges as hospital-claims costs. *Id*. at *4. Plaintiffs sought restitution and disgorgement of the hidden fees that their plans paid Defendant. *Id*. at *8. Defendant moved to dismiss and challenged Plaintiffs' ability to pursue these claims. First, the Court examined whether Plaintiffs' claim for restitution was a claim for equitable restitution, as opposed to legal restitution. In doing so, the Court relied on *Central States, Southeast & Southwest Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954 (6th Cir. 2014), which held that equitable restitution is awarded when a constructive trust or lien is imposed on particular funds or property in Defendant's possession but legal restitution is awarded when it holds Defendant liable for a sum of money. *Id*. at *9. Here, Plaintiffs sought to impose a constructive trust; however, the Court found that Plaintiffs failed to allege any specifically identifiable fund in Defendant's possession over which a constructive trust or equitable lien could be imposed. *Id*. at *11. Because Plaintiffs failed to sufficiently allege a specifically identifiable fund in Defendant's possession, the Court concluded that Plaintiffs could not sue for equitable restitution. *Id*. Similarly, the Court concluded that Plaintiffs' request for disgorgement must be dismissed for the same reason as their restitution claim. *Id.* Plaintiffs attempted to cure this deficiency by identifying specific funds that were siphoned off from the Plans because Defendant took assets directly from the Plans and disguised the excess payments as hospital costs without actually paying the hospitals. *Id*. at *13. The Court rejected this argument, finding that trying to cure a deficiency by offering allegations in briefing as opposed to making allegations in the complaint was not an acceptable way to oppose a motion to dismiss. *Id*. at *13-14. The Court also dismissed Plaintiffs' claims for injunctive relief, after they acknowledged that the only relief sought pertained to enforcing a favorable judgment, so as to ensure the recovery of monies that the plans paid to Defendant as a result of the misappropriation. *Id*. at *19-20. Because the Court found that Plaintiffs could not pursue their restitution claims, the Court concluded that Plaintiffs lacked constitutional standing to assert claims for injunctive relief. *Id*. at *20. Accordingly, the Court dismissed Plaintiffs' complaint.

***Pender, et al. v. Bank Of America Corp.,* 2015 U.S. App. LEXIS 9512 (4th Cir. June 8, 2015).** In this ERISA class action arising out of a transfer of $3 billion in assets from a pension plan that enjoyed a separate account feature to a pension plan that lacked one, allegedly resulting in decreased accrued benefits, the Fourth Circuit reversed the District Court's grant of summary judgment to Defendant on the basis that Plaintiffs did have standing to sue. Defendant amended its defined-contribution plan (the "Plan") to give eligible participants a one-time opportunity to transfer their account balances to its defined benefit plan (the "Pension Plan") and guaranteed that participants who elected to transfer would receive, at a minimum, the value of the original balance of their accounts. *Id.* at *2-3. While Plan participants' accounts reflected the actual gains and losses of their investment elections, the Pension Plan participants' accounts reflected only the hypothetical gains and losses of their investment options. *Id.* at *3. By design, the

Pension Plan participants' selected investment options had no bearing on how Defendant actually invested the Pension Plan's assets because Defendant chose how the assets were invested, periodically crediting each Pension Plan participant's account with the greater of the hypothetical performance of the participant's selected investment option or the value of the original balance of their Plan accounts. *Id.* An IRS audit in 2005 determined that these transfers impermissibly eliminated the Plan participants' separate account feature, meaning that participants were no longer being credited with the actual gains and losses generated by funds contributed on the participants' behalf. *Id.* at *7. Plaintiffs sued and sought disgorgement of any gains that Defendant obtained by these arrangements. The District Court ruled for Bank of America on this claim, finding that the bank's closing agreement with the Internal Revenue Service and subsequent action to restore the separate account feature deprived the workers of standing to assert this claim. Plaintiffs argued that § 502(a)(1)(B) of the ERISA allowed recovery, and in the alternative, argued that §§ 502(a)(2) and 502(a)(3) also entitled them to relief. Because Plaintiffs' requested remedy would require the District Court to do more than simply enforce a contract that was written, the Fourth Circuit found that § 502(a)(1)(b) provided no avenue for relief. The Fourth Circuit further determined that § 502(a)(2) also provided no avenue for relief because Defendant did not exercise discretion regarding the transfers, and the transfers occurred only for those plan participants who affirmatively and voluntarily directed Defendant to take such action. *Id.* at *14. The Fourth Circuit, however, ruled that Plaintiffs could proceed with their claim under § 502(a)(3). Because the transfers at issue resulted in a loss of the separate account feature, thereby violating § 204(g)(1), and because Plaintiffs sought profits generated using assets that belonged to them, and the other sub-sections of § 502(a) did not afford Plaintiffs any relief, the Fourth Circuit reasoned that Plaintiffs had standing to sue. *Id.* at *19.

***Taveras, et al. v. UBS AG,* 2015 U.S. App. LEXIS 7300 (2d Cir. April 30, 2015).** In this putative class action brought by a participant in Defendants' UBS Savings and Investment Plan (the "SIP") alleging violations of fiduciary duties under the ERISA, the Second Circuit affirmed the District Court's order granting Defendants' motion to dismiss, finding that Plaintiff lacked standing to sue. Under the terms of the SIP, participants voluntarily contributed and directed the SIP to purchase investments with those contributions from options pre-selected by the SIP Committee, including investments in the UBS Stock Fund. From late 2007 through the end of 2008, UBS sustained substantial losses and as a result the price of UBS Stock declined sharply. Plaintiff, a former UBS employee and a participant in the SIP, alleged that Defendants breached their duties to the SIP when they failed to eliminate the UBS Stock Fund at the time of financial crisis after a 69% drop. The Second Circuit found that while Plaintiff attempted to demonstrate injury-in-fact by showing diminution in the value of SIP's assets generally, it was possible that the SIP lost value while Plaintiff's individual account did not. *Id*. The Second Circuit concluded that even if Plaintiff's account lost value after she purchased shares of the UBS Stock Fund, Plaintiff's amended complaint did not allege any facts connecting her purported losses to the fiduciaries' alleged breaches. *Id*. at *3-4. Thus, the Second Circuit ruled that Plaintiff's failure to allege individualized harm went directly to constitutional standing and was fatal to Plaintiff's amended complaint. *Id*. at *4. Accordingly, the Second Circuit affirmed the judgment of the District Court.

(vii) Cash Balance Plan Issues In ERISA Class Actions

***Osberg, et al. v. Foot Locker, Inc.,* 2015 U.S. Dist. LEXIS 132054 (S.D.N.Y. Sept. 29, 2015).** Plaintiffs brought a putative class action alleging that Defendant violated the ERISA by hiding aspects of a pension plan change that resulted in an unexpected decrease in retirement benefits. Plaintiffs sought reformation of their pension plan to conform to the benefits that they understood that Defendant had promised them, including benefits that continued to grow with additional service to the company. *Id.* at *2. The Court ruled in Plaintiffs' favor, finding that numerous aspects of Defendant's cash balance plan conversion violated the ERISA and that Defendant failed adequately to tell employees about a freeze in benefits. The Court found that Plaintiffs showed by a preponderance of the evidence that Defendant, acting as the plan administrator, violated § 404(a) and § 102 by providing participants materially false, misleading, and incomplete descriptions of the amended plan and that Plaintiffs were entitled to reformation. *Id.* at *94. The Court further noted that Defendant knew that virtually every participant's pension earnings effectively would be frozen for a period of time as a result of the wear-away effect inherent to the plan, which was not the result of an unexpected change in economic conditions. Having knowingly created a pension plan that

mathematically locked in a wear-away of the benefits, Defendant had a duty to disclose and explain the effect in a manner calculated to be understood by the average plan participant. *Id.* at *95. Numerous plan participants testified that they did not understand or realize what was actually occurring when the plan converted from a defined benefit plan to a cash balance plan; hence, they did not understand that their retirement benefits would not grow despite providing additional service to the company, and in fact they believed that their accrued benefits under the prior plan was the foundation for an ever-growing retirement pay-out. *Id.* at *98. The Court determined that the commonly available documents created a class-wide misrepresentation and that individualized communications with participants did nothing to disabuse participants of the idea that their benefits were growing with their time of service. The Court, therefore, had no doubt that Defendant engaged in equitable fraud because it sought and obtained cost savings by altering Plaintiffs' plan without disclosing the full extent or impact of those changes. *Id.* at *102. The Court further held that Plaintiffs proved by clear and convincing evidence that Defendant engaged in inequitable conduct regarding the amendment and conversion of its cash balance plan. *Id.* at *105. Accordingly, the Court found in favor of the class on all claims and ordered reformation of the plan.

(viii) Statute Of Limitations Issues In ERISA Class Actions

***Defazio, et al. v. Hollister Employee Share Ownership Trust,* 2015 U.S. App. LEXIS 8048 (9th Cir. May 15, 2015).** In this class action brought by a group of former participants in the Hollister Employee Share Ownership Trust (the "Plan"), alleging that the Plan, Hollister, Inc., Hollister's parent company (John Dickinson Schneider, Inc. ("JDS"), and various Plan fiduciaries violated their rights under the ERISA, the Ninth Circuit affirmed the District Court's judgment for the Defendants. Plaintiffs appealed the District Court's judgment in Defendants' favor following multiple pre-trial motions and a bench trial. The Ninth Circuit found that Plaintiffs lacked standing to pursue relief related to a 1999 transaction in which JDS' preferred shares were transferred to a trust rather than distributed to Hollister employees. *Id.* at *3. The Ninth Circuit affirmed the District Court's grant of summary judgment, finding that Plaintiffs' claim was speculative and lacked evidentiary support to satisfy traceability and redressability. *Id*. The Ninth Circuit also noted that the District Court had dismissed Plaintiffs' pre-1993 share repurchase claims on the basis of the ERISA statute of limitations under 29 U.S.C. § 1113. *Id*. at *4. The Ninth Circuit remarked that it need not parse the active/passive distinction for the "fraud or concealment" exception to the statute of limitations because: (i) Plaintiffs had abandoned their claim for monetary damages; and (ii) the District Court determined that if the finding that Plaintiffs' claims – based on Defendants' conduct from 1982 to 1992 – was reversed for any reason, the remainder of the District Court's analysis of Plaintiffs' post-1992 claims would apply equally to their time-barred claims. *Id.* at *4-5. To the extent that Plaintiffs argued that passive concealment had tolled the ERISA's statute of limitations with respect to the 1978, 1980, and 1984 amendments to the JDS articles of incorporation, the Ninth Circuit rejected that argument because, as the District Court noted, all the amendments to the articles of incorporation were duly filed with the Illinois Secretary of State. *Id*. at *6. Thus, the Ninth Circuit held that even if passive concealment might toll the ERISA's statute of limitations, the record would not support a claim of passive concealment here. *Id*. Accordingly, the Ninth Circuit affirmed the District Court's judgment for Defendants. *Id.* at *7-8.

***Gordon, et al. v. Massachusetts Mutual Life Insurance Co.,* Case No. 13-CV-30184 (D. Mass. Mar. 30, 2015).** Plaintiffs, current and former MassMutual Thrift Plan ("Plan") participants, brought a class action alleging that the fiduciaries of the Plan breached their duty of prudence. Defendants filed a motion to dismiss based on the statute of limitations. Just before the motion was heard, the Supreme Court granted *certiorari* in *Tibble v. Edison International*, 729 F.3d 1110 (9th Cir. 2013), a case in which the Ninth Circuit had found similar claims barred by the ERISA's six-year statute of limitations for breach of fiduciary duty. *Id*. at *2. The Supreme Court granted *certiorari* on the issue of whether a claim that the ERISA plan fiduciaries breached their duty of prudence by offering higher cost retail class mutual funds to plan participants, even though identical lower-cost institutional-class mutual funds were available, was barred by the ERISA's statute of limitations in 29 U.S.C. § 1113(1) given that the fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed. *Id*. The District Court denied Defendants' motion to dismiss and ordered the case stayed pending the issuance of the Supreme Court's decision. *Id.* at *3. The District Court noted that the Supreme Court's decision in *Tibble* undoubtedly would affect its analysis of the parties' core arguments. *Id.* Accordingly, the District Court

denied Defendants' motion without prejudice and directed Defendants to renew their motion after issuance of the *Tibble* ruling. *Id.* at *3.

***In Re Citigroup ERISA Litigation*, 2015 U.S. Dist. LEXIS 63460 (S.D.N.Y. May 13, 2015).** In this class action brought by the participants of the Citigroup 401(k) Plan (the "Citigroup Plan") and the Citibuilder 401(k) Plan for Puerto Rico (the "Citibuilder Plan") alleging breaches of fiduciary duties under the ERISA to recover from Defendants for losses suffered due to the drop in price of Citigroup stock during the sub-prime mortgage crisis of 2008, the Court granted Defendants' motion to dismiss. The Plans, which were defined contribution or individual account plans, offered participants a variety of investment options, including the Citigroup Common Stock Fund. *Id*. at *5. Plaintiffs alleged that Defendants violated their fiduciary duties of prudence and loyalty under the ERISA by allowing the Plans to continue to hold and purchase Citigroup stock despite abundant public information regarding Citigroup's allegedly precarious condition and the riskiness of the Citigroup stock. The Court dismissed the claims as untimely, as they were barred by the ERISA statute of limitations, which is either: (i) six years after the breach or violation; or (ii) three years after Plaintiff had actual knowledge of the breach. *Id*. at *24. The Court noted that the vast majority of events that Plaintiffs described in the complaint occurred well before December 8, 2008, and on December 8, 2011, the first complaint alleging a class period beginning January 16, 2008 was filed in this action, and on July 30, 2014, the current complaint was filed alleging five counts of breach of fiduciary duty. The Court concluded that Plaintiff's claims were untimely, because Plaintiffs had actual knowledge, and reasoned that the events leading to Citigroup's position in January 2008 were "very public red flags" and "widely publicized," as were events that caused Citigroup's stock price to decline further in 2008. *Id*. at *26. To the extent Plaintiffs claimed that they were not aware of all of the publicized information alleged in the complaint regarding Citigroup's decline prior to December 2008, the Court remarked that the Congress did not intend the actual knowledge requirement to excuse "willful blindness" by a Plaintiff. *Id*. at *27. The Court noted that Plaintiffs sought to bring claims under the Plans, but no named Plaintiff in this action had standing under the Citibuilder Plan because no named Plaintiff was a participant in the Citibuilder Plan. The Court observed that § 502(a)(3) of the ERISA provides that a civil action may be brought by a participant, beneficiary, or fiduciary. *Id*. at *32. Accordingly, the Court concluded that Plaintiffs could not assert claims for breach of fiduciary duties related to the Citibuilder Plan. Plaintiffs alleged that Defendant fiduciaries knew or should have known that Citigroup was heavily invested in sub-prime mortgages and that Citigroup stock was an imprudent investment as a result. However, because Plaintiffs failed to identify any special circumstances rendering reliance on the market price of the stock imprudent, the Court concluded that Plaintiffs' duty of prudence claim based on publicly available information must be dismissed. *Id*. at *42. Similarly, Defendants sought dismissal of Plaintiffs' claims that Defendant fiduciaries failed to act prudently in response to non-public information, and argued that Plaintiffs did not sufficiently allege that there was any material, non-public information available to the Defendants. In arguing that Defendants could have disclosed the non-public information without harming the Plan participants, Plaintiffs alleged that it was hard to fathom that disclosure of the adverse non-public information alleged would have caused Citigroup stock to move palpably, especially in light of all of the negative public information about Citigroup. *Id*. at *44. The Court found that this allegation highlighted the immateriality of any purported non-public information that the Defendants could have disclosed. As a result, the Court also dismissed the non-disclosure claim.

***Jammal, et al. v. American Family Insurance Group,* 2015 U.S. Dist. LEXIS 52200 (N.D. Ohio April 21, 2015).** Plaintiffs, a group of insurance sales agents, brought a putative class action alleging that Defendant misclassified them as independent contractors and thereby denied them benefits under an ERISA-governed plan. In count one, Plaintiffs sought a declaratory judgment that Plaintiffs were employees for all purposes. In count two, Plaintiffs sought injunctive relief prohibiting Defendant from continuing to misclassify its agents and independent contractors. *Id.* at *4. In counts three and four, Plaintiffs sought payments under the Termination Benefit Plan in accordance with the ERISA requirements, and restitution, contract reformation, and actual damages for Defendant's alleged breach of fiduciary duty. *Id.* at *5. In counts five and six, Plaintiffs sought damages and injunctive relief based on Defendant's failure to provide Plaintiffs with health and welfare benefits offered to other employees. *Id.* Defendant moved for summary judgment. The Court granted it in part and denied it in part. Defendant argued that the statute of

limitations barred Plaintiffs' claims because the limitations period for all counts began to run on the date each agent signed his or her agency agreement. *Id.* at *11. Plaintiffs argued that the triggering event was when it became clear that Defendant would be permanently treating them as employees rather than independent contractors and that the statute of limitations should be indefinitely tolled because Defendant represented to the IRS that its sales agents were independent contractors. *Id.* at *12. Because the ERISA benefit claims arguably accrue only when an employee becomes eligible for but fails to receive benefits, the Court concluded that signing the agency agreement did not start the running of the statute of limitations. *Id.* at *14-17. According to the Court, Plaintiffs were not entitled to benefits unless and until Defendant treated them as employees, and, therefore, their claims did not accrue until sometime after Defendant treated them as employees. *Id.* at *17. Because the Court lacked sufficient information to determine the exact triggering date for the running of the applicable statute of limitations, the Court determined that the applicable statute of limitations on all counts, except count four, was six years after the termination date of each individual agent, and that Plaintiffs, having separated from Defendant within six years of filing suit, survived summary judgment. *Id.* at *21-22. As to count four, the Court noted that the statute of limitations was three years from the time each agent was terminated because Plaintiffs had knowledge of actual level of control being exerted over them and knowledge that they did not receive termination benefits under the ERISA. *Id.* at *22. All Plaintiffs except Plaintiff Tuersley separated from Defendant within the three-year limitations period. *Id.* at *22-23. The Court, therefore, concluded that Plaintiff Tuersley's claim was barred by the statute of limitations. *Id.* at *23. Further, the Court denied Defendant's motion for summary judgement on the issue of whether Plaintiffs were employees or independent contractors and noted that there remained a question of material fact as to the amount of control Defendant exerted over Plaintiffs as well as the degree to which Plaintiffs economically depended upon Defendant's business. *Id.* at *36. According to Plaintiffs, Defendant reserved the right to exercise complete control over every important aspect of Plaintiffs' business, despite classifying them as independent contractors, and evidence of control included maintaining ownership over their books of business, requiring them to sell only Defendant's insurance, requiring them to follow Defendant's policies and procedures, controlling their day-to-day operations, and controlling their hiring and firing. *Id.* at *34-35. Accordingly, the Court granted Defendant's motion for summary judgment in part and denied it in part.

***Tibble, et al. v. Edison International,* 135 S. Ct. 1823 (2015).** In this class action brought by several beneficiaries of the Edison 401(k) Savings Plan (the "Plan") seeking to recover damages for alleged losses suffered by the Plan due to Defendants' breaches of fiduciary duties with respect to three mutual funds added to the Plan in 1999 and 2002, the U.S. Supreme Court found that the Ninth Circuit erred by applying the ERISA's six-year statute of limitations to bar the claim. The Supreme Court reversed and remanded to the Ninth Circuit to consider the beneficiaries' claims that the plan fiduciaries breached their duties within the relevant 6-year period under 29 U.S.C. § 1113, recognizing the importance of analogous trust law. The Plan was a defined contribution plan, and Plaintiffs filed this action in 2007 contending that Defendants acted imprudently by offering six higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available. *Id*. at 1825. Specifically, Plaintiffs claimed that a large institutional investor with billions of dollars, like the Plan, could have obtained materially identical, lower priced institutional-class mutual funds that were not available to retail investors. *Id*. As to the three funds added to the Plan in 2002, the District Court agreed, and ruled that Defendants failed to offer any credible explanation for offering higher priced mutual funds, and as to the 1999 funds, it found that Plaintiffs' claim was untimely. *Id*. The Ninth Circuit affirmed. As to the 1999 funds, it relied on 29 U.S.C. § 1113 in holding that Plaintiffs' claims were untimely because the funds were added more than six years before the complaint was filed in 2007, and Plaintiff had not established a change in circumstances that might trigger an obligation to review and change investments within the 6-year statutory period. On further appeal, the Supreme Court noted that § 1113 provides that no action may be brought as to breach of any fiduciary duty after six years after the (i) the last breach or violation; and (ii) in the case of an omission, the latest date on which the fiduciary could have cured the breach. *Id*. at 1826. The Supreme Court found that the Ninth Circuit erred by applying a statutory bar without considering the nature of the fiduciary duty. *Id*. at 1827. The Supreme Court remarked that the Ninth Circuit failed to recognize that under trust law, a fiduciary is required to conduct a regular review of its investments, with the nature and timing of the review contingent on the circumstances. *Id*. at 1827-28. The Supreme Court opined that an

ERISA fiduciary must discharge his responsibility with the case, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use. *Id*. at 1828. The Supreme Court further remarked that under trust law, a trustee has a continuing duty to monitor trust investments and remove imprudent ones, and that the continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset. *Id*. In addition, the Supreme Court noted that the Uniform Prudent Investor Act confirms that "managing embraces monitoring," and that a trustee has a "continuing responsibility for oversight of the suitability of the investments already made." *Id*. Accordingly, the Supreme Court concluded that the Ninth Circuit erred in applying the statute of limitations in 29 U.S.C. § 1113, and it reversed and remanded the action.

(ix) ERISA Stock Drop Class Actions

***Murray, et al. v. Invacare Corp.,* 2015 U.S. Dist. LEXIS 114657 (N.D. Ohio Aug. 28, 2015).** Plaintiff, a participant and beneficiary of Defendant Invacare Corp.'s Retirement Savings Plan (the "Plan") brought suit alleging that Defendants breached their fiduciary duties of prudence and loyalty under the ERISA by allowing Plan participants to acquire more shares of Defendants' company stock at a time when Defendants knew that the company stock was an imprudent investment. *Id.* at *2. Plaintiff alleged that, although Defendants had a long history of non-compliance with regulations of the U.S. Food and Drug Administration ("FDA"), various FDA warning forms and letters caused company stock to drop significantly, and Defendants allowed their employees to continue investing in Defendants' own stock under its Plan. Defendants moved to dismiss, contending that Plaintiff failed to meet the pleading requirements established by the U.S. Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer,* 134 S. Ct. 2459 (2014), that Plaintiff failed to adequately plead loss causation, and that Plaintiff's monitoring and co-fiduciary breach claims were derivative of her defective prudence and loyalty claims. *Id.* at *12-13. The Court denied Defendants' motion. The Court noted that to state a claim for breach of the duty of prudence on the basis of inside information under *Dudenhoeffer*, Plaintiff plausibly must allege an alternative action that Defendant could have taken that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. *Id.* at *14. The Court recognized that ERISA fiduciaries often face legitimate competing interests that force them to make difficult decisions in situations of uncertainty regarding their legal authority to act on inside information under federal securities laws. The Court observed that, in this case, Plaintiff alleged facts that, if true, showed that Defendants knew that they were not complying with FDA safety and compliance standards applicable to the company's most important products. Plaintiff alleged that the continued deficiencies likely would result in harsh penalties to the company, including cessation of production, all of which materially would impact the financial performance of the company and harm all shareholders, including participants of Defendants' Plan who held shares of the company. The Court found that Plaintiffs' allegations showed that a prudent fiduciary armed with such inside information would have known that Defendants' stock artificially was inflated during the time that the market was unaware of the true nature and extent of the FDA compliance problems and that a significant fall was inevitable. The Court recognized that "closing the stock fund" was a fairly extreme action with significant consequences but that Plaintiff sufficiently had pled facts alleging that a prudent fiduciary could have concluded that closing the stock would not cause more harm than good. *Id.* at *20. Accordingly, the Court concluded that Plaintiff met her pleading burden by sufficiently supporting her claim that Defendants breached their duties of prudence and loyalty with respect to their management of the Plan's investment in Defendants' stock. *Id.* The Court also held that Plaintiff sufficiently alleged loss causation under *Dura Pharmaceuticals, Inc. v. Broudo,* 554 U.S. 336 (2005), to sustain the imprudent investment claim. *Id.* at *24. Finally, the Court declined to dismiss the failure to monitor and knowing participation claims because those claims were not derivative of defective breach of duty of prudence and loyalty claims. *Id.* Accordingly, the Court denied Defendants' motion to dismiss.

(x) Equitable Defenses In ERISA Class Actions

***Operating Engineers Local 324 Health Care Plan, et al. v. G&W Construction Co.*, 2015 U.S. App. LEXIS 6420 (6th Cir. April 20, 2015).** In this action brought by nine multi-employer pension and welfare fringe benefit trust funds (the "Funds") seeking to recover delinquent fringe-benefit payments from Defendants G&W Construction Co. ("G&W") and its president, the Sixth Circuit, on interlocutory appeal,

affirmed in part and reversed in part the District Court's denial of the Funds' motion to strike Defendants' affirmative defenses and remanded the case. Defendants raised the affirmative defenses of laches, estoppel, and waiver, which the Funds moved to strike on the basis that § 515 of the ERISA bars equitable defenses. The Sixth Circuit noted that collective bargaining agreements that establish ERISA plans are interpreted using ordinary contract principles to the extent they are not inconsistent with federal labor policy. The Sixth Circuit reasoned that § 515 protects and streamlines the procedure for collecting delinquent contributions owed to ERISA plans by limiting "unrelated" and "extraneous" defenses. *Id*. at *8. The Sixth Circuit observed that once the employer knowingly signs an agreement that requires it to contribute to an employee benefit plan, it may not escape its obligation by raising defenses that call into question the Funds' ability to enforce the agreement. *Id*. at *12. The Sixth Circuit opined that few affirmative defenses were permitted, such as illegality of contributions, the contract requiring the contributions was void at its inception, and fraud. The Sixth Circuit observed that the affirmative defense of laches has two elements, including: (i) unreasonable delay in asserting one's rights, and (ii) a resulting prejudice to the defending party. *Id*. at *13. In *Petrella v. MGM, Inc.*, 134 S. Ct. 1962 (2014), the U.S. Supreme Court held that where the Congress has established a statute of limitations, laches may not be invoked to bar damages if the action was brought within the limitations period. *Id*. Although the ERISA does not provide a statute of limitations for delinquent contribution actions, the Sixth Circuit noted that the limitations period for the state cause of action that is most analogous to the ERISA claim should be applied. *Id*. In this case, the Sixth Circuit applied Michigan's six-year statute of limitations for contract actions. *Id*. The Sixth Circuit noted that the Funds brought suit within the six-year statute of limitations. *Id*. The Sixth Circuit ruled that the reasoning in *Petrella* and other such cases counseled that laches is not a valid defense in suits brought under § 515 of the ERISA within the applicable statute of limitations, and therefore the motion to strike the affirmative defense should have been granted. *Id*. at *17. As to equitable estoppel, the Sixth Circuit noted that it requires a representation, to a party without knowledge of the facts and without the means to ascertain them, upon which the party asserting estoppel justifiably relies in good faith to his detriment. *Id*. at *19. From the facts alleged, the Sixth Circuit found that equitable estoppel would not constitute a valid defense to the Funds' collection action, whether based on conduct of the union or the Funds. *Id*. at *20. Accordingly, the Sixth Circuit concluded that the District Court should have granted the Funds' motion to strike the equitable estoppel defense. *Id*. The Sixth Circuit, however, refused to rule on the waiver defense because the Funds failed to offer a developed argument on that theory.

(xi) Arbitration Issues In ERISA Class Actions

***Aetna Health Of California, Inc. v. Ortiz, et al.*, 2015 U.S. Dist. LEXIS 171624 (N.D. Cal. Dec. 22. 2015).** In this class action, Plaintiff, a plan participant, claimed that the welfare plan's cap on autism treatment violated the ERISA and the California Mental Health Parity Act. Defendant moved to compel arbitration, citing an arbitration agreement previously signed by Plaintiff. The Court held that the claim was arbitrable under the Federal Arbitration Act, and thus granted the motion to compel arbitration. The Court reasoned that arbitration was proper as Plaintiff was not challenging the denial of benefits under the plan, but rather the permissibility of the plan's inclusion of a benefits cap which allegedly violated the ERISA and California law. The Court reasoned that "the duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim found on statutory rights." *Id.* at *11. As a result, the Court granted Defendant's motion.

***Mercadante, et al. v. Xe Services, LLC*, 2015 U.S. Dist. LEXIS 4845 (D.D.C. Jan. 15, 2015).** In this ERISA action alleging that Plaintiffs were misclassified as independent contractors and denied various employment benefits, the District Court granted Defendant's motion to compel arbitration. *Id.* at *1-2. Plaintiffs served as security contractors in Iraq or Afghanistan and each signed an Independent Contractor Service Agreement ("ICSA") with Blackwater Security Consulting, LLC, and BlackwaterWorldwide Trust, Health and Welfare Plan and Trustees (collectively "Blackwater"), which included an arbitration clause. *Id.* at *4-5. The arbitration provision in each Plaintiff's ICSA stated that any dispute regarding interpretation or enforcement of any of the parties' rights or obligations under the agreement would be resolved by binding arbitration according to the rules of the American Arbitration Association. *Id.* at *15. The Court noted that the AAA Employment Arbitration Rules and Mediation Procedures, in turn, provide for the arbitrator to rule on questions of arbitrability, and observed that numerous other federal circuits had concluded that

incorporation of the AAA rules constitutes clear and unmistakable evidence that the parties intended the question of arbitrability be adjudicated by an arbitrator. *Id.* at *15. Thus, the Court opined that the parties had clearly and unmistakably submitted questions of arbitrability to an arbitrator. *Id.* at *17. The Court also observed that if a party challenges the validity of a delegation agreement, the Court must consider the challenge before ordering compliance, and that the challenge must be directed specifically at the delegation agreement and not at another provision of the contract, or to the contract as a whole. *Id.* at *18-19. Plaintiffs argued they were misled to believe that the ICSA concerned only security matters, and they were not given an opportunity to read the agreements. *Id.* at *21. However, in their fraud argument, Plaintiffs only mentioned the arbitration agreement once and never referenced the delegation provision. *Id.* at *23. Because Plaintiffs' arguments as to fraud did not go to the validity of the delegation provision, the Court opined that it was valid and must be enforced, leaving any challenge to the validity of the agreement as a whole to be decided by the arbitrator. *Id*. Plaintiffs also argued that the detrimental economic impact of refusing to sign the agreement caused them to sign under duress. *Id.* Once again, the Court noted that this argument did not target the delegation agreement, and was directed at the signing of the ICSA overall, thereby making the delegation provision valid. *Id.* at *25. Further, Plaintiffs asserted that they mistakenly believed that the agreement was not an arbitration document, but instead had to do with general matters related to Blackwater not being liable due to sending workers into a war zone. *Id.* at *25-26. The Court observed that to afford relief, the mistake must be of a certain nature, and the fact about which the parties are mistaken must be an existing or past fact, and that the mistaken fact also must be material. *Id.* at *26. The Court opined that the mistake on which Plaintiffs relied (regarding the nature of the contract and its contents) was not a mistake about an existing or past fact that could satisfy this standard. *Id.* at *27. Finally, Plaintiffs argued that the shifting of attorneys' fees and expenses from Defendants to Plaintiffs made the agreement substantially unconscionable. *Id.* at *30. Citing *Torrence v. Nationwide Budget Finance*, 753 S.E.2d 812 (N.C. App. 2014), which held that high arbitration costs could no longer be a basis for substantive unconscionability, the Court determined that the shifting of arbitration costs to Plaintiffs did not constitute substantive unconscionability. *Id.* at *36. Thus, because none of the contract defenses that Plaintiffs presented invalidated the arbitration delegation agreements in their respective ICSAs, the arbitration delegation provision was valid, and all questions of arbitrability had to be decided by an arbitrator in the first instance, including any challenge to the validity of the Agreement as a whole, the Court granted Defendant's motion to compel arbitration. *Id.* at *37.

***Shy, et al. v. Navistar International Corp.,* 2015 U.S. App. LEXIS 4974 (6th Cir. Mar. 27, 2015).**
Plaintiffs, a group of retirees, brought an action seeking retirement benefits from Defendant. The parties reached a settlement and, pursuant to a formula set forth in the consent decree, Defendant made annual contributions to a Supplemental Benefit Trust managed by a Supplemental Benefits Committee ("SBC"). *Id*. at *2. In the event that the SBC disputed the information or calculations, the agreement provided for arbitration before an accounting firm to evaluate whether Defendant applied the formula correctly. *Id*. In 2009, the SBC sent Defendant letters requesting additional information and disputing Defendant's classification of Medicare Part D subsidies in its calculations of its profits sharing obligations. *Id*. at *5. When SBC was not satisfied with the responses, it intervened in the litigation and filed a motion to enforce the settlement agreement. *Id.* at *6. Defendant moved to dismiss on the ground that the questions SBC raised were subject to arbitration. The District Court denied the motion. The District Court found that the claims in SBC's amended complaint were subject to arbitration, but that Defendant had waived its right to demand arbitration through its behavior, including waiting until the District Court granted the SBC's motion to intervene before demanding arbitration. *Id.* at *9. On appeal, the Sixth Circuit reversed. The Sixth Circuit explained that the SBC's claim, at its core, was that Defendant misclassified various aspects of its business, resulting in incorrect information being provided to the SBC, and, therefore, the claim fell within the scope of the arbitration agreement. *Id*. at *10. The Sixth Circuit found that the arbitration agreement applied when the SBC disputed information or calculations provided by Defendant and was not limited by its terms to disputes over the calculations. *Id.* at *17. Thus, the Sixth Circuit concluded that, if the SBC disputed Defendant's classification, it was disputing the information Defendant provided, and its dispute was subject to arbitration. *Id*. Accordingly, the Sixth Circuit concluded that SBC's claims should be arbitrated. *Id.* at *17-18. In addition, the Sixth Circuit found that Defendant's pre-litigation conduct and failure to raise arbitration in its response to the SBC's motion to arbitrate did not constitute a waiver of its

right to arbitrate. *Id*. Accordingly, the Sixth Circuit vacated the District Court's order, remanded the action, and directed the District Court to order arbitration. *Id.* at *27.

(xii) Vesting Issues In ERISA Class Actions

***Fulghum, et al. v. Embarq Corp.*, 2015 U.S. Dist. LEXIS 76141 (D. Kan. June 10, 2015).** In this class action alleging that Defendants eliminated retirees' medical and life insurance in violation of the ERISA, the District Court granted Defendants' motions for summary judgment, finding that the language in the relevant documents did not give them a vested right to lifetime benefits. *Id.* at *144. Seventeen named Plaintiffs asserted that the summary plan descriptions ("SPDs") in effect when they retired gave them vested health and life insurance benefits and Defendants' modification or elimination of those benefits violated the ERISA. *Id.* at *145. In February 2013, the District Court granted Defendants' motion for summary judgment with regard to 15 of 17 Plaintiffs and as to all of the class members as to whom Defendants sought summary judgment. As to the claims of the remaining two named Plaintiffs, James Britt and Donald Clark, the District Court found that issues of fact precluded summary judgment. Upon appeal, the Tenth Circuit reversed in part, by reviving contractual vesting claims. The Tenth Circuit found that it was error to grant summary judgment in full as to the class members who potentially had a claim for vested benefits based on SPDs that were not before the District Court. *Id.* While Defendants contended that none of the class members could establish a contractual vesting claim, Plaintiffs asserted that language in the relevant documents promised lifetime benefits to the retiree class members. *Id.* at *149-50. On remand, the District Court reviewed the relevant documents at issue, particularly 70 SPDs, and ruled that none of them contained language promising lifetime benefits. *Id.* at *156-162. The District Court noted that several SPDs contained broad reservations of rights ("ROR") clauses allowing Defendants to terminate the plan for any reason, and none of the SPDs clearly and expressly stated that health benefits were vested. *Id.* at *159. Further, all of the SPDs contained termination provisions, which indicated that Defendants did not promise lifetime benefits. The District Court thus held that language of the SPDs and the inclusion of the broad ROR provision could not reasonably be interpreted as a promise of lifetime benefits. *Id.* at *159-60. Plaintiffs contended that certain collective bargaining agreements ("CBAs") defined their benefits, and the CBAs were the controlling documents. The District Court, however, noted that the CBAs were only relevant if a particular SPD specifically referenced a CBA, and Plaintiffs failed to direct the Court to any particular CBA linked to a particular SPD. *Id.* at *164. In Clark's case, the SPD referenced a CBA, which the District Court considered, and found that the CBA expressly stated that insurance benefits would be provided through the term of the agreement, which expired in 1977. Agreeing with several other case law authorities that addressed the effect of CBA language specifying the duration of medical or life insurance benefits, the District Court held that CBA language providing durational limits was not indicative of lifetime benefits. *Id.* at *198. The District Court thus concluded that Plaintiffs' interpretation of the plan language in both the SPDs and the CBA would override explicit terms establishing that the benefits were durational and could be terminated. *Id.* at *207. Accordingly, the District Court granted Defendants' motion for summary judgment and denied Plaintiffs' cross-motion for summary judgment.

(xiii) Preemption Issues In ERISA Class Actions

***Calop Business Systems, Inc., et al. v. City Of Los Angeles*, 2015 U.S. App. LEXIS 9168 (9th Cir. June 2, 2015).** Plaintiff Calop Business Systems ("Calop") brought suit against the City of Los Angeles alleging that its Living Wage Ordinance ("LWO") was preempted by the ERISA, the Airline Deregulation Act, and the Railway Labor Act. The LWO requires contractors who operate at the City's airports to pay their employees $14.80 per hour, or $10.30 per hour if the contractor provides health benefits. *Id.* The City's Office of Contract Compliance found that Calop had violated the LWO when it paid its employees only $11.55 per hour with no health benefits. *Id.* at *1. Defendant moved for summary judgment. The District Court granted Defendant's motion. On Plaintiff's appeal, the Ninth Circuit affirmed. First, Plaintiff's claims that the LWO was unconstitutionally vague were dismissed for lack of standing, as the Ninth Circuit concluded that Calop had not shown that the City ever attempted to enforce the supersession provision against it, and therefore could not show that it suffered an injury as a result. In addition, the Ninth Circuit opined that the higher overtime rate that the LWO imposes on employers who do not pay health benefits did not confer standing on Calop because it was "fairly traceable" to the City's interpretation of the LWO's

minimum wage term, not to any ambiguity in the minimum wage and supersession provisions. *Id*. at *2-3. The Ninth Circuit therefore concluded that Plaintiff had no standing to argue that the minimum wage and supersession terms were unconstitutionally vague. Second, the Ninth Circuit observed that the ERISA preempts any state law that has a connection with or a reference to an employee benefits plan. *Id.* at *3. In these circumstances, the Ninth Circuit concluded that the LWO does not have a "reference to" the ERISA plans merely because it takes into account what health benefits employers offer in calculating the cash wage that must be paid. *Id.* Further, the LWO's provisions requiring reports on employee compensation from employers did not create a "connection with" the ERISA plans because the provision imposes no obligations on plans themselves. *Id.* The Ninth Circuit reasoned that the LWO does not give rise to a "connection with" benefits plans merely by creating economic incentives to offer certain kinds of benefits, because it imposes no affirmative obligation on the plans. *Id.* at *4. Thus, the Ninth Circuit found that the LWO was not preempted by the ERISA.

***Concerned Home Care Providers, Inc., et al. v. Cuomo*, 783 F.3d 77 (2d Cir. 2015).** Plaintiffs, a group of licensed home care services agencies ("LHCSAs"), brought an action alleging that the National Labor Relations Act ("NLRA") and the ERISA preempted New York's Wage Parity Law and seeking to prevent Defendants from enforcing the law. *Id.* at 83. The LHCSAs employed two categories of home care providers, including: (i) home health aides ("HHAs"); and (ii) personal care aides ("PCAs"). The HHAs received a lower starting hourly wage than PCAs. *Id.* at 81. In 2011, New York enacted the Wage Parity Law, among other things, to bring parity in wages among the two types of aides. *Id*. Sub-division four of the Wage Parity Law allows unequal pay to the extent that compensation includes health benefits through payments to jointly administered labor-management funds (also known as a "Taft-Hartley" plan). *Id*. at 82-83. The District Court dismissed the action. On appeal, the Second Circuit affirmed, holding that the Wage Parity Law was not preempted. *Id.* at 81. The Second Circuit explained that, unlike the NLRA, the ERISA contains an express provision that preempts any and all state laws insofar as they relate to any employee benefit plan. *Id.* at 84. Plaintiffs contended that the Wage Parity Law has a connection with plans under the ERISA because employers would have to re-evaluate, and possibly enhance, their benefits packages in order to pay employees the applicable minimum rate of home care aides' total compensation. *Id*. 88-89. The Second Circuit noted that such an indirect effect on ERISA-based plans does not trigger preemption; instead, only statutes that mandate employee benefit structures or their administration have the necessary connection with ERISA-based plans to result in preemption. *Id*. at 89. The Second Circuit found that the Wage Parity Law gives employers freedom to select the manner in which they pay the minimum rate of home care aide total compensation. *Id*. Under the law, total compensation may consist of wages and other direct compensation paid on behalf of the employee, including health, education, or pension benefits, supplements in lieu of benefits, and compensated time off. *Id*. The Second Circuit reasoned that the statute is agnostic as to the mix of wages and benefits that employers provide, so long as the total amount equals or exceeds the applicable minimum rate. *Id*. The Second Circuit further noted that, in order to trigger preemption under the ERISA, a statute must not merely mention or allude to an ERISA-based plan, it also must have some relationship to an ERISA plan or affect an ERISA-based plan in some manner. *Id.* at 90. The Second Circuit found that the creation of ERISA plans by SEIU 1199's collective bargaining agreement had no more than a remote bearing on the Wage Parity Law's operation and that the employers were not required to match the benefits in SEIU 1199's collective bargaining agreement or to provide benefits at all. *Id*. Employers need not even calculate the benefits in SEIU 1199's plan; instead, the Wage Parity Law requires the Commissioner of the New York State Department of Health to calculate an hourly amount of total compensation and promulgate that rate to employers. *Id*. This calculation converts all of the benefits from SEIU 1199's collective bargaining agreement, including those contained in its ERISA plans, into a single hourly figure. *Id.* The Second Circuit held that the Wage Parity Law, therefore, functions irrespective of the existence of an ERISA plan and, accordingly, ruled that the ERISA does not preempt the Wage Parity Law. *Id.*

(xiv) Damages Issues In ERISA Class Actions

***Tussey, et al. v. ABB, Inc.,* 2015 U.S. Dist. LEXIS 89068 (W.D. Mo. July 9, 2015).** In this ERISA class action alleging breach of fiduciary duties in mapping plan investments from one mutual fund to another, the Court ruled in favor of Defendants. *Id.* at *4. Plaintiffs participated in the PRISM Plan, which was

sponsored by Defendant ABB Inc. ("ABB") and managed by Defendant Pension Review Committee of ABB, Inc. ("PRC"). *Id.* at *7-8. The Plan paid Fidelity Trust, the trustee and record-keeper of the PRISM plan, through a combination of revenue sharing and hard dollar fees. *Id.* at *8. Pursuant to an investment policy statement ("IPS"), the PRISM Plan included one income fund and eight mutual funds as investment options, including the Vanguard Wellington Fund. *Id.* at *12. In 2000, ABB considered adding three lifestyle funds to the PRISM Plan, including Fidelity Freedom Funds. *Id.* at *14. Fidelity proposed that it would reduce record-keeping fees for both PRISM plans to zero if ABB mapped the assets in the Wellington fund to Fidelity's Freedom Funds. *Id.* at *15-16. At that time, the Wellington Fund had invested in both stocks and bonds, and its annual performance exceeded Morningstar's benchmark by 4%. *Id.* at *15. Nonetheless, the PRC removed the Wellington Fund, added Fidelity Freedom Funds, and "mapped" Wellington assets into the Freedom Funds. *Id.* at *16. The PRISM Plan subsequently sustained a loss because the Wellington Fund consistently outperformed the Freedom Funds after mapping. *Id.* at *25. The Court found that the Plan fiduciaries breached their duties in removing the Wellington Fund and mapping assets into the Fidelity Freedom Funds. *Id.* at *35. The Court further found that the fiduciaries knew this would result in increased revenues to Fidelity, which ultimately would benefit ABB. *Id.* at *20-21. Although the evidence was circumstantial, considering the circumstances as a whole, the Court determined that ABB's conflict of interest made the removal of the Wellington Fund and the mapping of its assets to the Fidelity Freedom Funds an abuse of discretion. *Id.* at *33. Nonetheless, the Court ruled for ABB, finding that Plaintiffs "failed to satisfy their burden of proof on the issue of damages." *Id.* at *38.

(xv) DOL And PBGC ERISA Enforcement Litigation

***Pension Benefit Guaranty Corp. v. The Renco Group, Inc.,* 2015 U.S. Dist. LEXIS 27807 (S.D.N.Y. Mar. 5, 2015).** The Pension Benefit Guaranty Corporation ("PBGC"), a U.S. government agency, brought suit against the Renco Group ("Renco") alleging reachback liability under the ERISA and New York common law. *Id.* at *1-2. The PBGC collects premiums from pension plan administrators and provides certain guarantees with respect to the benefits provided. *Id.* at *2. Renco, a subsidiary of RG Steel LLC, acquired a steel mill company, Severstel Sparrows Point LLC ("Sparrows"), which in turn owned steel mill companies, Severstal Warren LLC and Severstal Wheeling LLC. *Id*. at *5. RG Steel assumed responsibility for two pensions plan known as the Warren Pension Plan and the Wheeling Pension Plan. *Id*. at *6. RG Steel soon faced financial difficulties and, to overcome this, it reached an agreement with Cerberus Capital Partners, L.P. ("Cerberus"), wherein Cerberus provided two term loans to RG Steel totaling $125 million. In return, Cerberus received 24.5% equity and warrants to purchase another 24.5%. *Id*. at *6-8, 17. This influx of capital was insufficient, and RG Steel declared bankruptcy four months later in May 2012. *Id.* at *18. Throughout this period, PBGC was in contact regarding the status of financing efforts, and even before Cerberus agreed to provide financing, the PBGC had begun preparations to terminate the pension plans in order to mitigate its potential exposure. *Id.* at *13. The Court denied the parties' cross-motions for summary judgment. The Court noted that 29 U.S.C. § 1369(a) assigns reachback liability to companies or persons who evade pension obligations by selling ownership interests in order to reduce their ownership below 80% within five years before the termination date. *Id*. at *21. Here, it was undisputed that the two pension plans were terminated less than five years after the effective date of the Renco-Cerberus transaction, as the transaction closed on January 17, 2012, and the plans were terminated in November 2012, with an effective date of August 31, 2012. *Id*. at *21-22. Accordingly, the Court found that the question was whether Renco entered into the Cerberus transaction with a principal purpose to evade liability by removing itself from RG Steel's controlled group by reducing its ownership. *Id*. at *22. The Court noted that the plan language of § 1329, which imposes liability if evasion was a principal purpose of a transaction, allows for the fact that a transaction may have more than one principal purpose, such that reachback liability applies if any of the purposes of a party entering a transaction was to evade its pension obligations. *Id*. at *22-23. The Court concluded that disputed issues of fact precluded summary judgment for either of the parties. *Id.* at *24. The Court explained that it was undisputed that RG Steel was in dire need of capital, so one of the key purposes of Renco seeking financing was to improve its financial position. *Id*. Plaintiff introduced facts from which a reasonable fact-finder could conclude that Renco structured the transaction specifically to reduce its ownership stake below 80% to avoid pension liability. *Id*. The Court, however, was unable to conclude as a matter of law at the summary judgment stage that evasion was a principal purpose of the deal. *Id*. at *26. Accordingly, the Court denied summary judgment

on the PBGC's reachback liability claim. *Id.* at *27. Regarding the common law claims, the Court also found that disputed facts precluded summary judgment in favor of either party. Specifically, the Court noted that the disputed facts made it impossible to decide whether Renco made a material misrepresentation with scienter, whether PBGC justifiably relied on the material misrepresentation, and whether PBGC's reliance actually caused its injury. *Id*. at *28. Accordingly, the Court denied the parties' cross-motions for summary judgment. *Id.* at *33.

***Perez, et al. v. California Pacific Bank*, 2015 U.S. Dist. LEXIS 94180 (N.D. Cal. July 20, 2015).** In this ERISA enforcement action brought by the Secretary of Labor ("DOL") alleging that the fiduciaries of the California Pacific Bank Employee Stock Ownership Plan (the "Plan") mismanaged the Plan's assets, the Court denied Defendants' motion for summary judgment and granted summary judgment in part to the DOL. *Id.* at *2. The Plan was terminated three years before the action was initiated while the California Pacific Bank (the "Bank") was under investigation by the DOL. *Id.* The Bank was both a named fiduciary and the Plan Sponsor, but the "real targets" were four individual fiduciaries of the Plan who were also members of the Bank's Board of Directors. *Id*. at *2. The DOL alleged four ways in which the fiduciaries mismanaged the Plan assets causing over $1.39 million in harm, including: (i) after deciding to terminate the Plan, the fiduciaries failed to liquidate and distribute Plan shares as cash in accordance with the Plan document; (ii) upon receiving payment on a $132,506 account receivable owned to the Plan, the fiduciaries diverted a significant portion to the Bank, which had no claim to this Plan asset; (iii) in 2012, the fiduciaries transferred approximately $69,746 of Plan assets to the Bank despite the fact that the Bank had no claim to such assets; and (iv) between 2007 and 2011, the fiduciaries held Plan assets in cash in various non-interest bearing accounts owned by the Bank. *Id*. at *3. Defendants sought summary judgment on Count I, arguing that the Plan did not require distributions to be made only in cash upon termination. *Id.* at *11. Defendants pointed to other parts of the Plan that permitted distributions to be made in cash or stock. *Id.* The Court, however, observed that the express provision entitled "Termination of Plan" stated that payment to each affected participant would be made in cash. *Id.* The Court thus held that Defendants violated § 404(a)(1)(D) of the ERISA by failing to act in accordance with the documents and instruments governing the Plan, and granted judgment as a matter of law for the DOL on that issue. *Id.* On Count II, the Court noted that although the parties agreed that the Plan had a $132,506 receivable at some point and that the Bank ultimately received $81,407.18 of this amount, they disagreed on whether this $81,407.18 was a Plan asset. *Id.* at *16-17. Three individual Defendants passed a resolution to demand payment of book value interest. *Id.* at *17. The resolution stated that the undersigned Trustees had a right to demand payment of the $132,506 book value of the Plan's membership interest in Seclusion Alcalde, LLC from Seclusion Alcalde Management, LLC ("SAM") pursuant to that certain Asset Purchase and Sale Agreement entered into between the Plan and SAM (the "Agreement") and resolved that, prior to the termination of the Plan, the Plan exercised its right under the Agreement to receive payment of the $132,506 from SAM. *Id.* at *17-18. The Defendants submitted no evidence relating to the purported repurchase by the Bank of the unallocated stock collateralizing the loans, or any agreement between the Bank and the Plan relating to whether that repurchase would encompass any dividends associated with that stock. *Id.* at *19-20. Further, Defendants' resolution failed to mention that part of the $132,506 might in fact properly belong to the Bank and not the Plan because of repurchases by the Bank of unallocated stock held by the Plan. *Id.* at *20. Accordingly, the Court opined that Defendants diverted to the Bank $81,407.18 of the $132,506 accounts receivable that belonged to the Plan, and thus violated §§ 403, 404 and 406 of the ERISA. *Id.* Finally, although the DOL alleged that Defendant held Plan cash assets in 11 separate non-interest bearing accounts at the Bank, thereby making the cash available for use by the Bank without charge, the Court found that Plaintiff failed to establish that holding Plan cash assets in non-interest bearing accounts violated the ERISA. *Id.* at *25.

***U.S. Department Of Labor v. Bruister,* 2015 U.S. Dist. LEXIS 5774 (S.D. Miss. Jan. 16, 2015).** The U.S. Department of Labor ("DOL") brought suit alleging that Defendants breached their fiduciary duties and engaged in prohibited transactions under the ERISA. On October 16, 2014, the Court granted judgment in favor of the DOL and awarded damages in excess of $6.4 million. *Id*. at *5. Subsequently, the DOL attempted to execute the judgment and claimed that Defendants intentionally frustrated those efforts. *Id*. Whereas Defendants stated that they were unable to pay any part of the judgment, Plaintiffs believed that

Defendants had an interest in certain life insurance portfolios (or "viaticals") worth several million dollars. *Id*. As to some of those viaticals, Premium Funding, LLC ("PFLLC"), an entity that Defendants' business associate Nathan Prager controlled, entered into a financing arrangement with Defendant Bruister Family LLC, whereby PFLLC agreed to pay the premiums and administrative costs of the viaticals in exchange for certain payments and a security interest in the viaticals. *Id*. at *5-6. Defendants contended that the agreement was executed on October 15, 2014, one day before the Court entered its judgment. *Id*. at *6. The DOL contended that Defendants back-dated the document in an effort to frustrate execution of the judgment because PFLLC was not created until October 22, 2014. *Id*. The Court granted the DOL's *ex parte* motion for a temporary restraining order ("TRO"). First, the Court found that, because Defendants had exhibited a willingness to frustrate the Court's judgment, allowing the DOL to seek a TRO without notice would avoid the irreparable injury that might occur. *Id*. at *8. Further, the Court found that the balance of harms favored the DOL's motion. *Id*. at *9. Specifically, the Court observed that the DOL faced the threatened dissipation of the viatical policies, thereby leaving no means to satisfy the judgment. *Id*. The Court found that the harm to the DOL was significantly greater than the harm to Defendants and others in maintaining the status quo. To the extent the TRO would result in some portion of the judgments being satisfied, the Court concluded that it served the public interest. *Id*. In addition, the Court noted that Rule 65(d)(2)(C) states that, in addition to the parties, a TRO binds other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B). *Id*. Based on the record evidence, the Court found that Prager was in active concert or participation with Defendants. *Id*. Accordingly, the Court entered the TRO restraining Defendants from transferring, encumbering, otherwise disposing of, or otherwise limiting its interest in any asset or property in which they owned any interest or that they controlled. *Id.* at *10-11.

***U.S. Department Of Labor v. Koresko*, 2015 U.S. Dist. LEXIS 14873 (E.D. Pa. Feb. 6, 2015)**. The U.S. Department of Labor ("DOL") brought an enforcement action against Defendants John J. Koresko, PennMont Benefit Services, Inc., Koresko & Associates, P.C., Koresko Law Firm P.C., and Penn Public Trust ("PPT") (collectively, the "Koresko Defendants"), Jeanne Bonney, and others for violating various provisions of the ERISA. *Id.* at *4. Defendants were fiduciaries and/or managed hundreds of employee benefit plans (the "Plans"). *Id.* at *5. The DOL requested a permanent injunction against the Koresko Defendants and Bonney barring each of them from serving as a trustee or fiduciary or as a representative in any capacity to any employee benefit plan or from serving in any capacity that required them to control the assets of any benefit plan. *Id*. at *4-5. After a bench trial, the Court found in favor of the DOL on all claims. *Id.* at *5. The DOL contended that the Koresko Defendants had diverted death benefit proceeds totaling approximately $2.5 million for their own use and benefit, and had diverted $35 million in loans on insurance policies owned by the Trusts for the benefit of the Plans and employer arrangements participating in the Trusts to accounts for entities other than the Plans' trustee. *Id*. at *18. The Court found that the Plans at issue were employee welfare benefit plans as defined by the ERISA and that the Plans had assets in the form of employee contributions and insurance policy proceeds. *Id.* at *5. The Court noted that, under § 404(a)(1) of the ERISA, plan fiduciaries must act for the exclusive purpose and solely in the interest of a plan's participants and beneficiaries. *Id*. at *217. The Court observed that, in deciding the DOL's motion for partial summary judgment, it earlier had held that certain of the Koresko Defendants violated § 404(a)(1)(A) by diverting death benefits from the Trust to accounts the Koresko Defendants personally controlled. *Id*. at *218. The Court observed that, under the authority of the Koresko Defendants, Plan assets were routinely transferred to accounts held out of the reach of the Trustee and owned solely by Koresko and, in some instances, owned in conjunction with Bonney. *Id*. The Court noted that, under § 404(a)'s "prudent man" test, it was imprudent for the Koresko Defendants to divert almost $40 million in Trust assets out of the trust to three different accounts in Koresko's name or in the law firms' names or to the operating accounts of the law firms, Trusts, and PennMont. *Id*. at *222. The Court ruled that these and other transactions violated § 406(b)(1) prohibition on fiduciaries dealing with plan assets in their own interest or for their own account. *Id*. at *224. Based upon these findings, the Court concluded that the participants and beneficiaries of the Plans at issue, and of other employee benefit plans throughout the United States, must be protected from the type of fiduciary misconduct in which Defendants had engaged. *Id*. at *242. Accordingly, the Court barred Defendants from serving as fiduciaries, and found the Koresko Defendants liable for $19,852,114.88 in restitution for losses and disgorgement of profits.

(xvi) Standing Issues In ERISA Class Actions

***N.Y. State Psychiatric Association, Inc., et al. v. UnitedHealth Corp.*, 2015 U.S. App. LEXIS 14641 (2d Cir. Aug. 20, 2015).** Plaintiffs brought suit alleging that Defendants breached their fiduciary duties under the ERISA, the terms of ERISA-governed health insurance plans, and the Mental Health Parity Act. *Id.* at *2-3. Plaintiffs alleged that Defendants unlawfully imposed financial requirements and treatment limitations on mental health benefits for patients of Plaintiff New York State Psychiatric Association ("NYSPA") members, that Defendants treated medical claims more fairly than mental health claims, and that Defendants denied or reduced benefits for psychiatric evaluation services. The District Court granted Defendants' motion to dismiss, holding principally that NYSPA lacked associational standing to sue on behalf of its members. *Id.* at *4. Plaintiffs appealed. The Second Circuit affirmed the District Court's order in part, vacated the order in part, and remanded the action. *Id.* First, the Second Circuit reversed and remanded as to NYSPA's standing. The Second Circuit held that NYSPA plausibly had alleged that its claims did not require individualized proof and that if, at summary judgment or at trial, NYSPA's claims required significant individual participation or proof, the District Court could dismiss NYSPA for lack of standing at that juncture. *Id.* at *9-10. Second, the District Court dismissed the complaint on the grounds that, as claims administrators, Defendants could not be sued under § 502(a)(3) or § 502(a)(1)(B) and that relief under § 502(a)(3) was inappropriate because Plaintiffs' injuries could be remedied under § 502(a)(1)(B). The Second Circuit rejected this argument, finding that, as claims administrators, Defendants exercised total control over the plans' claims process, and therefore Defendants were properly named under § 502(a)(1)(B). *Id.* at *14. Further, the Second Circuit held that § 502(a)(3) imposed a fiduciary duty arising indirectly from the Parity Act, even though the Parity Act itself did not impose such a duty, that Defendants were proper Defendants under § 502(a)(3), and that the dismissal of such claims was premature. *Id.* at *18. Finally, the Second Circuit affirmed the District Court's dismissal of an individual named Plaintiff's claims, finding that the allegations relating to her claim that Defendants' treatment of "evaluation and management" services violated the Parity Act failed to satisfy applicable pleading standards. *Id.* at *20. Accordingly, the Second Circuit affirmed in part, vacated in part, and remanded the action.

(xvii) Intervention Issues In ERISA Class Actions

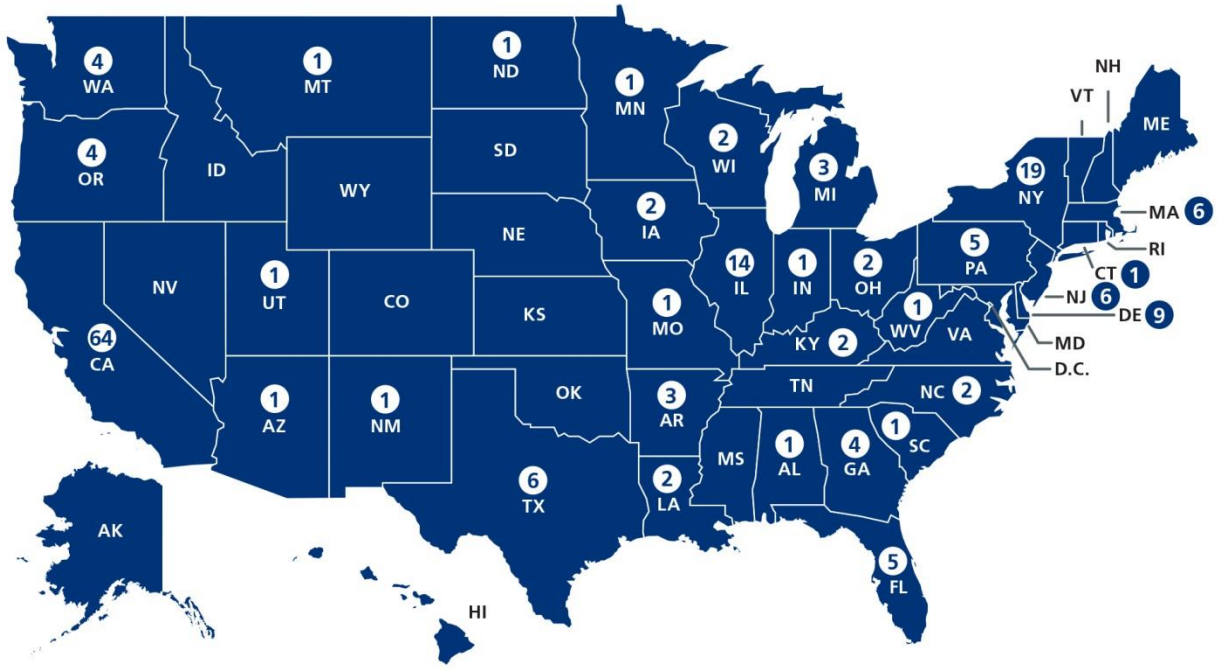
***I.A.M. National Pension Fund, et al. v. Listerhill Total Maintenance Center*, 2015 U.S. Dist. LEXIS 102909 (N.D. Ala. Aug. 6, 2015).** Plaintiff, a Fund and its trustees, brought a class action on behalf of the participants and beneficiaries of the Fund alleging that Defendant failed to make required contributions in violation of § 515 of the ERISA. *Id.* at *3. A group of Defendant's employees (the "Interveners") who were covered by a collective bargaining agreement ("CBA") with Defendant filed a motion to intervene to obtain declaratory relief. *Id.* at *4. The Court denied the Interveners' motion. The Interveners requested that the Court declare their rights as to the contribution rate that Defendant was obliged to pay on their behalf. *Id.* at *5. Defendant argued that the CBA required the Interveners to submit their claim to arbitration through the grievance process outlined in the CBA. *Id.* The Interveners disputed that their proposed declaratory judgment complaint raised a grievable issue under the CBA. *Id.* at *7. Based on the CBA's language, the Interveners contended that the agreement's "general purpose" included recording the terms of agreement between the parties arrived at through collective bargaining with respect to rates of pay, wages, and hours of employment. *Id.* The Court rejected the Interveners' argument. The Court found that the CBA required Defendant to make certain contributions to the Fund on its employees' behalf. *Id.* at *10. The Court noted that, whereas Plaintiffs were pursing their claims under a Trust Agreement because Plaintiffs were parties to such agreement, the Interveners were pursuing their claims under the CBA. *Id.* Because the CBA required all covered employees first to submit their claims to arbitration through the grievance procedure, the Interveners could not file a claim in Court without first pursing arbitration. *Id.* Moreover, the Court noted that, when stating that all claims should be pursued through the grievance procedure, the CBA did not distinguish between damages claims and declaratory claims. Accordingly, the Court concluded that the Interveners were parties to the CBA and, therefore, required to pursue arbitration before filing a claim in Court. Accordingly, the Court denied the motion to intervene.

VII. Significant State Law Class Action Rulings

Over the last decade, plaintiffs' lawyers have resorted to state court forums on an ever increasing basis to pursue employment-related class action litigation. The civil justice system in each state is obviously different, and the resulting impact on businesses often varies from county to county within certain jurisdictions. Some states and certain counties within those states are viewed by litigants as safe havens for opportunistic class action lawsuits, which position those jurisdictions as launching platforms for dubious claims or novel theories of recovery. Through a variety of factors – including forum shopping, discovery abuse, consolidation and joinder practices, lax evidentiary standards for experts, the absence of limitations on damages, and plaintiff-friendly class certification precedents – those jurisdictions tend to spawn more class action litigation. As reflected by the volume of rulings on class action issues, those jurisdictions in 2015 were clustered in California, Delaware, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Texas, and Washington. Rulings from California alone resulted in 64 class action decisions.

In terms of class action rulings at the state level, the following map shows those rulings:

State Court Class Certification Decisions By State



Wage & hour claims, in particular, have been filed in state courts at a precipitous rate. The most dominant trend has been a steep rise in the number of class action lawsuits filed in state courts alleging violations of California's overtime laws or the California Labor Code and wage & hour regulations. This trend continued unabated in 2015. The rate of new case filings has continued to grow to the point where multiple class actions are filed in California every day.

The reasons for this trend are varied. First, California's wage & hour laws differ from federal law in subtle yet important ways. This means that an employer might be compliant with federal law, but not California law. Second, California's procedural rules make it easier to file a class action or collective action. In contrast, the Fair Labor Standards Act requires an "opt-in" procedure that is generally less lucrative to plaintiffs than a traditional "opt-out" class action. Third, California's unfair competition law allows claimants to borrow violations of other laws but extend the statute of limitations to four years, which tends to make

class actions more lucrative. Fourth, many California Labor Code provisions allow for the recovery of attorneys' fees, creating additional incentives for plaintiff's counsel to pursue class actions.

This Chapter analyzes reported class action rulings from all state jurisdictions, with an emphasis on the leading California, Delaware, Illinois, New Jersey, New York, Pennsylvania, Texas, and Washington precedents.

A. Employment Discrimination Rulings

(i) California

***Javorsky, et al. v. Western Athletic Clubs, Inc*., 2015 Cal. App. LEXIS 1111 (Cal. App. 1st Dist. Dec. 11, 2015).** Plaintiffs, a group of health club members, brought a class action alleging that Defendant violated the California Unruh Civil Rights Act and the Unfair Competition Law ("UCL") by charging a lower membership fee to people ages 18 to 29 than to people age 30 and over. Defendant launched a young professional program in 2003, which offered a reduced-cost membership for individuals ages 18-29, and Defendant maintained that the discount reflected the reduced financial resources of the under-30 age group. *Id.* at *3-4. In moving for summary judgment, Defendant argued that its age-based pricing practice promoted access to its clubs for those who might not otherwise be able to afford to join them and that California law permits reasonable discounts for this purpose. *Id.* at *5-6. The trial court granted Defendant's motion, finding that the young professional discount was reasonable and not arbitrary. *Id.* at *10. The California Court of Appeal affirmed the trial court's judgment. The Court of Appeal noted that a policy treating age groups differently under a price differential might be upheld if the pricing policy ostensibly provides a social benefit to the recipient group who was disadvantaged economically when compared to other groups paying full prices and if there was no invidious discrimination. *Id.* at *22. The Court of Appeal found that Defendant's evidence supported a finding that people in the under-30 age group were less able to afford a membership than people of 30 and over, and that the discount increased access for 18-29 year old individuals to facilities and activities promoting physical fitness and did not perpetuate irrational stereotypes. *Id.* at *26. Defendant presented evidence from its expert witness that individuals under age 30 tend to have substantially less disposable income than individuals over 30, and that they had some economic disadvantage when compared to those over 30. *Id.* at *28-32. Plaintiff nonetheless contended that the discount perpetuated "ageism" and the harmful stereotype that "younger is better," and its invidious nature was demonstrated by the fact that Defendant received some complaints from its older members. *Id.* at *35. The Court of Appeal, however, found that Plaintiff's argument lacked merit. According to the Court of Appeal, offering a reasonable discount to a particular age group did not suggest that the group was better than another, and even if it did, Defendant's program did not communicate malice, hostility, or damage to persons over 30. *Id.* at *36. The Court of Appeal opined that Defendant met his burden of demonstrating that its pricing program did not constitute arbitrary, unreasonable, or invidious discrimination. *Id.* at *36. Further, because Plaintiff failed to establish a triable issue of material facts, including whether Defendant's pricing scheme was really designed to address the income levels of 18 to 29 year olds and promote Defendant's legitimate business interest, the Court of Appeal concluded that the trial court did not err in granting summary judgment to Defendant. *Id.* at *37-42. Accordingly, the Court of Appeal affirmed the trial court's judgment.

(ii) New Jersey

***Schiavo, et al. v. Marina District Development Co.*, N.J. Super LEXIS 156 (N.J. Super. App. Div. Sept. 17, 2015).** Plaintiffs, a group of current and former women casino employees, brought an action alleging that Defendant adopted and applied personal appearance standards ("PAS"), and subjected them to illegal gender stereotyping, sexual harassment, disparate impact, and disparate treatment in violation of the New Jersey Law Against Discrimination ("LAD"). The trial court found that the provisions of the challenged PAS were reasonable in light of casino industry standards and customer expectations, and also because Plaintiffs consented to abide by Defendant' program known as "the BorgataBabes" when they accepted their employment. *Id*. at *2. The trial court granted summary judgment to Defendant, finding that the PAS requirements were permitted by N.J.S.A. 10:5-12(p), a provision allowing an employer to establish reasonable employee appearance standards. *Id*. at *2. On appeal, the New Jersey Appellate Division

affirmed in part. Plaintiffs alleged that: (i) the PAS on its face was discriminatory, in violation of the LAD, and outside the bounds of reasonable appearance standards provided in N.J.S.A. 10:5-12(p); (ii) the PAS weight standard imposed unlawful gender stereotyping; and (iii) the disparate enforcement of PAS resulted in sexual harassment and created a hostile work environment. *Id*. at *26. The Appellate Division noted that in *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175 (3d Cir. 2015), the Third Circuit held that dress codes were permissible under Title VII as long as, like other work rules, they were enforced even-handedly between men and women, even though the specific requirements may differ. *Id*. at *32. The Appellate Division noted that a similar Title VII challenge was presented in *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2015), where employees challenged the employer's use of maximum weight requirements as imposing different standards upon female flight attendants and their male counterparts. *Id*. at *34. The difference in treatment was facially discriminatory as it applied less favorable treatment to one gender over the other. *Id*. The Appellate Division observed that a general principle gleaned from the cited authorities was that when an employer's reasonable workplace appearance, grooming, and dress standards complied with state or federal law prohibiting discrimination, even if they contained sex-specific language, did not violate Title VII, and by extension the LAD. *Id*. at *36. The Appellate Division observed that no expert evidence explained how the PAS weight standard posed an unequal burden on one gender over the other, or that adversely affected female over male applicants for positions or advancement. *Id*. at *38. The record showed that the BorgataBabes position, from its inception, included an element of performance and a public appearance component. *Id*. at *41. Accordingly, the Appellate Division concluded that the evidence failed to present a cognizable claim of discrimination based on Defendant's weight policy. *Id*. at *43. The Appellate Division similarly found that Plaintiffs failed to show that Plaintiffs failed to assert a colorable claim for discrimination or hostile work environment. However, the Appellate Division noted that Plaintiffs had alleged sufficient facts to demonstrate that the PAS weight standards were enforced in a harassing manner against women because of their gender, thereby alleging a viable hostile work environment. *Id*. at *57. Accordingly, the Appellate Division reversed the trial court's finding on the hostile work environment claim, but affirmed as to the remaining claims.

(iii) New York

***Margerum, et al. v. City Of Buffalo,* 2015 N.Y. LEXIS 250 (N.Y. Feb. 17, 2015).** Plaintiffs, a group of 12 white firefighters, brought a putative class action alleging that Defendant engaged in reverse, disparate treatment racial discrimination by permitting the promotion eligibility lists to expire before their maximum legal duration, thereby violating the New York Human Rights Law, the Civil Service Law, and the New York Constitution. The promotion eligibility lists were based on a controversial examination used to select firefighters for promotions. A separate putative class action had earlier been filed alleging an illegal disparate impact against African-American firefighters. *Id*. at *2-3. Defendant moved to dismiss the compliant, asserting Plaintiffs' undisputed failure to file a notice of claim under General Municipal Law. Defendant argued that the statutory provision required Plaintiffs, as a pre-condition to commencing suit, to provide prior notice of their claims in order to permit timely investigation and opportunity for early resolution. *Id.* at *4. After several appeals and then a trial, Defendant appealed a judgment for Plaintiffs, which the New York Appellate Division affirmed in part. On further appeal, the New York Court of Appeal rejected Defendant's motion, finding no notice of claim requirement. *Id.* at *7. While § 50-e(1)(a) of the General Municipal Law requires service of a notice of claim within 90 days after the claim arises "[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation," § 50-i(1) precludes commencement of an action against a city "for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city," unless a notice of claim has been served. *Id.* at *6-7. The Court of Appeal noted that the Appellate Division cases addressing the issue had determined that the General Municipal Law does not encompass a cause of action based on the Human Rights Law and "[s]ervice of a notice of claim is therefore not a condition precedent to commencement of an action based on the Human Rights Law in a jurisdiction where §§ 50-e and 50-i provide the only notice of claim criteria." *Id.* at *7. Because human rights claims are not tort actions under 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i, the Court of Appeal concluded that Plaintiffs were not subject to the notice of claim requirement. *Id.* The Court of Appeal therefore affirmed the denial of Defendant's motion to dismiss. The Court of

Appeal further modified an earlier judgment granting Plaintiffs' motion for summary judgment as to the liability involving discrimination by remitting to the trial court for further proceedings because Defendant's liability turned on issue "whether it had a strong basis in evidence to believe it [would] be subject to disparate impact liability at the time that it terminated the promotion eligibility lists while discrimination litigation was still pending against it," that could not be determined on motion for summary judgment. *Id.* at *10-11.

B. Wage & Hour Rulings

(i) California

***Alberts, et al. v. Aurora Behavioral Health Care,* 2015 Cal. App. LEXIS 913 (Cal. App. 2d Dist. Oct. 16, 2015).** Plaintiffs, a group of nurses at a hospital, brought a class action alleging that Defendant denied them meal and rest periods and forced them to work off-the-clock in violation of the California Labor Code. Plaintiffs claimed that Defendant regularly and intentionally understaffed its hospitals and forced them to remain on-duty in lieu of taking of meal and rest periods. *Id.* at *1. Plaintiffs also alleged that Defendant regularly required nurses to perform tasks off-the-clock and without adequate overtime compensation. *Id.* at *2. Plaintiffs proposed multiple sub-classes for certification, including: (i) the meal break sub-class, (ii) the rest break sub-class, (iii) the overtime sub-class, and (iv) two derivative sub-classes for waiting time penalties and allegedly inaccurate wage statements. *Id.* The trial court denied Plaintiffs' motion for class certification, holding that the proposed sub-classes lacked commonality. *Id.* On appeal, the California Court of Appeal reversed. The Court of Appeal found that the trial court relied on improper criteria, erroneous legal assumptions, and insubstantial evidence in denying certification. *Id*. The Court of Appeal noted that the trial court had deemed legally acceptable Defendant's policy that employees be provided with "an unpaid 30-minute break for a meal period approximately halfway between the beginning and end of the employee's shift" in concluding that Plaintiffs failed to demonstrate the existence of a universal practice of denying staff the benefits of that policy. *Id.* at *25-26. The Court of Appeal found that trial court erred because the mere existence of a lawful policy would not defeat class certification in the face of actual contravening policies and practices that, as a practical matter, undermined the written policy, and when Plaintiffs in fact disputed the "facial" legality of Defendant's break policies. *Id.* Moreover, Plaintiffs submitted evidence to demonstrate that Plaintiffs regularly failed to receive their meal period until far later in their shifts, and produced statistical evidence showing many workers missed breaks or had them cut short. *Id.* at *32-38. The statistical evidence reflected a common practice by which Defendant's management modified time-keeping records, and substantiated declarants' testimony that Defendant undertook active efforts to hide its wage & hour violations. The Court of Appeal thus found that the evidence of widespread violation of Defendant's policies would be sufficient to warrant consideration for class certification, and the trial court's conclusion regarding the legality and application of applicable policies was improper. *Id.* at *47. The Court of Appeal also held that even if Plaintiffs articulated a common issue for purposes of class certification, it was unclear whether the case would be manageable as a class action and whether individual issues, such as damages, or other common issues would predominate. *Id.* at *47. The Court of Appeal therefore remanded the action for further proceedings, and directed the trial court to determine whether the handling of individual issues might have an effect on the ultimate manageability of the case as a class action.

***Ayon, et al. v. Camino Real Foods,* Case No. BC541415 (Cal. Super. Ct. July 6, 2015).** Plaintiff, a former employee, brought a class action alleging that Defendants violated the California Labor Code and wage orders by failing to provide them rest breaks, meal breaks, and vacation time, and failed to compensate them for all hours worked. *Id*. at 2. Plaintiff had an arbitration agreement with Defendant Real Time Staffing Services. Defendant Camino Real Foods staffed its workforce from Real Time. Camino Real, Plaintiff's employer and a non-signatory to the agreement, sought to invoke the arbitration agreement pursuant to the doctrine of equitable estoppel, which the Court granted. The arbitration agreement was in English, and Plaintiff contended that he spoke and wrote Spanish and had very limited understanding of English. *Id*. at 4. Defendant Real Time contended that it offered Plaintiff and all other applicants an option of completing paperwork (including arbitration agreement) in Spanish and English, but Plaintiff chose to complete it in English. *Id*. The Court observed that although Plaintiff had a limited understanding of

English, his correct answer to a word problem demonstrated some ability to read and understand English. *Id*. at 5. The Court concluded that his signature and initials on the arbitration clause were sufficient to establish that he signed a facially valid arbitration agreement. *Id*. The Court also noted that the FAA establishes a federal policy favoring arbitration, and requires rigorous enforcement of agreements to arbitrate. *Id*. at 6. It also reasoned that an arbitration clause is subject to the defense of unconscionability. The Court observed that it can refuse to enforce a contract if both procedural as well as substantive unconscionability is present. *Id*. at 7. The Court further determined that a contract term is not substantively unconscionable when it merely gives one side a greater benefit. *Id*. The Court noted that the agreement exhibited at least a "modicum of bilaterality," and contained no terms that shocked the conscience. *Id*. at 8. The Court explained that the agreement was titled "Mutual Agreement to Arbitrate," and did not contain oppressive terms that shocked the conscience, and was consistent with the requirements of the Federal Arbitration Act and the California Arbitration Act. *Id*. at 8-9. The Court observed further that, unlike those cases where an arbitration agreement was unsconscionable, the agreement here was significantly shorter, and its arbitration provision was flagged by a bolded, capitalized title, and separately initialed by Plaintiff. *Id*. at 9. The Court found that these factors indicated procedural validity in the formation of an agreement. *Id*. Accordingly, the Court concluded that the arbitration agreement was valid. As to the class arbitration waiver, the Court noted that the parties' mutual assent at the time of contracting guided the interpretation of the contract. The Court remarked that the language of the arbitration agreement between the parties indicated that it was merely a bilateral agreement, and none of the evidence offered indicated that the parties intended the agreement to cover class arbitration. *Id*. at 11. Accordingly, the Court dismissed the class claims based on the agreement. Finally, the Court observed that Defendant Camino Real pointed out that Plaintiff's claims against Defendant Real Time and Camino Real were identical. *Id*. at 12. Defendant Camino Real clarified that it did not rely on any judicial admission of an agency relationship in support of its motion to compel arbitration, but rather believed this evidenced how Plaintiff's claims against Defendant Camino Real were intimately found in and intertwined with the claims against Defendant Real Time. The Court agreed with this argument and concluded the doctrine of equitable estoppel was applicable and Defendant Camino Real also+ could compel Plaintiff to arbitration.

***Augustus, et al. v. ABM Security Services, Inc*., 2014 Cal. App. LEXIS 1209 (Cal. App. 2d Dist. Jan. 29, 2015).** Plaintiffs, a group of security guards, brought a putative class action alleging that Defendant required them to remain on-call during breaks, and failed to relieve them of all duties during rest breaks as required by § 226.7 of the California Labor Code. In the course of discovery, Defendant admitted that it required security guards to "keep their radios and pagers on during rest breaks, to remain vigilant, and to respond when needs arise, such as when a tenant wishes to be escorted to the parking lot, a building manager must be notified of a mechanical problem, or an emergency situation occurs." *Id.* at *6. Plaintiffs filed a motion for summary judgment based on Defendant's admission, and based on a California Division of Labor Standards Enforcement Opinion Letter stating that rest periods must be duty-free. The trial court agreed with Plaintiffs certified class of 15,000 California-based security guards, granted Plaintiffs' motion for summary judgment, and then entered a judgment in favor of the class, awarding $90 million in rest break premium pay, interest, and waiting time penalties. *Id.* at *12. Defendant appealed. The California Court of Appeal reversed the trial court's judgment and held that the trial court erred in ruling that Defendant's on-call rest break policy violated California law. The Court of Appeal held that California law only requires that employees be relieved of "working" during rest breaks, but does not require that they be relieved of being "on duty" or be relieved of all employer control. *Id.* at *17. The Court of Appeal drew a clear distinction between being available for work (on-call) versus actually working (on-duty) and determined that the Legislature, when drafting § 226, intended only to prohibit actual work during rest breaks and not being available to work. *Id*. The Court of Appeal explained that the requirement that employees be free of employer control and relieved of all duty applies only to meal breaks, as the Legislature specifically required in the Wage Orders that an employer completely relieve its employees of all duty for a 30-minute meal period. Because nothing in the applicable Labor Code provisions or Wage Orders suggest that an employee must be free of all employer control during rest breaks, the Court of Appeal concluded that the Legislature did not intend the same prohibition to apply. *Id.* at *27. In addition, while employers need not pay for uninterrupted meal breaks, they must pay for rest breaks. This difference

provided further basis for the Court of Appeal's decision that a policy requiring Plaintiffs to remain on-call during a rest breaks was not unlawful so long as Defendant did not require Plaintiffs to perform work during a rest break. Plaintiffs did not produce any evidence of any rest break actually being interrupted due to the on-call policy. To the contrary, the evidence showed that they engaged in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the internet. *Id.* at *17. Thus, the Court of Appeal concluded that remaining on call did not itself constitute performing work. Accordingly, the Court of Appeal reversed the trial court's orders granting summary judgment, and vacated the judgment against Defendant.

***Behaein, et al. v. Pizza Hut, Inc.*, Case No. BC541415 (Cal. Super. Ct. July 15, 2015).** Plaintiffs, a group of drivers, brought an action alleging that Defendants' vehicle reimbursement policy violated § 2802 of the California Labor Code. Defendants paid their California-based drivers a set amount per order delivered, regardless of the distance driven. *Id*. at 2. Defendants paid drivers at 90 cents per order, but after January 2007, Defendants determined the rate by multiplying cost-per-mile and average miles per trip, then dividing that number by the average orders per trip. *Id*. Defendants modelled its vehicle costs on those of a new Toyota Camry, and contended that since the Camry was more expensive, this overestimated the costs. *Id*. Plaintiffs asserted that using Camry underestimated those costs. Plaintiffs moved to certify a reimbursement class, which the Court granted. The Court observed that the only question contested was whether Plaintiffs' mileage reimbursement claim was susceptible to common proof. The Court noted that § 2802(a) requires an employer to indemnify its employees for expenses they incurred in the discharge of their duties. *Id*. at 6. The Court noted that in *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007), the California Supreme Court laid out three possible ways of reimbursing employees, including: (i) the actual expense method; (ii) mileage reimbursement method; and (iii) lump-sum payment method. *Id*. at 6-7. Plaintiffs put forth two theories of establishing that Defendants under-reimbursed Plaintiffs on a class-wide basis. First, Plaintiffs submitted common proof that Defendants' method of compensation was not based on a reasonable assessment of miles driven and expenses incurred. *Id*. at 8. Plaintiffs' evidence showed that Defendants compensated drivers based on the assumption that employees drove approximately 2.68 miles per order, and in reality employees actually drove an average of 3.79 miles per order. *Id*. Plaintiffs also submitted evidence that in calculating the lump sum rate, Defendants used a mileage rate over 60% lower than the IRS rate that under-compensated Plaintiffs. *Id*. Based on the evidence presented, the Court determined that it was persuaded that Plaintiffs' claim was susceptible to common proof on a class-wide basis. *Id*. As an alternative basis for establishing liability, Plaintiffs asserted that Defendants' own electronic delivery records showed that their method of compensation under-compensated drivers in comparison to the mileage reimbursement method. *Id*. at *9. Plaintiffs contended that Defendants' method was a lump-sum method because Plaintiffs were compensated on the same amount per order regardless of how many miles they drove. *Id*. at 9-10. The Court remarked that while it was true that Defendants' method was not a true lump-sum payment method because Defendants paid drivers per order delivered, it nevertheless found that Defendants' method was closer to lump-sum method that it was to a mileage reimbursement method. *Id*. at 10. Accordingly, the Court concluded that Plaintiffs' established that they could show Defendants' liability through common proof, and granted their motion for class certification.

***Contos, et al. v. Kokkari, Ltd.,* 2015 Cal. App. Unpub. LEXIS 1623 (Cal. App. 1st Dist. Mar. 6, 2015).** Plaintiff, a restaurant employee, brought a putative class action under the California Labor Code alleging that Defendant maintained a uniform policy of changing employee time records and failed to provide meal and rest breaks. *Id.* at *3. Plaintiff also alleged that Defendant failed to compensate employees for purchasing and maintaining uniforms, withheld tips from servers, and failed to provide accurate wage statements. *Id.* Plaintiff sought to represent 232 current and former employees. Pursuant to Defendant's subsequent settlement offer, 182 of the 232 potential class members signed a settlement agreement releasing all claims asserted in this action. Plaintiff moved for class certification seeking to represent all employees, including those who settled their claims. The trial court denied Plaintiff's motion, finding that common issues of fact and law did not predominate because resolving the enforceability of the settlement agreements required an individualized inquiry into each agreement. *Id.* at *6. The trial court also found that the class was not ascertainable until it determined the enforceability of the settlement agreements, and

Plaintiff's claims were not typical of the putative class because he did not sign a settlement agreement. *Id.* at *6-7. Plaintiff appealed, and the California Court of Appeal affirmed the trial court's order. The Court of Appeal found that substantial evidence supported the finding that Plaintiff's claims were not typical of the proposed class. The Court of Appeal noted that numerous case law precedents "have held [that] a proposed class representative cannot establish typicality where members of the proposed class have signed settlement agreements but the proposed representative has not." *Id.* at *9. According to the Court of Appeal, unlike the majority of the proposed class, Plaintiff did not sign a settlement agreement, and thus his legal position was different from most of the proposed class. *Id.* at *12. The Court of Appeal further noted that Plaintiff's claims and the defenses to those claims were not typical for the additional reason that the threshold questions of whether particular class members who signed settlement agreements wished to challenge the validity of the agreements, and whether the settlement agreements were valid and covered the subject matter of the litigation would have to be decided before the merits. *Id.* at *16-17. The Court of Appeal therefore concluded that the trial court did not err in ruling that Plaintiff failed to establish typicality, and accordingly affirmed the trial court's order denying Plaintiff's motion for class certification.

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***Cruz, et al. v. Sun World International, LLC,* 2015 Cal. App. Unpub. LEXIS 1158 (Cal. App. 5th Dist. Nov. 23, 2015).** Plaintiffs, a group of agricultural workers, brought a class action alleging that Defendant failed to provide them their full rest and meal breaks, did not compensate them for breaks that were not provided, required them to provide their own tools without reimbursement, required them to wash their grape harvest trays without compensation, failed to provide employees with accurate itemized wage statements, and declined to timely pay all wages due at the time of termination of employment. Plaintiffs sought to certify a class of individuals employed by Defendant as non-exempt agricultural employees, either directly or through the use of farm labor contractors ("FLC"). The trial court denied the motion for class certification, finding that the FLC class was not a sufficiently ascertainable group for class treatment, and further, could not be members of the proposed class because Plaintiffs failed to establish they were joint employees of Defendant. *Id.* at *6. Thus, by limiting the proposed class to employees that Defendant hired directly, the trial court concluded that common issues did not predominate over individual issues, Plaintiffs' claims were not typical of those of the class, Plaintiffs were not adequate representatives of the class, and a class action was not a superior means of adjudicating the claims because of the lack of commonality. Plaintiffs appealed the denial of the motion for class certification, and the California Court of Appeal affirmed the order denying class certification. *Id.* at *56. The Court of Appeal noted that the motion for class certification indicated that the only claims asserted on behalf of the entire class were the claims that Defendant's workers were not provided their full meal and rest breaks or properly compensated for the failure to provide them. *Id.* at *12. Agreeing with the trial court that the FLC class was not ascertainable, the Court of Appeal noted that Plaintiffs could not wait until the merits of the class claims were adjudicated to establish a basis for finding that the proposed class was ascertainable. *Id.* at *16. Further, the Court of Appeal held that Plaintiffs' evidence did not demonstrate a class-wide uniform practice. *Id.* at *49. Finally, because the Court found that a lack of predominant common issues of law or fact was a sufficient basis for denial of certification of the direct employee portion of the class, the Court of Appeal declined to address the trial court's findings that Plaintiffs did not have claims typical of the class, that Plaintiffs could not adequately represent the members of the proposed class, and that a class action would not be a superior means of adjudicating Plaintiffs' claims. *Id.* at *56. Accordingly, the Court of Appeal affirmed the trial court's order denying class certification. *Id.*

***Flowers, et al. v. Los Angeles County Metropolitan Transportation Authority,* 2015 Cal. App. Unpub. LEXIS 8544 (Cal. App. 2d Dist. Nov. 25, 2015).** Plaintiff, a bus and train operator, brought a putative class action alleging that Defendant failed to pay them minimum wage and overtime compensation in violation of the FLSA and the California Labor Code. *Id.* at *2. Defendant demurred to all causes of action and filed a petition to compel arbitration of some of Plaintiff's claims. The trial court sustained the demurrer as to the causes of action for violation of state minimum wage and rest period requirements imposed by the Labor Code and Wage Order 9, as well as for civil penalties under the Private Attorney General Act

("PAGA"), and overruled the demurrer with respect to the FLSA claim and denied the petition to compel arbitration. *Id.* at *3. Plaintiff voluntarily dismissed the FLSA claim without prejudice and the trial court entered a judgment of dismissal in Defendant's favor. On appeal, the California Court of Appeal reversed the order sustaining the demurrer as to violation of state minimum wage requirements, Wage Order 9, and to the cause of action for civil penalties under the PAGA. *Id.* at *30-31. Defendant contended that §§ 30257 and 30750 of Public Utilities Code ("PUC") exempted it from the minimum wage and rest period requirements imposed by the Labor Code and Wage Order 9. *Id.* at *16. The Court of Appeal, however, found that the plain language of the PUC sections did not support Defendant's position, as it simply described Defendant's obligation to bargain in good faith with a duly designated labor organization, to execute a collective bargaining agreement, and to comply with the terms of such an agreement that shall not be limited or restricted by any other provision of law. *Id.* at *17. Defendant failed to explain how complying with the state minimum wage law would limit or restrict its obligation to perform any of the tasks specified under the PUC. *Id.* Further, the absence of an express exemption from the applicable minimum wage requirements in the PUC sections on which Defendant relied might be contrasted with express exemptions accorded to public employee in other statutes. *Id.* at *18. The Court of Appeal therefore held that the PUC did not exempt the minimum wage provisions of Wage Order 9. *Id.* at *19. The Court of Appeal further ruled that Defendant's interpretation of the PUC conflicted with the express terms of Wage Order 9 which, subject to certain exceptions, applies to all individuals employed in the transportation industry. *Id.* at *22. The Court of Appeal explained that, under the applicable principles of statutory interpretation, Defendant could not only comply with the minimum wage law, but also meet its obligations to bargain in good faith with a duly designated labor organization, execute a collective bargaining agreement, and comply with its terms. *Id.* at *22-23. The Court of Appeal therefore opined that the trial court erred by sustaining the demurrer to Plaintiff's cause of action for violation of the state minimum wage law based on the PUC. For the same reason, the Court of Appeal reversed the trial court's order sustaining the demurrer to Plaintiff's PAGA claim. The Court of Appeal also held that the trial court did not err by sustaining the demurrer to Plaintiff's cause of action for rest period violations, finding that the rest period requirements set forth in Wage Order 9 did not apply to Plaintiff because Defendant was only required to pay a premium for overtime worked as defined in the parties' collective bargaining agreement. *Id.* at *29. Accordingly, the Court of Appeal reversed in part the trial court's order sustaining Defendant's demurrer.

***Fowler, et al. v. Carmax, Inc.,* 2015 Cal. App. Unpub. LEXIS 559 (Cal. App. 2d Dist. Jan. 28, 2015).** Plaintiffs, a group of sales consultants, brought a putative class action alleging that Defendant failed to provide them meal and rest periods in violation of the California Labor Code. Plaintiff also alleged that Defendant failed to comply with wage statement requirements, failed to timely pay wages due at termination, and violated the California Unfair Competition Law. Defendant moved to compel arbitration pursuant to a dispute resolution agreement that Plaintiffs signed as a condition of employment. Plaintiffs opposed the motion, arguing that Defendant waived its right to compel arbitration and the agreement was procedurally and substantively unconscionable. The trial court granted Defendant's motion. Upon Plaintiffs' appeal, the California Court of Appeal affirmed the trial court's order. Although Defendant had filed two successful motions for summary judgement and obtained substantial discovery from Plaintiffs before they moved to compel arbitration, the Court of Appeal found that Defendant had not waived its right to compel arbitration. *Id.* at *10-11. The Court of Appeal noted that Defendant did not take any significant action inconsistent with the right to arbitrate. *Id.* at *14. Although three years have passed since Plaintiffs filed their complaints, the Court of Appeal found that Defendant's delay in filing the motion to compel was not unreasonable because during the year after the filing of Plaintiffs' complaint and before the parties stipulated to a stay pending the California Supreme Court's decision of *Brinker Restaurant Corp. v. Superior Court,* 165 Cal. App. 4th 25 (2008), the decision of *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), had made a motion to compel a highly risky proposition. *Id.* at *14-15. Moreover, the action was stayed for the two of those three years pending the resolution of the legal questions in *Brinker.* When Defendant first requested arbitration with the stay still in effect, it acted only slightly more than a month after *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), cast *Gentry* into doubt, and Defendant filed its motion within two weeks later. *Id.* In these circumstances, the Court of Appeal determined that the parties actively litigated the case only during the year preceding the stay, and Plaintiffs did not suffer any prejudice due to the delay in initiating arbitration. *Id*. at *15. Further, the Court of Appeal found that the

arbitration agreement was not unconscionable. Although there was some evidence of procedural unconscionability, the Court of Appeal held that the provision allowing Defendant to unilaterally alter or terminate the agreement by posting advance notice did not constitute sufficient evidence of substantive unconscionability to counterbalance the relatively low level of procedural unconscionability. *Id.* at *18. Accordingly, the Court of Appeal affirmed the trial court's order granting Defendant's motion to compel arbitration.

***Garrido, et al. v. Air Liquide Industrial U.S. L.P.,* 2015 Cal. App. LEXIS 946 (Cal. App. 2d Dist. Oct. 26, 2015).** Plaintiff, a truck driver, brought a putative class action alleging that Defendant, his former employer, violated the California Labor Code and Unfair Competition Law by failing to provide him timely meal periods and accurate wage statement, and by failing to pay compensation due upon separation of employment. *Id.* at *3-4. Defendant moved to compel arbitration pursuant to an arbitration agreement governing Plaintiff's employment. The arbitration agreement precluded Plaintiff from pursuing class or representative claims and expressly provided that the Federal Arbitration Act ("FAA") would govern the agreement and any arbitration proceedings. *Id.* at *3. The trial court denied the motion to compel arbitration, determining that the arbitration agreement posed an obstacle to the employee's ability to vindicate statutory rights under the Labor Code. *Id.* at *4. On Defendant's appeal, the California Court of Appeal affirmed. The Court of Appeal found that the FAA did not apply to Plaintiff's dispute because the statute expressly exempts transportation workers from its scope. *Id.* at *5-6. Because Plaintiff worked as a truck driver who transported Defendant's products across state lines, the Court of Appeal determined that he was a transportation worker within the meaning of the FAA. *Id.* The Court of Appeal thus held that, despite the arbitration agreement's express invocation of the FAA, the plain terms of the statute superseded the terms of the agreement. The Court of Appeal also found that the arbitration agreement was enforceable under the California Arbitration Agreement ("CAA") and the factors set forth in *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007), still remained valid. According to Court of Appeal, the *Gentry* rule was not completely undone by *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), and *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal. 4th 348 (2014), as both *Concepcion* and *Iskanian* explicitly addressed the enforceability of class waivers in cases where the FAA applies, and neither considered the continued viability of *Gentry* in cases not governed by the FAA. *Id.* at *12-14. In the absence of such authority, the Court of Appeal concluded that *Gentry* sets forth valid grounds for refusing to enforce an arbitration agreement as long as the FAA does not apply to the dispute. *Id.* at *16. Thus, applying the *Gentry* rule to the facts of this case, the Court of Appeal reasoned that class proceedings would be a significantly more effective way of allowing employees to vindicate their statutory rights, and therefore, the arbitration agreement's prohibition of class proceedings was unenforceable. *Id.* at *18-20. Accordingly, the Court of Appeal affirmed the trial court's order denying Defendant's motion to compel individual arbitration.

***Gentile, et al. v. Keenan & Associates,* 2015 Cal. App. Unpub. LEXIS 5256 (Cal. App. 2d Dist. July 27, 2015).** Plaintiff, a claims examiner, brought a putative class action alleging that Defendant, an insurance brokerage and consulting firm, misclassified her and other claims examiners as exempt employees to avoid paying overtime in violation of the California Labor Code. Plaintiff moved to certify a class defined as individuals employed by Defendant as claims examiners or senior claims examiners in California who worked in the workers' compensation department, schools division, between October 2007 and July 2013. *Id.* at *4. Plaintiff asserted that the proposed class was made up of 92 members who performed the same job of processing workers' compensation claims in accordance with Defendant's "master binder," which routinized and circumscribed the class members' tasks by requiring strict adherence to the procedures, rules, and preformatted templates and provided detailed instructions as to how files must be documented and processed. *Id.* The trial court denied class certification, finding that common issues did not predominate based on Defendant's declarations indicating that many claims examiners understood the master binder to be a resource and rarely referred to it when performing their duties. *Id.* at *5-7. On Plaintiff's appeal, the California Court of Appeal affirmed. The Court of Appeal found that substantial evidence supported the trial court's conclusion. Although it was undisputed that all the proposed class members performed the same duty of processing indemnity claims, the Court of Appeal noted that the evidence demonstrated variations among them as some claims examiners performed predominantly non-discretionary, data-tabulating tasks and others performed work directly related to management policies or

general business operations. *Id.* at *25-28. Plaintiff argued that, even conceding some differences among potential class members, common issues predominated because all witness and documentary evidence resoundingly confirmed that Defendant limited the class members' work to the day-to-day processing of individual workers' compensation files, as opposed to formulating managerial or operating policies. *Id.* at *29. The Court of Appeal found significant the variations in the tasks for which class members were responsible and in the discretion they exercised. The record supported the trial court's finding that some claims examiners performed their duties in accordance with the master binder and some used their own judgment and training. *Id.* at *39. The declarations submitted by Defendant reflected that many claims examiners performed a variety of discretionary tasks, including litigating and settling workers' compensation claims, and that they did not perform their duties by merely plugging claimant data into formulas provided by Defendant. *Id.* at *36-37. The declarations further reflected that unique managerial styles of the supervisors and the individual relationship between supervisor and claims examiner impacted individual work experiences, and thus the level of supervision also varied among the class members. *Id.* at *40. The Court of Appeal therefore affirmed the trial court's order denying Plaintiff's motion for class certification on the basis that substantial evidence supported each of the trial court's findings with regard to predominance.

***Gerard, et al. v. Orange Coast Memorial Medical Center,* 2015 Cal. App. LEXIS 132 (Cal. App. 4th Dist. Feb. 10, 2015).** Plaintiffs, a group of healthcare workers, brought a putative class action alleging that Defendant's meal break policy authorizing waivers of second meal periods on shifts longer than 12 hours violated § 512 (a) of the California Labor Code. While § 512 (a) requires two meal periods for shifts longer than 12 hours, Industrial Wage Commission ("IWC") Wage Order No. 5 authorizes employees in the healthcare industry to waive one of those two required meal periods on shifts longer than 8 hours. *Id.* at *2. Plaintiffs occasionally worked shifts longer than 12 hours without being provided a second meal period. Although Plaintiffs signed second meal period waivers pursuant to Wage Order No. 5, they contended that the second meal period waiver violated § 512 and that Wage Order No. 5 was invalid to the extent it authorized employees to waive second meal periods for shifts longer than 12 hours. Defendant moved for summary judgment relying upon the Wage Order exception. The trial court granted summary judgment in Defendant's favor. On Plaintiffs' appeal, the California Court of Appeal reversed the trial court's judgment. The Court of Appeal found that Wage Order No. 5 was partially invalid to the extent it authorized healthcare workers to waive their second meal periods on shifts longer than 12 hours because it conflicted with section 512(a). *Id.* at *6. The Court of Appeal extensively reviewed the legislative history underlying §§ 512 and 516, which authorize the IWC to promulgate wage orders, and concluded that the legislative history "evidences the intent to prohibit the IWC from [adopting] wage orders in ways that conflict with meal period requirements in § 512, including the proviso [that a] second meal period may be waived only if the total hours worked is less than 12 hours." *Id.* at *14. The Court of Appeal therefore found that the IWC exceeded its authority in enacting § 11(D) of Wage Order No. 5 and declared Wage Order 5 to be invalid to the extent it created an "unauthorized additional exception … beyond the express exception for waivers on shifts of no more than 12 hours." *Id.* at *16-17. The Court of Appeal also held that its decision had at least some retroactive effect in that the authorization for waiver of a second meal period in the Wage Order was partially invalid from the moment it was promulgated because § 516 states that the IWC's authority to issue wage orders is limited by the specific terms of California Labor Code. *Id.* at *24. The Court of Appeal found no compelling reason that warranted an exception to the general rule of retroactivity of its decision partially invalidating Wage Order 5. *Id.* The Court of Appeal therefore held that Plaintiffs were entitled to seek premium pay under § 226.7 of the Labor Code for any failure by Defendant to provide mandatory second meal periods pre-dating its decision and within the three-year statute of limitations period. *Id.* at *24-25. Accordingly, the Court of Appeal reversed the trial court's grant of summary judgment.

***Johnson, et al. v. Contemporary Services Corp.,* 2015 Cal. App. Unpub. LEXIS 1885 (Cal. App. 2d Dist. Mar. 18, 2015).** Plaintiffs, a group of employees, brought a class action for Defendants' violations of the Private Attorney General Act ("PAGA") and several provisions of the California Labor Code. Defendants' standard employment agreement contained an arbitration provision, which was silent on the issue of representative actions. When Plaintiffs filed their complaint, the law was in flux concerning the extent to which certain class action claims could be litigated in the trial court when the parties had an

arbitration agreement that was either silent on, or expressly barred, representative claims. *Id*. at *2. After the trial court granted Defendants' motion to compel arbitration, the arbitrator issued an intermediate award finding that the arbitration agreement was not substantively unconscionable, and that the employer could not be compelled to arbitrate representative actions, including the PAGA claims, specifically as the agreement was silent on the issue. *Id*. at *3. The trial court confirmed the intermediate arbitration award, and Plaintiffs appealed. Two years later, the California Supreme Court decided *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), holding that class action waivers of employees' unwaivable statutory rights were not enforceable, except in regard to claims under the PAGA, which were actions by the state being prosecuted by individuals. *Id*. at *5. Plaintiffs, meanwhile, withdrew their appeal as to their non-PAGA claims, and as for the PAGA claims, they contended that they not only should proceed as representative claims, but also they should do so in the trial court, and not in arbitration. *Id*. at *6. The Court of Appeal of California reversed the order confirming the arbitration award as to the PAGA claims. The Court of Appeal noted that the only issue unresolved in *Iskanian* was the proper forum for adjudicating Plaintiffs' representative PAGA claims, *i.e.*, either in the trial court or in arbitration along with Plaintiffs' individual claims. *Id*. at *5. Because the arbitration agreement gave no clue how to the parties intended to address that issue, the Supreme Court left it to the parties and the trial court to sort it out on remand. *Id*. As to *Iskanian*, the Court of Appeal posed several issues, including whether the parties would "agree on a single forum for resolving the PAGA claim and the other claims? If not, should the PAGA claim be bifurcated, with it proceeding in litigation while the Plaintiffs' individual claims go to arbitration? If bifurcation occurs, should the arbitration or the [trial] court action be stayed?" *Id*. at *7. The Court of Appeal noted that *Garden Fresh Restaurant Corp. v. Superior Court*, 231 Cal. App. 4th 678 (2014), left it to the trial court to determine whether under the arbitration agreement, the PAGA claim should be litigated or arbitrated. *Id*. at *8. The Court of Appeal remarked that as in *Garden Fresh*, the appropriate resolution of this case would be to leave it to the trial court to determine whether the parties' agreement contemplated arbitration of the representative PAGA claims.

***Kizer, et al. v. Tristar Risk Management,* Case No. 30-2014-707394 (Cal. Super. Ct. July 30, 2015).** Plaintiffs, a group of claims examiners, brought a putative class action alleging that Defendant misclassified them as exempt from the overtime requirements of the California Labor Code. Plaintiffs also asserted derivative claims under California's Unfair Competition Law based on Defendant's misclassification for failure to timely pay wages and to provide accurate wage statements. *Id.* at 2. Seeking class certification, Plaintiffs proposed a class of individuals employed by Defendant as claims examiners in its worker's compensation division for a defined period and who did not work as return to work coordinators, backup supervisors, or hearing representatives. *Id.* at 5. The Court denied Plaintiffs' motion for class certification, finding that Plaintiffs failed to satisfy the typicality requirement of Rule 23. The Court reasoned that there was no basis to infer from the job descriptions and other admissible evidence that Plaintiffs required overtime to accomplish their work. *Id.* at 6. Further, Plaintiffs offered no declarations, either from current or former employees or management, suggesting a company-wide *de facto* policy requiring overtime. *Id.* Although Plaintiffs suggested that employee computer log-in and log-out records would provide evidence of overtime, the Court found that Plaintiffs had neither sought any log-in records nor submitted any declarations from an expert suggesting that a statistical or extrapolation analysis would demonstrate that class members commonly worked overtime. *Id.* According to the Court, the sworn evidence that two former employees worked overtime to complete their assigned caseload was anecdotal and inadequate to demonstrate that Plaintiffs' overtime claims were typical for the proposed class. *Id.* In addition, without credible evidence that more than two of the more than 450 claims examiners worked overtime, the Court also declined to find that Plaintiffs established the commonality and superiority requirements. *Id.* at 7. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Kohsuwan, et al. v. Dynamex, Inc.,* 2015 Cal. App. Unpub. LEXIS 3865 (Cal. App. 4th Dist. June 1, 2015).** Plaintiffs, a group of drivers, brought a wage & hour action alleging that Defendants misclassified them as independent contractors pursuant to the independent contractor operating agreement, which they signed with Defendants. *Id.* at *2. Defendants moved to compel arbitration pursuant to an arbitration clause in the agreement. Plaintiffs argued that the arbitration paragraph was unconscionable and that the clause delegating the question of arbitrability to the arbitrator was also unconscionable. The trial court

denied the motion, holding that the agreement was procedurally and substantively unconscionable. On appeal, the California Court of Appeal reversed. At issue was whether it was for the trial court or the arbitrator to decide whether the arbitration paragraph was unconscionable. The Court of Appeal observed that under the Federal Arbitration Act ("FAA"), the trial court determines the enforceability of an arbitration agreement unless the parties agree otherwise pursuant to a delegation clause, which requires issues of interpretation and enforceability of an arbitration agreement to be resolved by the arbitrator. *Id.* at *4-5. Further, the Court of Appeal noted that who decides the enforceability of a delegation clause depends on whether a party is challenging the enforceability of the delegation clause itself or is attacking the entire arbitration paragraph. *Id.* at *5. If the challenge is to the arbitration paragraph as a whole, the delegation clause is severed and under that authority the arbitrator decides whether the entire arbitration paragraph is enforceable, and if a party challenges the delegation clause itself, the trial court determines whether it is enforceable. *Id.* Since Plaintiffs contended that both the delegation clause and the entire arbitration paragraph were unconscionable and thus unenforceable, the Court of Appeal reasoned that it was the trial court's responsibility to decide the enforceability of the delegation clause. *Id.* The trial court did not rule on the enforceability of the delegation clause, but instead decided the question of the validity of the entire arbitration paragraph. The Court of Appeal opined that in order to be enforceable, a delegation clause must be clear and unmistakable. *Id.* at *6. The language of the delegation clause specifically stated that the arbitrability of disputes between the parties shall be fully resolved by arbitration, and thus the provision was clear. Further, the Court of Appeal noted that a delegation clause must not be unconscionable. *Id.* Although Plaintiffs argued that the delegation clause was unconscionable because it gave the arbitrator a financial incentive to decide he or she has jurisdiction, the Court of Appeal observed that *Malone v. Superior Court*, 226 Cal. App. 4th 1551, 1559 (2014), analyzed and rejected this argument and held the opposition based on the arbitrator's alleged self-interest is preempted by the FAA. *Id.* at *7. Further, although Plaintiffs argued the delegation clause was unconscionable because it required them to arbitrate the question of arbitrability in Texas to determine whether an arbitration would proceed, the Court of Appeal remarked that venue did not apply solely to the delegation clause, and thus could be considered in analyzing the unconscionability of the delegation clause. Additionally, the Court of Appeal noted that contentions that the entire arbitration paragraph is unconscionable are not sufficient to challenge the delegation clause itself, and any claim of unconscionability must be specific to the delegation clause. *Id.* at *8. Thus, the Court of Appeal held that the delegation clause was not unconscionable and that the arbitrator should decide the arbitrability of the claims. Accordingly, the Court of Appeal reversed the trial court's order denying Defendant's motion to compel arbitration.

***Laborers Pacific Southwest Regional Organizing Coalition v. Gomez, et al.*, 2015 Cal. App. Unpub. LEXIS 1971 (Cal. App. 4th Dist. Mar. 20, 2015).** Plaintiff, a former employee, filed a complaint with the California Labor Commissioner seeking to recover unpaid overtime pay. The parties had entered into an arbitration agreement, which required arbitration of any employment dispute. The Commissioner initiated a *Berman* hearing (based on § 98 of the California Labor Code and named after its legislative sponsor), and denied Defendant's request to stay the matter and defer to arbitration because Defendant had not filed a petition to compel arbitration. *Id.* at *5. Thereafter, Defendant unsuccessfully filed a petition to compel arbitration and stay the *Berman* hearing. Defendant then filed a first amended petition to compel arbitration and added the Commissioner as a respondent, and subsequently moved to compel arbitration and stay proceedings. The Commissioner agreed to stay the *Berman* proceeding, filed a response to the amended petition, and also filed opposition points and authorities to the petition to compel arbitration. *Id.* at *8. The trial court denied Defendant's petition and motion to compel arbitration. On appeal, the California Court of Appeal reversed. The Court of Appeal opined that the arbitration agreement was procedurally unconscionable because Plaintiff declared that Defendant presented the agreement in a meeting and told him to sign it to continue working, and that he had to turn in the signed agreement before he left the meeting. *Id.* at *13. The Court of Appeal found that Plaintiff did not meet his burden of showing substantive unconscionability. The Court of Appeal observed that although it may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a *Berman* hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer. *Id.* at *14. The Court of Appeal reasoned that there were no provisions in the agreement that gave Defendant an unfair advantage over Plaintiff or created any lack

of mutuality. The arbitration agreement contemplated providing a final and binding method to use in the event a question, dispute, or disagreement of any kind or character arose regarding the employment relationship that Defendant and employees were unable to resolve themselves. Thus, a significant feature of the agreement was that the arbitration decision would be final and not subject to challenge by appeal, as an administrative decision in a *Berman* proceeding would be. *Id.* at *18. Further, pursuant to the arbitration agreement Defendant would pay for case processing fees, the fees and costs of the arbitrator and any hearing-associated room rental charges, which proved beneficial to the employees. The Court of Appeal thus determined that this provision brought the agreement within the requirement that an adhesive arbitration agreement that compels the surrender of *Berman* protections as a condition of employment must provide for accessible, affordable resolution of wage disputes. *Id.* Additionally, the Court of Appeal remarked that the fact that the agreement did not require Defendant to bear the cost of legal counsel to represent Plaintiff in the arbitration did not support a finding that the arbitral scheme contemplated by the agreement was substantively unconscionable. *Id.* at *19. The Court of Appeal observed that an arbitration agreement that does not require the employer to provide the employee with counsel in the arbitration of a wage dispute but otherwise provides the employee with an accessible and affordable arbitral forum for resolving wage disputes cannot be deemed substantively unconscionable. *Id.* at *20. The Court of Appeal opined that the unconscionability doctrine is instead concerned with whether the agreement is unreasonably favorable to one party, considering in context its commercial setting, purpose, and effect. *Id.* at *23. Further, the Court of Appeal found that the agreement satisfied the requirement of providing employees with an accessible and affordable process for resolving wage disputes, and the fact that arbitration supplants an administrative hearing cannot be a basis for finding the arbitration agreement unconscionable. *Id.* at *23-24. Accordingly the Court of Appeal reversed the order denying Defendant's petition to compel arbitration.

***Lewings, et al. v. Chipotle Mexican Grill, Inc.*, 2015 Cal. App. Unpub. LEXIS 4673 (Cal. App. 2d Dist. July 1, 2015).** Plaintiffs, a group of non-exempt workers, brought a class action alleging violations of §§ 3751 and 3752 of the California Labor Code for requiring them to bear the cost of workers' compensation expenses, and violations of §§ 201 and 202 for failing to reimburse a terminated employee for the cost of shoes for crews ("SFC") shoes. Plaintiffs also alleged a violation of § 226(a) for providing deficient wage statements. SFC marketed its non-slip shoes to employers by offering to reimburse them in workers' compensation-related medical expenses if an employee injured was involved in a slip and fall while on the job. *Id.* at *2. Defendant implemented a SFC program and permitted employees to buy the shoes directly or through a payroll deduction, and based on its employees wearing the shoes, it obtained a reduction in its workers' compensation premiums. *Id.* Defendant demurred to Plaintiffs' third amended complaint ("TAC") and argued that §§ 3751 and 3752 do not prohibit safe workplace programs that are voluntary, nor do they prohibit third-party warranty reimbursements. *Id.* at *4. The trial court sustained the demurrer, and dismissed the action. On appeal, the California Court of Appeal reversed. Under § 3751 (a), no employer shall exact or receive from any employee any contribution, or make or take any deduction from the employee's earnings, either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. *Id.* at *5. The Court of Appeal opined that the warranties covered part of "compensation," and that "compensation" in § 3751(a) means compensation under Division 4 of the Labor Code, and includes every benefit or payment conferred by that division upon an injured employee. *Id.* at *7. Further, § 4600 provides that an employer must provide an injured worker with medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury. *Id.* Here, any time Defendant was self-insured, the warranties directly covered the cost of compensation by paying medical expenses, and any time it had workers' compensation insurance, the warranties indirectly covered the cost of compensation by defraying increases in insurance premiums and replacing lost dividends. *Id.* The Court of Appeal observed that the warranties were designed to cover, to the extent specified, the cost of compensation, and because employee purchases of the shoes funded the warranties, the warranties extended by SFC for the sole benefit of Defendant were contributions by the employees. *Id.* at *7-8. Further, the Court of Appeal noted that under § 3751 the employer must bear the entire cost of securing compensation. *Id.* at *9. Thus, when the employees purchased the shoes, they secured at least part of the cost of compensation, and because Defendant received contractual protection against medical expenses and rising premiums, the Court of Appeal reasoned that it was immaterial whether any employees suffered

slip and fall accidents triggering the warranties. Although Defendant argued that the statute does not create a private right of action, the Court of Appeal noted that *Ralphs Grocery Company v. Superior Court,* 112 Cal. App. 4th 1090, 1102-03 (2003), recognized a private right action under § 3751. *Id.* at *10. Accordingly, the Court of Appeal held that the § 3751 claim survived Defendant's demurrer. Finally, Defendant asserted a special demurrer for uncertainty regarding § 226 claim. Because Plaintiffs properly stated the claim under § 3751, the Court of Appeal ruled that the claim under § 226 should not have been dismissed on the ground that it was derivative of § 3751. Further, Defendant asserted that violations of § 3751 did not support a cause of action under § 226 (a) because § 226 (a) is not violated if an employer reports an unlawful deduction on a pay stub. *Id.* at *14. The Court of Appeal held that Defendant waived its argument for not raising it earlier. Plaintiffs had alleged that Defendant issued pay stubs that failed to set forth the information required by § 226. Defendant, however, offered no explanation why these alleged deficiencies failed to support the claim under § 226. Accordingly, the Court of Appeal reversed the order of the trial court dismissing the action.

***Mendiola, et al. v. CPS Security Solutions, Inc.,* 2015 Cal. LEXIS 3 (Cal. Jan. 8, 2015).** Plaintiffs, a group of security guards, brought a class action alleging that Defendant's on-call compensation policy violated minimum wage and overtime obligations imposed by the applicable California Industrial Welfare Commission ("IWC") wage order and the California Labor Code. Defendant employed on-call security guards to provide 24-hour security at construction worksites. Each evening, guards were required to be on-call on-site and respond to disturbances or alarms, and were required to reside in a trailer provided by Defendant. While guards generally could use their on-call time as they chose, they were not allowed children, pets, alcohol, or unapproved visitors, and if they wished to leave the worksite, they were required to notify a dispatcher and wait until a relief guard arrived. If no relief guard was available, the guard had to remain on-site, even in the case of a personal emergency, and if relieved, they had to be accessible by pager or radiophone and able to return to the site within 30 minutes. *Id.* at *3-4. The guards were paid for all patrol hours, but they received no compensation for on-call time unless an alarm or other circumstance required that the guard conduct an investigation or the guard requested to leave the site and waited for, or was denied, a relief guard. *Id.* at *4. Concluding that on-call hours constituted compensable "hours worked," the trial court had granted Plaintiffs' motion for summary judgment, and the California Court of Appeal partly affirmed the trial court's judgment. Upon parties' petition for further appellate review, the Supreme Court of California affirmed the Court of Appeal's conclusion that Plaintiffs' on-call time constituted "hours worked" and was thus compensable, including any "sleeping" time. *Id.* at *9-10. In considering whether on-call time constituted hours worked and the extent of the employer's control, the Supreme Court determined that Plaintiffs' on-call time constituted "hours worked." *Id*. at *10-11. The Supreme Court noted that Plaintiffs were required to stay on the worksite unless Defendant gave them permission to leave, and if they were allowed to leave, they could be no more than 30 minutes away from the site, and would remain subject to recall. In addition, they were required to respond immediately to any alarms or issues that arose during their on-call time while on-site. The Supreme Court thus found that Defendant exerted control over Plaintiffs in a variety of ways, and their on-call time was spent primarily for the benefit of Defendant because even when not actively responding to disturbances, the guards' "mere presence" was integral to Defendant's business. *Id.* at *12-13. The Supreme Court rejected Defendant's argument that because the guards could engage in some personal activities – such as sleeping, showering, eating, reading, watching television, and browsing the internet during the on-call time – this was not compensable time, as it did not lessen Defendant's control over Plaintiffs. *Id.* at *14. The Supreme Court further declined to hold that a sleep period during on-call could be excluded from hours worked by agreement, finding that Wage Order 4 does not permit such an exclusion. The Supreme Court also held that California's wage & hour laws did not "implicitly incorporate" the federal regulations, 29 C.F.R. 785.23, which allows an employer who requires an employee reside on its property to exclude from hours worked time the employee is not carrying out his/her duties, and 29 C.F.R. 785.22, which allows an employer and employee to agree that a sleep period of no more than eight hours may be excluded from hours worked when the employee is scheduled to work a 24 hour shift. *Id*. at *14-20. The Supreme Court explained that the relevant issue in deciding whether the federal standard had been implicitly incorporated was whether state law and the wage order contained an express exemption similar to that found in federal law. Because Wage Order 4 does not contain any such exemption, and because "courts should not incorporate a federal

standard concerning what time is compensable '[a]bsent convincing evidence of the IWC's intent," the Supreme Court concluded that the Wage Order did not implicitly incorporate these exemptions. *Id.* at *22. Accordingly, the Supreme Court held that Plaintiffs' on-call time constituted compensable hours worked within the meaning of Wage Order 4, and that state and federal regulations did not permit Defendant to exclude sleep time from Plaintiffs' "hours worked" by agreement. *Id.*

***Mies, et al. v. Sephora U.S.A., Inc.,* 2015 Cal. App. Unpub. LEXIS 789 (Cal. App. 1st Dist. Feb. 2, 2015).** Plaintiff, a specialist in Defendant's retail store, brought a class action alleging that Defendant misclassified her and 98 other specialists in its various stores as exempt from overtime pay and meal breaks in violation of the California Labor Code. Plaintiff filed a motion for class certification and claimed that the proper classification of specialists could be determined by common proof of the job's general duties and descriptions, without a highly individualized inquiry for each employee. Plaintiff also asserted that statistical evidence would show that specialists spend more than 50% of their time doing non-exempt work and that a statistical sampling of evidence would give proof of class-wide liability. *Id.* at *5-6. The trial court denied certification, finding that Plaintiff failed to prove class-wide liability. While both Plaintiff and Defendant submitted declarations from specialists who reported doing exempt and non-exempt work in varying degrees during an average workweek, the trial court opined that it could not determine, on a class-wide basis, how they spent their time, and whether Defendant collectively exempted or non-exempted them. *Id.* at *11. On appeal, the California Court of Appeal affirmed the trial court's order. The Court of Appeal determined that the trial court reasonably credited the declarations of specialists from both sides, which, read together, suggested that specialists' exempt duties varied significantly from store to store and specialist to specialist, despite their job description and company-wide operational policies. *Id.* at *26. Because the central issue was how specialists spent their work time, the Court of Appeal found that Defendant's general operational policies offered little insight into class-wide liability, especially in light of the declarations showing that specialists handled work time very differently, varying as to the nature and level of the tasks and the time spent on those task. *Id.* at *29. The Court of Appeal further opined that Plaintiff's proposed statistical evidence was undeveloped and unsubstantiated, and thus not adequate for demonstrating the requisite commonality. *Id.* at *34-35. The Court of Appeal therefore concluded that the trial court rightfully denied class certification.

***Miranda, et al. v. Pacer Cartage, Inc.,* Case No. 37-2014-00008552 (Cal. Super. Ct. Jan. 28, 2015).** In this action alleging that Defendant misclassified its port truck drivers as independent contractors, the Court upheld the Labor Commissioner's $2 million award to Plaintiffs. Plaintiffs provided services to Defendant out of an agreement with the ports, and Defendant required them to utilize trucks that meet with new regulations of Clean Air Act. In April of 2012, seven Plaintiffs filed a claim with the Labor Commissioner alleging that Defendant misclassified them as independent contractors, and that Defendant made improper deductions from their pay. Plaintiff also alleged that Defendant did not pay them certain expenses as compelled by the California Labor Code. The Labor Commissioner found for Plaintiffs and awarded them in excess of $2 million. *Id.* at 2. Upholding the Commissioner's award, the Court found that Defendant exercised sufficient control over Plaintiffs demonstrating an employment relationship. Defendant required Plaintiffs to follow numerous procedures beyond those required under federal safety standards, and other matters that indicated control. Defendant required Plaintiffs to use the trucks only for its business, and to report by radio their job status. *Id.* at 6. Plaintiffs did not register the vehicles used by them in their own name, and Defendant required them to enter into a complex leasing arrangement for the use of vehicles. Defendant also provided various safety handbooks and safety programs for Plaintiffs, and they faced disciplinary actions for traffic and inspection violations. *Id.* at 8. Defendant further required Plaintiffs to obtain insurance through it and required them to strictly follow their "procedures." *Id.* at 8. Moreover, most of the drivers spoke virtually no English and lacked even a high school education to understand the complex leasing and hauling documents. The evidence showed that Defendant ultimately determined whether or not a person could work as a driver and operate its truck, on which it had a substantial economic interest. *Id.* at 9. On this record, the Court thus concluded that Defendant exercised sufficient control over Plaintiffs. *Id.* at 10. Additionally, the Court found that Plaintiffs' work formed an essential part of Defendant's business; Defendant supplied the tool and place of work; Plaintiffs maintained long-term relationships with Defendant; Defendant paid Plaintiffs on a weekly basis with a printout showing salary,

deductions, and year-to-date earnings; and Plaintiffs did not have the ability to generate profit or loss. *Id.* at 11-12. The Court therefore concluded that Plaintiffs were Defendant's employees and not independent contractors.

***Montano, et al. v. The Wet Seal Retail, Inc.*, 2015 Cal. App. LEXIS 8 (Cal. App. 2d Dist. Jan. 7, 2015).** Plaintiff, a non-exempt retail employee, brought a wage & hour action against Defendant alleging failure to offer all required meal and rest periods, and failure to provide all regular and overtime pay. Plaintiff also asserted a representative claim under the Private Attorney General Act ("PAGA"). When Plaintiff moved to compel discovery responses, Defendant moved to compel arbitration of Plaintiff's individual claims and to stay the action pending completion of arbitration. Plaintiff argued that the arbitration agreement was unconscionable because the arbitration agreement waived the right to bring class actions and representative PAGA actions. *Id.* at *3. The trial court denied the motion to compel arbitration and granted the motion to compel discovery. On appeal, the California Court of Appeal affirmed. The Court of Appeal noted that *Iskanian v. CLS Transportation Los Angeles*, LLC 59 Cal. 4th 348 (2014), held that because the PAGA augments the limited enforcement capability of the Labor and Workforce Development Agency ("Agency") by empowering employees to enforce the Labor Code as representatives of the Agency, an agreement by employees to waive their right to bring a PAGA action disables one of the primary mechanisms for enforcing the Labor Code. *Id.* at *12. Further, the Court of Appeal noted that *Iskanian* held that because such an agreement indirectly exempts the employer from responsibility for its own violation of law, it is against public policy and may not be enforced, and that whether or not an individual claim is permissible under the PAGA, a prohibition of representative claims frustrates the PAGA's objectives. *Id.* at *13. Additionally, *Iskanian* determined that the rule against PAGA waivers does not frustrate the objectives of the Federal Arbitration Act ("FAA") because the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Agency. *Id.* at *14. Accordingly, the Court of Appeal opined that under *Iskanian*, Plaintiff's purported waiver of her right to bring a representative action under the PAGA cannot be enforced. Because the PAGA waiver was invalid, the trial court had applied the arbitration agreement's non-severability provision, and stated that the entire arbitration agreement was void and unenforceable. The Court of Appeal opined that the trial court properly denied the motion to compel arbitration. Defendant also argued that the trial court should not have reached the merits of the discovery motion while its motion to compel arbitration was undetermined. Defendant relied on § 1281.4 of the Code of Civil Procedure, which provides that while a motion to compel arbitration is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate. *Id.* at *16. The Court of Appeal, however, noted that the motion to compel arbitration was denied and the motion to compel further discovery responses was granted on the same date. Thus, when the trial court ruled on the discovery motion, the motion to compel arbitration was no longer pending, and the request for arbitration had been denied. The Court of Appeal thus opined that the Superior Court had no obligation to stay the action under § 1281.4, and accordingly, dismissed this portion of the appeal.

***Oregel, et al. v. Pacpizza, LLC,* 2015 Cal. App. Unpub. LEXIS 3110 (Cal. App. 1st Dist. May 1, 2015).** Plaintiff, a pizza delivery driver, brought a putative class action alleging that Defendant failed to fully reimburse delivery drivers for necessary expenses associated with using their personal vehicles to deliver pizza on Defendant's behalf in violation of the California Labor Code and Unfair Competition Law ("UCL"). After Defendant's initial denial of Plaintiff's allegations, discovery commenced and continued for 12 months. On September 30, 2013, Plaintiff filed a motion for class certification and the parties stipulated to a modification of the briefing schedule on Plaintiff's motion to allow Defendant time to depose the putative class members who had submitted declarations. *Id.* at *8. Defendant then deposed 25 putative class members and Plaintiff's counsel spent more than 100 hours of attorney time on these putative class members' depositions alone. Seventeen months after Plaintiff's initial complaint, Defendant demanded arbitration of Plaintiff's claims. Plaintiff opposed the demand for arbitration, arguing that Defendant waived any right to arbitration. The trial court denied Defendant's petition to compel arbitration and entered orders granting Plaintiff's motion for class certification. Defendant appealed. The California Court of Appeal

affirmed the trial court's order finding that Plaintiff satisfied his burden of establishing waiver. The Court of Appeal noted that, in the 17 months between Plaintiff's initiation of the class action and Defendant's assertion of the arbitration agreement, Defendant had engaged in substantial conduct inconsistent with its claimed right to arbitrate. *Id.* at *24. Early in the litigation, Defendant paid jury fees and demanded a jury trial, and acted to preserve its jury rights. *Id.* at *25. Defendant also attended two case management conferences, and at both conferences, it remained silent about its intent to arbitrate Plaintiff's claims. Further, Defendant not only actively participated in discovery pertaining to Plaintiff's claims, but also propounded its own discovery requests, many of which sought information regarding Plaintiff's class allegations. *Id.* at *25-26. Moreover, Defendant did not seek enforcement of arbitration agreement even after it represented about the existence of a valid arbitration agreement in its November 2012 responses to Plaintiff's special interrogatories. *Id.* at *26. The Court of Appeal thus found that Defendant acted inconsistently with its purported right to arbitrate. Defendant argued that it delayed the motion because it believed that it would have been futile to seek enforcement of the arbitration agreement given the state of the law at the time. Particularly, Defendant pointed out that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), did not provide the desired clarity to California employers with respect to employment arbitration agreements, and that it waited for the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), for clarification, which held that a party has not acted inconsistently with its right to arbitrate if the party delayed seeking to enforce an arbitration agreement during a time when that agreement would have been considered unenforceable under existing law. *Id*. at *26-27. The Court of Appeal, however, found that Defendant's theory was fatally flawed because the line of cases on which it relied all involved the enforceability of arbitration agreements containing express class action waivers, unlike the arbitration provision at issue. *Id.* at *28-29. Defendant did not identify any authority decided in the period just prior to its petition that changed the governing law and suggested that the arbitration agreement at issue would suddenly be enforceable. *Id.* at *30. Further, Defendant did not petition for arbitration before the filing of any briefing on class certification, and the record suggested that Defendant kept open the option of arbitrating while it conducted discovery and asserted its purported right to arbitrate when it appeared that a class would be certified. *Id.* at *30-31. According to the Court of Appeal, Defendant took advantage of judicial discovery procedures, and Plaintiff suffered prejudice far beyond merely incurring legal fees and costs. *Id.* at *33-34. The Court of Appeal therefore concluded that Defendant waived any claimed right to arbitrate, and accordingly, affirmed the trial court's order.

***Palacio, et al. v. Jan & Gail's Care Homes, Inc.,* 2015 Cal. App. LEXIS 1093 (Cal. App. 5th Dist. Dec. 7, 2015).** Plaintiff brought an action alleging that Defendant, a residential care facility for developmentally disabled individuals, violated the California Labor Code and Wage Order 5 by depriving her of uninterrupted meal periods. *Id.* at *3. Defendant operated six 24-hour facilities, and employees worked varied shifts, including full-time, part-time, day, overnight, afternoon split, and weekend-only shifts. *Id.* at *2. Under Wage Order 5, a residential care facility's on-duty direct care staff must provide 24-hour care to clients to protect them from illness, injury, fire, and other emergencies. Under § 11(E) of Wage Order 5, a residential care facility's employees may be required to work on-duty meal periods without penalty, provided: (i) it is necessary to meet regulatory or approved program standards; (ii) the employee eats with residents during residents' meals; and (iii) the employer provides the same meal to the employee at no charge. *Id.* at *5. Consequently, Defendant required Plaintiff and other direct care employees to work on-duty meal periods and required them to sign an agreement waiving their right to an uninterrupted meal period in accordance with § 11(E) of Wage Order 5. *Id*. Defendant terminated Plaintiff in late 2013, and she brought this action contending that Defendant's policy of requiring employees to waive their right to an uninterrupted meal period violated the Labor Code and Wage Order 5 because it failed to inform employees that they also had the right to revoke their waiver at any time in accordance with § 11(A). Plaintiff also sought certification of a class of all former and current employees and contended that by failing to inform about the right to revoke, Defendant had a general policy that violated wage & hour laws that was common among class members. *Id*. The trial court denied Plaintiff's motion, finding that that Plaintiff failed to prove predominant questions of law or fact. Plaintiff appealed and argued that the trial court erred by not holding that, in addition to § 11(E), Defendant was also obligated to comply with § 11(A). *Id.* at *6. The California Court of Appeal rejected Plaintiff's argument and affirmed the trial court. Applying principles of statutory construction, the Court of Appeal found that nothing in § 11(E) suggested that it was

meant to be read in conjunction with § 11(A). *Id.* at *8. To the contrary, the Court of Appeal reasoned that the two provisions were irreconcilable, and it would be inconsistent to allow an employer to require an employee to work on-duty meal periods under § 11(E), yet permit the employee to revoke that requirement at any time under § 11(A), which would render the word "require" in § 11(E) meaningless. *Id.* at *8-9. In addition, the Court of Appeal noted that Plaintiff's interpretation of Wage Order 5 would place Defendant and other residential care facilities in a "precarious state," because if employees were permitted to revoke the on-duty meal period requirement at any time, employers would need to alter scheduling practices to allow the employee to do so, while ensuring continuous care for the residents. *Id.* at *9. According to the Court of Appeal, even if such an arrangement were feasible, it could not have been what the IWC intended because § 11(E) permits employees to take off-duty meal periods upon 30 days' notice to the employer, without revoking the on-duty meal period requirement. *Id.* at *9-10. The Court of Appeal therefore concluded that Defendant was not obligated to comply with § 11(A). Thus, the trial court's finding that predominant questions of law or fact did not exist was not based on erroneous legal assumptions. *Id*. at *11. Accordingly, the Court of Appeal affirmed the trial court's denial of class certification.

***Paprock, et al. v. First Transit,* 2015 Cal. App. Unpub. LEXIS 3430 (Cal. App. 4th Dist. May 18, 2015).** Plaintiffs, a group of current and former non-exempt bus drivers, filed a wage & hour class action in 2010 asserting violations of the California Labor Code for failure to provide required meal and rest breaks and to pay wages (the "*Paprock* class action"). In 2008, another employee, Eric P. Clarke, had filed an action under the Private Attorney General Act ("PAGA") to recover civil penalties (the "*Clarke* PAGA action"). *Id*. at *12. The *Clarke* PAGA action was stayed in February 2009, and remained stayed. *Id*. In March 2010, another employee, Angel Alonzo, filed a class action (the "*Alonzo* class action") alleging many of the same violations of the California Labor Code asserted by Plaintiffs in the *Paprock* class action. Clarke was a member of the certified class in the *Alonzo* class action. *Id*. at *14. In the *Paprock* class action, Clarke filed a motion to intervene, and to have his attorneys appointed as lead counsel in the *Paprock* class action, which the trial court denied. *Id*. at *4. The parties subsequently settled the action, and the trial court preliminarily approved the settlement. Three months after the preliminary approval, and seven weeks before the final fairness hearing, Clarke filed a second motion to intervene, which the trial court once again denied. Clarke appealed, and meanwhile, the parties filed a motion to approve the settlement, which the trial court granted, and thereafter issued a final judgment. *Id*. at *8. Clarke appealed the judgment. Clarke then filed a motion to vacate judgment, which was also denied by the trial court, and Clarke appealed. In these appeals, Clarke challenged two orders and the trial court's judgment, which the California Court of Appeals granted in part. Clarke first argued that the trial court erred in dismissing his motion to intervene because he met the requirements for both mandatory and permissive intervention under § 387 of the California Code of Civil Procedure. The Court of Appeals noted that under mandatory intervention, a prospective intervener must demonstrate both adequate interest in the outcome, and inadequate representation of its interest by either party. *Id*. at *18. Under permissive intervention, the trial court has discretion to permit a non-party to intervene where: (i) proper procedures have been followed; (ii) the non-party has a direct and immediate interest in the action; (iii) the intervention will not enlarge the issues in the litigation; and (iv) the reasons for the intervention outweigh any opposition. *Id*. at *21. As to Clarke's mandatory intervention theory, the Court of Appeals noted that he presented no evidence regarding his purported status as a *Paprock* class action member, and therefore, he forfeited appellate review of the finding that he was not a class members. *Id*. at *26. As to permissive intervention, Clarke argued that even if he was not a class member, the trial court erred because he had an interest in the *Paprock* class action. According to Clarke, since the settlement of the *Paprock* class action included payment for, and a release of, the class' potential PAGA claims, his claim for PAGA penalties in the *Clarke* PAGA action would be adversely affected. *Id*. at *29. The Court of Appeals disagreed, finding that only the aggrieved employees of Defendant who were represented in the *Paprock* class action were bound by the settlement and related judgment. *Id*. at *30. The Court of Appeals concluded that the judgment would have no preclusive effect on the claims in *Clarke* PAGA action. *Id*. Accordingly, the Court of Appeals affirmed the trial court's order denying his motion to intervene. The Court of Appeals further concluded that because Clarke was denied his right to intervene on the basis that he was not a member of the *Paprock* class action, he lacked standing to appeal judgment. Accordingly, the Court of Appeals dismissed Clarke's appeal challenging the judgment. *Id*. at *33. In his third appeal, Clarke argued that the trial court erred in

denying his motion to vacate judgment. The Court of Appeals noted that the judgment was filed on September 13, Plaintiffs gave notice of its filing on September 16, and Clarke timely filed a motion to vacate the judgment 15 days later. The Court of Appeals observed that 80 days after Clarke filed his motion to vacate judgment, Plaintiffs prepared an *ex parte* application to dismiss his motion for lack of jurisdiction on two independent grounds, including: (i) § 663a sets a 60-day limit on the trial court's power to vacate a judgment, and more than 60 days had passed since Clarke filed the motion; and (ii) Clarke's appeal from the judgment had divested the trial court of jurisdiction. *Id*. at *34-35. The Court of Appeals held that pursuant to § 663, a motion must be decided within 60 days of its filing, or the effect shall be denial of the motion without further order of the trial court. *Id*. at *36. The Court of Appeals, accordingly, ruled that because Clarke had appealed the judgment, the trial court was without jurisdiction to hear his motion to vacate. Finding that the trial court erred in denying Clarke's motion to vacate, the Court of Appeals reversed and remanded.

***Phillips et al. v. So-Cal Dominoids, Inc.*, 2015 Cal. App. Unpub. LEXIS 4678 (Cal. App. 4th Dist. July 1, 2015).** Plaintiffs, a group of employees, brought an action against Defendants alleging several wage & hour violations under the California Labor Code and the Private Attorneys General Act ("PAGA"). Defendants moved to compel arbitration and to dismiss Plaintiffs' class and representative claims based on alternative dispute resolution agreements (the "ADR agreements") that Plaintiffs signed in connection with their employment. The trial court denied the motion, finding that the parties carved out class actions and representative actions in the ADR agreements from binding arbitration and permitted Plaintiffs to proceed in the trial court. On appeal, the California Court of Appeal reversed and remanded. Defendants contended that a proper analysis of the ADR agreements showed that Plaintiffs expressly agreed to submit all of their employment and wage-related claims to binding arbitration. *Id*. at *9. Defendants maintained that any interpretation of the ADR agreements as "carving-out" class claims contravened fundamental rules of contract interpretation that required contracts to be construed as a whole. *Id*. According to their terms, the ADR agreements applied to any claim or dispute arising out of or related to the employment relationship or its termination, including claims of wrongful termination, harassment, discrimination, breach of contract, and tort claims. *Id*. at *5. The ADR agreements excluded the claims of non-parties by stating that: "[t]he parties wish to resolve any disputes between them in an individualized, informal, timely, and inexpensive manner . . . Consequently, the Arbitrator shall not consolidate or combine the resolution of any claim or dispute between the two parties to this ADR agreement with the resolution of any claim by any other party." *Id*. The Court of Appeal noted that the plain language of the ADR agreement, particularly the provision that required the parties to resolve any dispute between them in an individualized manner in arbitration, supported its conclusion that the agreements barred class and representative claims. *Id*. at *12. In view of the scope of the covered disputes clause, the Court of Appeal did not agree that the prohibition on class or representative actions showed that the parties intended to carve out such class claims from arbitration. The Court of Appeal found that the ADR agreements constituted the parties' unequivocal waiver of their right to bring any employment related claim in the trial court and that the language appearing in the agreements, when construed in its ordinary and popular sense, constituted a class action waiver. *Id*. at *13. Accordingly, the Court of Appeal reversed the trial court's order denying Defendants' motion to compel arbitration. The Court of Appeal, however, found that the ADR agreements were unenforceable to the extent that the parties sought to waive Plaintiffs' PAGA claim. The Court of Appeal noted that in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), the California Supreme Court held that parties cannot waive a Plaintiff's right to bring a representative PAGA claim in an arbitration agreement. *Id*. at *15. Plaintiffs contended that arbitration must be stayed pending the outcome of their PAGA claims pursuant to § 1281.3 of the Code of Civil Procedure, which states that if a trial court determines that there are other issues between the parties to an arbitration, which are part of the pending action but not subject to arbitration, the trial court may delay its order to arbitrate until determination of such other issues. *Id*. at *17. Accordingly, the Court of Appeal stayed the arbitration pending resolution of Plaintiffs' PAGA claims.

***Rosas, et al. v. Capital Grille Holdings, Inc.,* Case No. BC507869 (Cal. Super. Ct. Oct. 7, 2015).** Plaintiffs, a group of food service employees, brought a putative class action alleging that Defendants failed to provide them rest breaks and failed to compensate them for the time worked during rest breaks in

violation of the California Labor Code. Plaintiffs moved for class certification, and the Court denied the motion. Based on the evidence both the parties' submitted, the Court remarked that Plaintiffs failed to provide sufficient evidence that Defendants maintained a uniform policy or practice denying rest breaks or denying compensation to employees for each day they were not provided with a rest break in compliance with California law. *Id.* at 2. The Court found that Plaintiffs also failed to show that common questions of law and fact would predominate this litigation, that their claims were typical of the class, or that a class action would be superior to individualized litigation of their claims. *Id*. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Salazar, et al. v. Avis Budget Group, Inc.,* 2015 Cal. App. Unpub. LEXIS 1366 (Cal. App. 4th Dist. Feb. 27, 2015).** Plaintiffs, a group of mechanics, brought a putative class action alleging that Defendant failed to provide various classifications of auto mechanics with meal periods or premium wages for missed meal periods in accordance with the California Labor Code. *Id.* at *1. After the case was removed, Plaintiffs moved to certify a state-wide class of auto mechanics who performed work for Defendant since November 2002. *Id.* at *2. After denial of class certification because individual issues predominated, the case was remanded. Subsequently, Plaintiffs then filed a renewed motion for class certification requesting certification of a class of all auto mechanics who worked for Defendant for a period of more than six hours on one or more days on and after November 2002 until December 2011. *Id.* In support, Plaintiffs produced evidence that they did not always receive meal breaks of at least 30 minutes on days when they worked more than six hours and a second 30-minute meal break on days when they worked more than ten hours. *Id.* at *3. Plaintiffs further claimed that Defendant's policies and practices encouraged employees to delay, skip, or interrupt meal periods. *Id.* at *3-4. The trial court denied Plaintiffs' renewed motion, concluding that Plaintiffs failed to establish the existence of predominant common questions of law or fact. *Id.* at *5. Specifically, the trial court found that the evidence showed a significant variance in whether, when, and how putative class members received meal breaks. *Id.* On appeal, Plaintiffs argued that the trial court relied on improper criteria to deny class certification. Plaintiffs asserted that the trial court did not give proper weight to Defendant's failure to keep proper time records of meal breaks, which, according to Plaintiffs, created a presumption that Defendant was not providing meal periods. *Id.* at *10. The California Court of Appeal rejected Plaintiffs' argument and affirmed the trial court's ruling. The Court of Appeal found that the trial court's conclusion – that Plaintiffs failed to present evidence establishing a uniform policy on the part of Defendant to deprive putative class members of the ability to take meals breaks – was supported by the record. *Id.* at *13. Defendant submitted declarations from numerous auto mechanics stating that they could take meal breaks, while some chose to take shorter breaks or skip them altogether on occasion. *Id.* Further, the records showed numerous variances in when and how putative class members received meal breaks. The Court of Appeal noted that while some clocked-out for their meal periods and others did not, some took at a specified time and some had flexibility to decide when to take their meal break, and yet some decided on their own when to take a meal break. *Id.* at *14. The Court of Appeal thus agreed with the trial court that the putative class members could not meet the commonality requirement. Regarding Plaintiffs' argument on Defendant's alleged failure to keep proper time records, the Court of Appeal held that Plaintiffs failed to establish common issues of law or fact despite the time records, and thus the trial court acted within in its discretion in denying certification. *Id.* at *16-17. Accordingly, the Court of Appeal affirmed the trial court's order denying class certification.

***Valdovinos, et al. v. American Logistics Co., LLC*, 2015 Cal. Unpub. LEXIS 7266 (Cal. App. 4th Dist. Oct. 7, 2015).** Plaintiffs, a group of former drivers, brought a putative class action alleging that Defendant misclassified them as independent contractors. Plaintiffs filed a motion to certify a class of drivers who entered into written agreement purporting to provide services to Defendant as an independent contractor, and who were required to have and maintain a California Public Utilities Commission License as an owner-operator. *Id*. at *7. The trial court denied their motion, finding that Plaintiffs failed to establish the requirements of typicality, predominance, and superiority. On appeal, the California Court of Appeal affirmed. At the outset, the Court of Appeal noted that the test of typicality was whether class members have the same or similar injury, whether the action is based on the conduct which is not unique to the named Plaintiffs, and whether other class members have been injured by the same course of conduct. *Id*. at *12. In its order denying certification, the trial court noted the absence of any substantive declarations

on class certification issues, except for two brief declarations submitted by the named Plaintiffs concerning their understanding and acceptance of the role of a class representative. *Id*. at *13. The Court of Appeal noted that the only substantive evidence presented were excerpts from Plaintiffs' deposition. *Id*. at *14. The Court of Appeal found that this did not provide the necessary evidence to establish typicality. The Court of Appeal remarked that there was no evidence that any putative class member had a similar experience, nor did Plaintiffs offer any evidence to contradict the declaration of Defendant's president establishing that administrators were separate entities from Defendant. *Id*. at *17. Accordingly, the Court of Appeal affirmed the trial court's order denying class certification.

***Williams, et al. v. Superior Court Of Los Angeles County*, 2015 Cal. App. LEXIS 421 (Cal. App. 2d Dist. May 15, 2015).** Plaintiff, a retail employee, brought a representative action alleging that Defendant failed to provide its employees with meal and rest breaks or premium pay in lieu thereof, and failed to provide accurate wage statements in violation of the Private Attorney General Act ("PAGA"). Plaintiff served special interrogatories and requested Defendant to produce names and contact information of all of its non-exempt employees. Defendant objected to the discovery, contending that it was irrelevant, overbroad, and unduly burdensome, and implicated the privacy rights of its employees. *Id*. at *2. Plaintiff then moved to compel discovery. The trial court granted the motion and directed Defendant to produce contact information for the employees only at its Costa Mesa store, and denied production of discovery relative to Defendant's other 128 stores state-wide. *Id*. Plaintiff sought a writ of mandate compelling the trial court to vacate its discovery order, which the California Court of Appeal denied. Plaintiff argued that the immediate discovery of state-wide employees was necessary for progress in his PAGA action. The Court of Appeal found that in this action, discovery was not completed, even Plaintiff had not been deposed. *Id*. at *5. The Court of Appeal remarked that the litigation therefore was based only on allegations in the complaint, where Plaintiff alleged that he and perhaps other employees at the store were subjected to violations of the Labor Code at the Costa Mesa Store. *Id*. at *6. The Court of Appeal remarked that nowhere did Plaintiff evince knowledge of Defendant's practices at other stores, nor any fact that would lead a reasonable person to believe that he knew whether Defendant had a uniform state-wide policy. *Id*. Plaintiff argued that in a PAGA action such as this, he stood in as a proxy for the California Division of Labor Standards Enforcement ("DLSE"), and should thus be entitled to all discovery to which DLSE would be entitled. The Court of Appeal disagreed, finding that nothing in the PAGA suggested that a private litigant standing in as a proxy to the DLSE was entitled to the same access. *Id*. at *8. The Court of Appeal also concluded that Defendant's employees' privacy interests guaranteed under the California Constitution outweighed Plaintiff's need to discover their identity at this time. *Id*. at *10. The Court of Appeals explained that Plaintiff would be entitled to a state-wide discovery after he established that he was himself subjected to violations of the California Labor Code, and showed that Defendants employment practices were uniform. Accordingly, the Court of Appeals affirmed the trial court's order.

(ii) Georgia

***Anderson, et al. v. Southern Home Care Services, Inc.,* 2015 Ga. LEXIS 906 (Ga. Nov. 23, 2015).** Plaintiffs, a group of former employees, brought an action in the state court alleging that Defendant denied them minimum wages under the Georgia Minimum Wage Law ("GMWL"). *Id.* at *1. Plaintiffs provided in-home personal support services to Defendant' medically home-bound clients. *Id*. at *2. Plaintiffs alleged that the GMWL requires Defendant to pay at least $5.15 per hour for the employees' unpaid workday travel time. *Id*. at *2-3. Defendant removed the case to federal court and moved for judgment, arguing first that they were subject to the FLSA and Plaintiffs were not covered by § 34-4-3(a) of the OCGA, and second that the GMWL did not apply to Plaintiffs because they were "domestic employees" exempted under § 34-4-3(b)(3). *Id*. at *4. The federal court certified two issues to the Georgia Supreme Court. Plaintiffs relied on § 34-4-3(a) for their $5.15/hour claim, and Defendant relied on § 34-4-3(c), which provides that GMWL is not applicable to an employer who is subject to the minimum wage provisions of any act of Congress as to employees covered if such law provides minimum wages more than the GMWL. *Id*. at *5. Defendant argued that they were covered by the FLSA, because the FLSA provides greater minimum wage than the GMWL. The Supreme Court remarked that it was undisputed that Defendant, as companies with employees and clients in multiple states, were enterprises in commerce, and were subject to the FLSA's minimum wage provisions. *Id*. at *6. The parties agreed for the purposes of answering the certified

questions that from November 21, 2004 until at least January 1, 2015, the employees fell under the companionship services exemption, which exempts the FLSA's minimum wage and maximum hour protections. *Id*. at *7. The Supreme Court observed that during this period, the federal regulation defined companionship services as including meal preparation, bed making, washing clothes, and other similar services. *Id*. at *8. Defendant argued that even though Plaintiffs fell under the FLSA exemption, they were still covered by the FLSA because Plaintiffs were exempt only from the minimum wage and maximum hour requirements, meaning that they were covered by other FLSA provisions. *Id*. at *10. The Supreme Court noted that § 34-4-3(c) does not speak in terms of employees' coverage by the FLSA, as it removed from the GMWL's protection employees who were covered by the minimum wage provisions of a federal statute like the FLSA. *Id*. Accordingly, the Supreme Court answered the first certified question in the negative. Defendant argued that even if Plaintiffs were not exempt under § 34-4-3(c), they were exempt as "domestic employees" under § 34-4-3(b)(2), which provides that the GMWL shall not apply with respect to any employer of domestic employees. *Id*. at *13. The Supreme Court noted that the Georgia Department of Labor has interpreted "domestic services" as those services performed in or about the private home of the person employing the individual. *Id*. at *15. The Supreme Court likewise observed that the FLSA also defines domestic services as those services performed around a private home. *Id*. at *16. The Supreme Court observed that here, the employees were not providing domestic services. For these reasons, the Supreme Court held that the "domestic employees" term as used in § 34-4-3(b)(2) provided employee must work in or about homes of their employers, and Defendant was therefore not exempt from the GMWL under that provision. *Id*. at *20. Accordingly, the Supreme Court answered the second certified question in the negative as well.

***Fulton County, Georgia v. Andrews, et al.*, 2015 Ga. App. LEXIS 332 (Ga. App. June 11, 2015).** A group of current and former attorneys employed with the Office of the Public Defender ("the Public Defenders") brought an action against Fulton County, Georgia, alleging breach of contract and violation of county laws. *Id.* at *1. The issue arose when the County increased the salary of the County Attorneys, creating an allegedly unlawful pay disparity between the two attorney groups. Following discovery, the trial court granted the Public Defenders' motion for summary judgment, which the Georgia Court of Appeals affirmed. The County asserted that the trial court erred by concluding that the County's Personnel Regulations constituted the entire employment agreement between the parties, and instead argued that only the offer letters set forth the terms of employment should be enforced. *Id.* at *8. The Court of Appeals, however, found that under the Civil Service Act of 1982, the Personnel Regulations, including the requirement that the same schedule of pay be equitably applied to all positions in the same class, have the full force and effect of law. *Id.* Further, the Court of Appeals ruled that the County was without authority to override the Personnel Regulations by creating its own terms in an offer letter. *Id.* at *9. The Court of Appeals also noted that PR 300-1 expressly mandated that no employee shall be paid at a salary rate lower than the minimum or higher than the maximum of the salary range approved and established. *Id.* at *10. The Court of Appeals thus opined that the County had no authority to unilaterally create a pay disparity between the County Attorneys and the Public Defenders. *Id.* The County also contended that the Public Defenders could not establish a breach of contract claim because they were relying on the County Attorneys' contracts to which they were neither parties nor intended beneficiaries. *Id.* at *11. The Court of Appeals, however, reasoned that the Personnel Regulations clearly established a minimum and maximum salary rate for all employees and provided that no employee shall be paid outside his or her designated salary range. *Id.* Thus, the Court of Appeals concluded that by awarding a higher percentage of premium pay to the County Attorneys, who were members of the same classification as the Public Defenders, the County breached its contractual obligations to the Public Defenders under the Personnel Regulations. *Id.* at *12. The County further asserted that the trial court erred in concluding that the County violated the Personnel Regulations, because OCGA § 36-1-21 vested the County with authority to compensate the Public Defenders and the County Attorneys as it sees fit under home rule. The Court of Appeals rejected this argument on the basis that OCGA § 36-1-21 was inapplicable where a civil service system was created by the General Assembly, as was the County's system. *Id.* Further, the County asserted that requiring it to pay the Public Defenders in the same range as the County Attorneys would violate the Gratuities Clause of the Georgia Constitution, which prevented the General Assembly from granting extra compensation to any public officer after the service has been rendered. *Id.* at *13. The Court of Appeals, however, remarked

that the Public Defenders were not seeking extra compensation, but the compensation they were legally entitled to under the Personnel Regulations in force at the time they performed their services. *Id.* Finally, the County argued that its personnel decision to compensate the Public Defenders differently was not unusual as it paid different salaries to judges in Georgia. *Id.* at *14. The Court of Appeals stated that the statute expressly determines the varying salaries for different judicial offices. The Public Defenders and County Attorneys, however, are within the same employment classification. Thus, the Court of Appeals concluded that the County was obligated to compensate the Public Defenders and County Attorneys within the same salary range, and affirmed the judgment of the trial court.

(i) Kentucky

***Hisle, et al. v. Correctcare-Integrated Health, Inc.,* 2015 Ky. App. LEXIS 89 (Ky. App. June 12, 2015).** Plaintiffs, a certified medication aide and two nurses, brought an action under the Kentucky Wages & Hours Act alleging that Defendant denied them their statutory rest and meal breaks over the course of their respective tenures of employment. Plaintiffs worked at a Kentucky Department of Corrections ("KDOC") penal facility located in Fayette County. *Id*. at *1. Plaintiffs based their claims on KDOC's requirement that nurses carry and/or otherwise monitor a handheld two-way radio while working inside the prison facilities, including during their 30-minute lunch breaks for which Defendant automatically deducted pay. *Id.* at *2. Plaintiffs alleged that they performed compensable work during lunch breaks each and every day they worked at KDOC without compensation. *Id.* at *3. The trial court granted Defendant's motion for summary judgment, finding that merely monitoring radio communications during meal breaks did not amount to a denial of a *bona fide* meal break. *Id*. at *4. In doing so, the trial court also found that the record demonstrated that such a requirement did not impair the employees' ability to comfortably and adequately pass their meal time. *Id*. Defendant then moved for separate trials on each claim against its stressing the variance of anticipated proof with respect to the location, times, supervisory practices and other circumstances of each of Plaintiffs' shifts over the years. *Id.* The trial court, however, found that the claims could be managed in a single trial, and ordered Plaintiffs to provide information with specifics and particulars for calculating the amount claimed for each Plaintiff. *Id.* at *4-5. Plaintiffs could not submit the required evidence, and therefore the trial court instructed the jury to determine whether Defendant provided Plaintiffs with *bona fide* meal breaks in accordance with the "predominance benefit" test and the rule articulated in *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012). *Id.* at *5. The predominant benefit test is applied by nearly all federal circuits, including the Sixth Circuit, and states that a specific period of an employee's time is "work time," and thus compensable, but only if the employee spends that time predominantly performing the duties for the employer's benefit. *Id.* at *13. The jury found that Defendant met its duty, and in cases where Plaintiffs did not receive the breaks, they had failed to follow Defendant's procedure for reporting uncompensated work time to get reimbursed. *Id.* at *7-8. Plaintiffs appealed, arguing that the trial court erred by denying their motion for a directed verdict as to liability and issued improper instructions to the jury. Plaintiffs asserted that, because the evidence at trial established without challenge that Plaintiffs performed work duties at all times during their shifts, the trial court should have granted their motion for a directed verdict as to liability. *Id.* at *10. The Kentucky Court of Appeals disagreed, and affirmed the trial court's verdict. Because Plaintiffs had initially conceded that the predominant benefit standard was the appropriate standard to be applied and the Sixth Circuit and other federal circuits have adopted the predominant benefit standard, the Court of Appeals found that a directed verdict was not appropriate and the trial court appropriately instructed the jury to adopt the predominant benefit test. *Id.* at *15. The Court of Appeals further found that the trial court appropriately informed the jury of Plaintiffs' burden to prove that they missed specific meal breaks and acted reasonably to be compensated for them. Plaintiffs alleged that Defendant's obligation to pay them arose from its knowledge that they had performed compensable work, not from any duty of the employees to affirmatively demand payment for the work they performed. *Id.* at *16. The Court of Appeals, however, noted that the U.S. Supreme Court and the Sixth Circuit have made it clear that the employees bear the burden of proving that he or she performed substantial duties and spend his or her meal time predominantly for the employer's benefits, and Plaintiffs' claim that they missed lunch practically every day due to the fact that they carried around a radio did not establish with specificity a claim for compensable time. *Id.* at *17-20. The Court of Appeals thus found no error in trial court's jury instructions, and accordingly, affirmed its verdict.

***McCann, et al. v. The Sullivan University System, Inc.,* 2015 Ky. App. LEXIS 31 (Ky. App. Feb. 27, 2015).** Plaintiff, an Admissions Officer at Defendant's school, brought a putative class and collective action in state court alleging that Defendant violated Kentucky's wage & hour laws by misclassifying Admissions Officers as exempt employees and by failing to pay them overtime compensation. The trial court denied Plaintiff's motion for class certification, finding that KRS § 337.385 prohibits class certification. Upon appeal, the Kentucky Court of Appeals affirmed the trial court's order. The Court of Appeals held that KRS § 337.385 does not permit individuals to pursue claims for unpaid wages and overtime in Kentucky in a representative capacity. *Id.* at *8-9. The Court of Appeals relied on the language in KRS § 337.385(2) stating that actions for unpaid wages and overtime may be maintained only by one or more employees "for and in behalf of himself, herself, or themselves." *Id*. The Court of Appeals also agreed with Defendant that the language in KRS § 337.385 contrasted sharply with the FLSA's language, which expressly permits workers to bring claims for wage & hour violations on behalf of themselves or other employees similarly-situated. *Id.* at *9. The Court of Appeals pointed out that when Kentucky's General Assembly enacted KRS § 337.385, it did not include any language allowing representative or collective actions; instead, it plainly expressed that an action may be brought only by one or more employees on behalf of themselves. *Id.* The Court of Appeals therefore concluded that KRS § 337.385 "does not permit actions to be brought on behalf of employees who are similarly-situated." *Id.* Plaintiff argued that Rules 1 and 23 of the Kentucky Rules of Civil Procedure make class actions available in all civil actions. The Court of Appeals, however, pointed out that KRS § 337.385's language specifying who "may bring an action for unpaid wages is contained in a substantive statute and is intertwined with the statute's rights and remedies," and thus the class action provisions in Rule 23 of the Kentucky Rules of Civil Procedure "cannot override KRS § 337.385's limitation on who may bring claims for unpaid wages." *Id.* at *13. The Court of Appeals therefore concluded that the plain language of KRS § 337.385 does not permit representative actions, and accordingly, affirmed the trial court's denial of Plaintiff's motion for class certification.

(ii) Massachusetts

***Clark, et al. v. Legal Sea Foods, LLC*, Case No. 2014-01206 (Mass. Super. Ct. April 14, 2015).** Plaintiffs, four former wait staff employees, brought a class action alleging that Defendant had a practice of requiring them to share tips with employees who performed silverware rolling duties, in violation of Massachusetts Tips Act ("Tips Act"). The Tips Act protects the wages and tips of employees such as wait staff employees, service employees, and service bartenders, and provides that if an employer or person submits a bill that imposes a charge or tip, the total proceeds should go to such employees. *Id*. at *3. Defendant had a policy or practice under which servers often gave 10% of their tips to bus persons, and 5% each to food runners and bartenders. *Id*. When bus persons began rolling silverware, servers added $2.00 per shift to the 10% share of their tips. Plaintiffs moved for class certification, which the Court denied. At the outset, the Court found that the class did not satisfy the typicality requirement. Plaintiffs' case hinged on a job description titled "silverware roller," which was initially understood by the Court to mean that wait staff employees were sharing their tips with employees whose sole job was to roll silverware into napkins, and who did not wait on customers or clear their tables. *Id*. at *5. In fact, all silverware rollers were hired as bus persons, and appear to have spent most of their time over the course of each pay period clearing tables. *Id*. The Court observed that the purpose of the Tips Act is to protect the wages and tips of certain employees, and bus persons clearly fell within the ambit of the statute. The Court reasoned that Plaintiffs' claim would survive only if it ruled that silverware rolling by bus persons disqualified the bus persons from receiving tips. *Id*. For this reason, the Court concluded that Plaintiffs failed to satisfy typicality requirement. The Court also found that Plaintiffs' claims would require that individual questions predominate as it would have to determine based on each shift worked by each server, whether that server shared tips, the amount of tips that was shared, and which bus persons spent rolling silverware. *Id*. at *7. Because of these individual questions, the Court concluded that Plaintiffs failed to satisfy predominance requirement. Finally, the Court ruled that class action was not a superior method of adjudication under the circumstances, and denied Plaintiffs' motion for class certification.

***Machado, et al. v. System4LLC*, 2015 Mass. LEXIS 163 (Mass. April 13, 2015).** Plaintiffs, a group of franchiseed janitorial workers, brought an action alleging that Defendants System4 LLC (the master franchisor) and NECCS, Inc. (the regional sub-franchisor) misclassified them as exempt employees.

Plaintiffs signed franchise agreements only with Defendant NECCS, Inc.; however, the complaint did not differentiate between the two Defendants, and alleged that NECCS was an agent of System4, and existed solely to conduct the business with the latter. *Id*. at *2. System4 filed a motion to compel arbitration based on the arbitration clause that Plaintiffs signed in their franchise agreements with NECCS. The trial court found the arbitration agreement to be unconscionable, and because System4 was not a signatory to the franchise agreements, Plaintiffs could proceed to litigate their claims. *Id*. at *8. On appeal, the Supreme Judicial Court of Massachusetts reversed in part. At the outset, the Supreme Judicial Court noted that case law precedents have recognized six theories for binding non-signatories to arbitration agreements, including: (i) incorporation by reference; (ii) assumption; (iii) agency; (iv) veil piercing/alter ego; (v) equitable estoppel; and (vi) third-party beneficiary. *Id*. at *11. The Supreme Judicial Court opined that the theory of equitable estoppel governed by state contract law applied to this case. Equitable estoppel allows a non-signatory to compel arbitration in circumstances when a signatory must rely on the terms of the written agreement in asserting its claims against non-signatory, or when a signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories. *Id*. at *13. Here, Supreme Judicial Court observed that Plaintiffs asserted multiple claims that were inextricably intertwined with and related directly to the franchise agreements containing the arbitration provision. *Id*. at *17. The agreement was replete with references to Plaintiffs' duties and responsibilities as franchisee, and System4's liability, if any, could not be determined without reference to the agreement. *Id*. at *20. The Supreme Judicial Court remarked that Plaintiffs could not avoid arbitration with System4 when the issues System4 was seeking to resolve in arbitration were intertwined with the agreements that Plaintiffs signed. *Id*. at *21. The Supreme Judicial Court observed that not only did Plaintiffs consistently allege concerted misconduct by Defendants, but also they lumped the two of them together, asserting each claim in their complaint against System4 and NECCS collectively. *Id*. at *22. Because a decision-maker must analyse the franchise agreements in assessing the merits of Plaintiffs' claims relating to misconduct between System4 and NECCS, the Supreme Judicial Court concluded that System4 could compel arbitration. *Id*. at *24. Plaintiffs argued that, even though System4 could compel arbitration, their Wage Act claims were not arbitrable. Plaintiffs relied on *Crocker v. Townsend Oil Co.*, 464 Mass. 1 (2012), holding that a release of claims must specifically reference the Wage Act in order to apply to Wage Act claims. *Id*. The Supreme Judicial Court noted that that arbitration agreements were not equivalent to claim releases, since one releases the claim completely, the arbitration agreements only dictates the forum in which Plaintiffs' right can be determined. *Id*. at *26. Because the arbitration clause did not mention the Wage Act claims specifically, as it classified Plaintiffs as independent contractors, the Supreme Judicial Court affirmed the trial court's order to proceed with those claims in the trial court. Accordingly, the Supreme Judicial Court reversed the trial court's order in part.

***Meshna, et al. v. Constantine Scrivanos*, 2015 Mass. LEXIS 161 (Mass. April 10, 2015).** Plaintiffs, a group of current and former food franchise employees, brought a class action challenging Defendants' no-tipping policy in violation of the Massachusetts Tips Act, and Massachusetts General Laws, G.L. ch. 149, § 152A. The trial court granted summary judgment to Defendants, concluding that the no-tipping policy was not a violation of the Tips Act; however, the trial court denied the motion on the claims challenging Defendants' policy of placing money left as tips in the cash register, as well as a policy of placing money left as tips in abandoned change. At Plaintiffs' request, two questions were certified to the Supreme Judicial Court of Massachusetts Court, including: (i) does G.L. ch. § 149, § 152A allow an employer to maintain a no-tipping policy; and (ii) if a no-tipping policy is permitted, can an employer be liable if the employer fails to communicate to the customers, and even after communication of the policy the customers still leave tips that are retained by the employer. *Id*. at *3. The Supreme Judicial Court answered the first question in the affirmative, and the second one in the negative. The Supreme Judicial Court noted that Defendants had instituted various mechanisms for enforcing the no-tipping policy, including placing signs in the stores stating "no tipping" or "thank you for not tipping." *Id*. at *5. At the outset, the Supreme Judicial Court noted that the Tips Act protects the wages and tips of employees. *Id*. at *7. Relying on G.L. ch. 149, § 152A, Plaintiffs contended that the Tips Act prohibits employer from instituting a no-tipping policy. The Supreme Judicial Court noted G.L. ch. 149, § 152A states that an employer is prohibited from demanding, requesting, or accepting a "deduction" from a tip "given to a covered employee." *Id*. at *9. The Supreme Judicial Court found that based on the plain and unambiguous language of the statute, an employer may

not take away from a service charge, tip, or gratuity that was given to a wait staff employee. The Supreme Judicial Court reasoned that a tip that was given to an employee would include a tip that was handed directly to the employee or left on the counter for the employee, or a sum designated as a tip or gratuity on a customer's credit card slip. *Id*. at *10. The Supreme Judicial Court further held that the Tip Act also contemplated that tips intended for employees may be given directly to an employer, and prohibits an employer from retaining a service charge or tip that was paid to the employer rather than to the wait staff employee. *Id*. at *11. The Supreme Judicial Court however, noted that no language in G.L. ch. 149, § 152A or elsewhere in the Tips Act prohibits an employer from imposing a no-tipping policy; instead, the Tip Act addressed circumstances in which tipping is permitted, and what the employer is required to do with such tips. *Id*. at *12. Accordingly, the Supreme Judicial Court concluded that G.L. ch. 149, § 152A does not prohibit employers from implementing a no-tipping policy. In response to the second question, the Supreme Judicial Court concluded that if an employer had not clearly communicated its no-tipping policy to customers, tips left by customers where service is provided by wait staff belong to those employees, and may not be retained by the employer. *Id*. at *15. On the other hand, where the employer has clearly communicated to customers that a no-tipping policy is in effect, money left by customers in establishments where service is provided by wait staff is not a tip that was given to wait staff employees, regardless of the customers' intent. *Id*.

***Monell, et al. v. Boston Pads, LLC*, 2015 Mass. LEXIS 318 (Mass. June 3, 2015).** Plaintiffs, a group of real estate salespersons, brought an action alleging that Defendants violated the Massachusetts independent contractor statute by misclassifying them as independent contractors. Defendant compensated their salespersons on a commission-only basis, and Plaintiffs paid their own taxes. The trial court granted partial summary judgment to Defendants, which the Massachusetts Supreme Judicial Court affirmed on appeal. At issue was the conflict between the independent contractor statute and the real estate licensing statute, which respectively supported Plaintiffs' claim that they were employees and Defendants' claim that Plaintiffs were independent contractors. *Id.* at *17. General Laws ch. 112, §§ 87PP through 87DDD½, and G. L. ch. 112, §§ 65A through 65E, set forth the licensing and registration provisions governing real estate brokers and salespersons. *Id.* at *12. The Supreme Judicial Court remarked that the real estate licensing statute made it impossible for a real estate salesperson to satisfy the three factors required to achieve independent contractor status, all of which must be satisfied to defeat the presumption of employee status. *Id.* at *18. Under the second factor of the independent contractor statute, the employer must prove that the service of the worker is performed outside the usual course of the business of the employer. *Id.* The Supreme Judicial Court, however, noted that because under G. L. ch. 112, § 87RR, no salesperson may conduct or operate his or her own real estate business nor act except as the representative of a real estate broker, an employer can never prove that the service is performed outside the usual course of the employer's business. *Id.* Further, § 87RR prohibits a salesperson from performing any services other than as the broker's representative and as part of the broker's business. *Id.* at *19. Although the third factor of the independent contractor statute requires the employer to prove that the worker is customarily engaged in an independently established business in the real estate industry, the Supreme Judicial Court opined that § 87RR prohibits a real estate salesperson from operating his or her own real estate business. *Id.* Thus, the Supreme Judicial Court ruled that compliance with this third factor also was not possible. Further, the Supreme Judicial Court noted that while § 87RR expressly authorizes a real estate salesperson to affiliate with a broker as an employee, it also expressly authorizes an association as an independent contractor. *Id.* Additionally, the 2010 amendment to § 87RR added language authorizing brokers and salespersons to enter into agreements whereby a real estate salesperson could be paid on a commission-only basis. *Id.* at *20. The Supreme Judicial Court reasoned that the amendment reflects an affirmation that the salesperson may be an independent contractor, but he or she also may be an employee, and that the amendment simply was intended to address how a real estate salesperson, whether an employee or an independent contractor, could be paid by authorizing payment in the form of commissions only. *Id.* at *20-21. Moreover, because in spite of the level of supervision and control mandated by law, § 87RR expressly preserves a salesperson's ability to be affiliated with a broker as either an employee or an independent contractor, the Supreme Judicial Court determined that § 87RR controlled in this instance, not the more general independent contractor statute. *Id.* at *22. The Supreme Judicial Court thus agreed with the trial court that the independent contractor

statute does not apply to real estate salespersons and that Plaintiffs could not prevail on a claim based on a statute that did not apply to them. The Supreme Judicial Court, however, refrained from determining whether Plaintiffs were employees or independent contractors, or how, in the absence of the framework established by the independent contractor statute, it could be determined whether a real estate salesperson is properly classified as an independent contractor or employee. Accordingly, the Supreme Judicial Court affirmed the grant of partial summary judgement to Defendants.

***Rotatori, et al. v. TGI Fridays, Inc.,* Case. No. 2014-81B (Mass. Super. Ct. Aug. 13, 2015).** Plaintiffs, a group of employees, brought a class action alleging that Defendant, a casual dining restaurant, violated the Massachusetts Tips Act and Minimum Wage Act by requiring them to pool tips and share tips with employees not eligible to receive them. *Id.* at 2. Plaintiffs also alleged that Defendant required them to work off-the-clock without compensation in violation of Massachusetts Weekly Payment of Wages Act. *Id.* In moving for class certification, Plaintiffs proposed a class of Defendant's hourly employees who worked anywhere in Massachusetts since January 2008 for the off-the-clock claims, and servers who worked at Defendant's locations in Millbury, Massachusetts between January 2011 and March 2014 for the improper tip pooling and minimum wage claims. *Id.* at 7. The Court granted Plaintiffs' motion, finding that Plaintiffs satisfied the certification requirements. First, the Court held that Plaintiffs met the numerosity requirement as Plaintiffs provided the statements of 20 employees who worked at fifteen different Massachusetts locations, attesting that off-the-clock work occurred regularly throughout the restaurant chain. *Id.* at 8. Second, the Court found that Plaintiffs met the commonality requirement as the issue of whether Defendant required the wait staff at the Millbury locations to pay over a portion of their tips to individuals who did not meet the definition of "wait staff" employees in violation of the Tips Law and the Minimum Wage Act was common to all putative members of the class on the improper tip sharing practices. *Id.* at 9. The Court similarly determined that the issue of whether Defendant's management violated overtime policies was also a question of fact that was common to the class on the off-the-clock claims. *Id.* Third, the Court found that Plaintiffs met the typicality requirement as Plaintiffs showed that Defendant acted consistently toward the class representative and members of the putative class. *Id.* Fourth, the Court ruled that Plaintiffs met the adequacy requirement, since Plaintiffs demonstrated that their interests did not conflict with the interests of the putative class, and Plaintiffs' counsel had substantial class action litigation experience and had prosecuted the action vigorously on behalf of the class. *Id.* at 10. The Court also held that Plaintiffs satisfied the predominance requirement as the common issue of whether Defendant's allegedly improper tipping and off-the-clock overtime practices could be largely resolved for all class members, and it predominated over any individualized questions, such as proof of damages. *Id.* at 11. Finally, the Court found that Plaintiffs met the superiority requirement as fear of employer retaliation might have a chilling effect on employees bringing claims on an individual basis, thereby making a class action a superior method for litigating Plaintiffs' claims. *Id.* at 12. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Sebago, et al. v. Boston Cab Dispatch, Inc.,* 2015 Mass. LEXIS 171 (Mass. April 21, 2015).** Plaintiffs, a group of taxicab drivers, brought a class action alleging that Defendants – taxicab owners, radio associations, and a taxicab garage – misclassified them as independent contractors, thereby depriving them of minimum wages, overtime pay, tips, and the protections afforded by § 148 of the Massachusetts Wage Act. Defendants filed a motion for summary judgment and argued that their relationships with Plaintiffs must be considered in the context of Boston Police Department Rule 403, which explicitly permits drivers to operate as independent contractors. Plaintiffs argued that a municipal regulation could not override the State's independent contractor statute. The Massachusetts Superior Court denied summary judgment to Defendants. On appeal, the Supreme Judicial Court of Massachusetts vacated the denial and held that Defendants properly classified Plaintiffs as independent contractors. The Supreme Judicial Court noted that Rule 403 neither precludes owners from entering into employer-employees relationship with drivers nor recasts drivers as independent contracts where they would otherwise be considered employees. *Id.* at *3. Because Rule 403 created a regulatory regime over an industry in which taxicab owners, radio associations, and drivers might operate as separate business, the Supreme Judicial Court declined to find that Rule 403 was contrary to the policies undergirding the independent contractor statute. *Id.* Before determining whether Plaintiffs were employees, the Supreme Judicial Court assessed the

threshold question of whether Plaintiffs provided services to Defendants. The Supreme Judicial Court found that Defendants could not be considered "as a single employer exercising monolithic control over the taxicab industry" because Plaintiffs limited their allegations to common ownership and control, and "[t]he mere fact of common management and shareholders among related corporate entities has repeatedly been held not to establish, as a matter of law, a partnership, agency or joint venture relationship that renders the corporations a 'single employer.'" *Id.* at *13-15. The Supreme Judicial Court therefore considered each Defendant's relationship with Plaintiffs separately and found that Plaintiffs provided no services to Defendants, but only to taxicab owners and radio associations. The Supreme Judicial Court noted that, although Plaintiffs were free to use leased taxicabs for purpose unrelated to the transportation of passengers, their use of the taxicabs constituted a service to the owners insofar as it increased the value and facilitated the sale of advertising space. *Id.* at *19. The Supreme Judicial Court further noted that Plaintiffs provided services to radio associations, as they maintained voucher accounts with corporate clients who submitted vouchers to the taxicab drivers as payment for fares and tips. *Id.* at *20. Because the garage neither owned a taxicab nor a medallion, but only operated a garage that catered to the taxicab industry as a whole, the Supreme Judicial Court determined that Plaintiffs provided no service to the garage. *Id.* The Supreme Judicial Court also analyzed whether the owners and radio associations lawfully classified Plaintiffs as independent contractors. Under Massachusetts law, a worker is an employee unless: (i) the individual is free from control and direction in connection with the performance of the service; (ii) the service is performed outside the usual course of the business of the employer; and (iii) the individual is customarily engaged in an independently established trade, or business. *Id.* at *11-12. Plaintiffs were mostly independent as they selected their own shifts and received minimal direction from owners or radio associations. *Id.* at *22. Plaintiffs' services were also outside the usual course of Defendants' businesses as owners' leasing businesses were not dependent on the success of Plaintiffs' operations. Plaintiffs paid a daily flat-rate to lease a taxicab, and the owners retained this fee regardless of how much money Plaintiffs earned on a given day. *Id.* at *25. Similarly, the radio association were not in the business of giving rides; instead, they provided dispatch services to owners, and only incidentally dependent on drivers. *Id.* at *28. Further, Plaintiffs engaged in an independent trade or business as they had the freedom to lease from whomever they wanted on whatever days they wanted, and were free to advertise their services as they wished. *Id.* at *30-31. The Supreme Judicial Court therefore concluded that Defendants properly classified Plaintiffs as independent contractors.

(iii) Minnesota

***J.D. Donovan, et al. v. Minnesota Department Of Transportation,* 2015 Minn. App. Unpub. LEXIS 124 (Minn. App. Feb. 2, 2015).** Plaintiffs, a group of contractors and sub-contractors, brought an action seeking declaratory judgment and injunctive relief against the Minnesota Department of Transportation's ("MDOT") demand for payroll records for work performed by J.D. Donovan, Inc. and Wayne Transports, Inc., and its determination that hauling work undertaken by subcontractors was not exempt under Minnesota Statute § 177.43, sub-division 2 (2014). MDOT contracted with general contractor Hardrives, Inc. for work along trunk highways 10 and 23 in Minnesota, and contracted with general contractor OMG Midwest, Inc. for work along trunk highway 30 in Minnesota. *Id.* at *1-2. While OMG Midwest contracted with Donovan to purchase asphalt cement material, Hardrives contracted with Donovan to purchase asphalt cement materials and arrange for transport of the material, and contracted with Wayne Transports, Inc. for service on the project. *Id.* at *3-4. At issue was whether it was erroneous to determine that Donovan and Wayne performed "work under the contract." *Id.* at *7-8. Minnesota Rule 5200.1106, sub-part 2(A) (2013) defines "work under the contract" as all construction activities associated with a public works project, including any required hauling activities on the site of or to or from a public works project and work conducted pursuant to a contract as defined by item B, regardless of whether the construction activity or work is performed by the prime contractor, sub-contractor, trucking broker, trucking firms, independent contractor, or employee or agent of any of the foregoing entities, and regardless of which entity or person hires or contracts with another. *Id.* at *8-9. Further, the prevailing wage provision applies to "laborers" who are "employed by a contractor, sub-contractor, agent, or other person" performing work on a contract to which the state is a party. *Id.* at *9. Plaintiffs argued that hauling loads of asphalt cement from a refinery to the general contractor did not qualify as "work under the contract," and that the term "construction activity" was ambiguous because it was unclear whether it included the act of hauling materials from a refinery to a

commercial establishment. *Id.* at *10-11. Defendants moved for summary judgment. The trial court granted the motion, and Plaintiffs appealed. Affirming the grant of summary judgment to Defendants, the Minnesota Court of Appeals noted that under Rule 5200.1106, sub-part 2(D) a "contractor" means an individual or business entity that is engaged in construction or construction service-related activities including trucking activities either directly or indirectly through a contract as defined by item B, or by sub-contract with the prime contractor, or by a further sub-contract with any other person or business entity performing work under the contract. *Id.* at *11. Because Donovan and Wayne hauled asphalt cement materials from the commercial refineries to the prime contractor's facility, the Court of Appeals opined that under Rule 5200.1106, these trucking activities qualified as construction service-related activities. Plaintiffs also argued the hauling activities did not meet the definition of "work under the contract" because they did not physically take place at a construction site. Rule 5200.1106 provides that construction activities include "any required hauling activities on the site of or to or from a public works project." *Id.* at *12. Plaintiffs asserted that by ignoring the phrase "to or from a public works project," the trial court rendered the language superfluous. The Court of Appeals, however, noted that sub-part 2 of the rule defines "work under the contract" broadly enough to encompass construction activities, including any required hauling activities on the site of or to or from a public works project and work conducted pursuant to a contract as defined by item B. *Id*. Item B enumerates six examples of hauling activities that are considered "work under the contract" for purposes of the MPWA, including the delivery of materials or products by trucks hired by a contractor, sub-contractor, or agent thereof, from a commercial establishment. *Id.* at *13. Accordingly, the Court of Appeals opined that Plaintiffs' hauling activities qualified as work conducted pursuant to a contract, and thus MDOT had a right to demand Plaintiffs' employees' payroll records.

(iv) Montana

***Morrow, et al. v. Monfric, Inc.*, 2015 Mont. LEXIS 330 (Mont. July 7, 2015).** Plaintiffs, a group of laborers, brought a putative class action alleging that Defendant failed to pay them prevailing wages. Plaintiffs moved to certify a proposed class consisting of all laborers, skilled tradesmen, and craftsmen who worked for Defendant or its subcontractors and who were not paid prevailing wages during the construction and rehabilitation of two of its multi-family housing projects. *Id.* at *2. The district court issued an order denying the motion for class certification. *Id.* at *3. On appeal, the Supreme Court of Montana affirmed the district court's decision. Plaintiffs argued that the district court erred by finding that the class was not sufficiently numerous. *Id.* at *4. The Supreme Court noted the proposed class included 24 to 28 individuals, seven of whom were named Plaintiffs and class representatives, and that was near the number below which class certification was likely to be considered inappropriate. *Id.* at *7. The Supreme Court observed, however, that the relatively small number of the proposed class was not dispositive, and in such circumstances the district court had broad discretion in determining whether a class action was the most fair and efficient procedure for conducting the litigation. *Id.* Thus, the Supreme Court concluded that the district court did not abuse its discretion. *Id.* The Supreme Court also observed that when a class is relatively small, it must also examine other factors and circumstances that may make joinder impracticable. *Id.* at *8. First, Plaintiffs argued that there was no evidence the proposed class members still resided in the relevant area. *Id.* at *10. The Supreme Court found, however, that Plaintiffs had offered no evidence suggesting that the laborers who worked on Defendant's projects had left that area. *Id.* at *10. In particular, Plaintiff's counsel had not attempted to locate the remaining proposed class members, and the idea that they may have left for North Dakota was based entirely on an off-the-cuff suggestion by the district court. *Id*. Accordingly, the Supreme Court rejected that argument. *Id.* Plaintiffs further asserted that the proposed class members were laborers of limited financial means, and therefore unable to prosecute their individual claims. *Id.* at *13. The Supreme Court noted the only evidence in the record pertaining to the financial means of the proposed class members was outdated and incomplete, and there was no evidence establishing the current income or financial resources of the proposed class members. *Id.* Thus, the Supreme Court held that the district court did not abuse its discretion when it determined class certification was not appropriate. *Id*.

(v) New Mexico

***Segura, et al. v. J.W. Drilling, Inc.,* 2015 N.M. App. LEXIS 72 (N.M. App. June 25, 2015).** Plaintiffs, a group of workers, brought a class action alleging that Defendants failed to pay them overtime wages for the time spent travelling from their homes to Defendant's jobsites, in violation of the New Mexico Minimum Wage Act ("MWA"). The district court granted Defendant's motion for summary judgment, which, on appeal, the Court of Appeals of New Mexico affirmed. The Court of Appeals noted that the essential legal question posed in the complaint was whether travel time is compensable under the MWA. Plaintiffs argued that the district court erred by engrafting on to MWA the concepts underlying the federal Portal-to-Portal Act, making all travel non-compensable, even round trips nearly equal to a day of work. *Id*. at *5. Plaintiffs contended that the MWA was enacted after the Portal-to-Portal Act and had no similar express exclusion, and therefore the district court erred in relying on federal case law interpreting the Portal-to-Portal Act. The Court of Appeals noted that Plaintiffs' claims were based entirely on the MWA, and the language of the MWA and the FLSA differed. *Id*. at *6. In addition, the Court of Appeals noted that the exclusions in the Portal-to-Portal Act were completely absent from the MWA. *Id*. Accordingly, the Court of Appeals concluded the district court erred in relying on federal case law interpreting the Portal-to-Portal Act. Plaintiffs also argued that under the MWA their travel time to the jobsites is compensable when it exceeds the normal commute time. Plaintiffs contended that employees were entitled to compensation for their travel time because they were "traveling employees." *Id*. at *10. The Court of Appeals observed that the traveling employee concept is derived from workers' compensation law, which guarantees compensation to workers when the travel is an integral part of the employee's duties. *Id*. at *6-7. The Court of Appeals declined to apply the traveling employee concept in this case, however, explaining that workers compensation law was *sui generis*, and New Mexico case law has repeatedly declined to mingle its principles with those in other areas of law. Id. at *8. Accordingly, the Court of Appeals affirmed the district court's judgment.

(vi) New Jersey

***Hargrove, et al. v. Sleepy's, LLC*, 2015 N.J. LEXIS 38 (N.J. Jan. 14, 2015).** Plaintiffs, a group of delivery drivers, brought an action in federal court alleging that Defendant misclassified them as independent contractors in violation of New Jersey law. The parties filed cross motions for summary judgment. The federal court, applying the factors to be considered in defining an employee under the Employment Retirement Income Security Act ("ERISA"), held that Plaintiffs were independent contractors. Plaintiffs filed a notice of appeal. Following oral argument, the Third Circuit certified the following question of law to the New Jersey Supreme Court: [u]nder New Jersey law, which test should a court apply to determine a Plaintiff's employment status for purposes of the New Jersey Wage Payment Law ("WPL") and the New Jersey Wage & Hour Law ("WHL"). *Id.* at *2. With respect to the WPL, the New Jersey Supreme Court noted that neither the text of the WPL nor its implementing regulations offered any guidance to distinguish between an employee and an independent contractor. *Id.* at *23. The U.S. Department of Labor ("DOL") filed an *amicus* brief, and advised the Supreme Court that the DOL has applied the "ABC" test for independent contractor determinations under the WPL. *Id.* The "ABC" test presumes that an individual is an employee unless the employer can show that: (i) the individual has been and will continue to be free from control or direction over the performance of his service, both under his contract of service and in fact; and (ii) such service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise; and (iii) such individual is customarily engaged in an independently established trade, occupation, profession or business. *Id.* at *25-26. With respect to the WHL, the Supreme Court noted that the regulation adopted to implement the WHL provided that the criteria identified in the New Jersey Unemployment Compensation Act and case law would be used to determine whether an individual was an employee or independent contractor. *Id.* at *25. The Supreme Court noted that both the WPL and WHL incorporated the terms "suffer or permit" in the definition of "employee" or "employ." *Id.* at *37. Because of the similarity of language, the Supreme Court opined that any interpretation or implementation issues should be treated similarly. In addition, the Supreme Court observed that statutes addressing similar concerns should resolve similar issues, such as the employment status of those seeking the protection of one or both statutes. *Id.* The Supreme Court concluded that, by requiring each identified factor to be satisfied to permit classification as an independent

contractor, the "ABC" test fostered greater income security for workers, which is the express purpose of both the WPL and WHL. *Id.* at *41. The Supreme Court held that, because the issue of employment status under the WPL and WHL should utilize a single test, the agency charged with implementation and enforcement of these statutes has declared that the "ABC" should govern employment-status disputes under the WHL, the rule has been applied without challenge since 1995, and the DOL has applied the same test to employment-status issues under the WPL because of its similar purpose of furthering income security, it was not persuaded that this long-standing approach to resolving employment status issues needed any alteration. *Id.* at *43. Accordingly, the Supreme Court concluded that the "ABC" test governed an individual's status as an independent contractor or employee under the WPL and WHL.

***KhiSharpe, et al. v. New Meadowlands Racetrack, LLC,* Case No. 15-L-5665 (N.J. Super. App. Div. Oct. 23, 2015).** Plaintiff brought a putative class action alleging that Defendant failed to pay him and other similarly-situated workers the prevailing wage in accordance with the New Jersey State Building Service Contract Act ("SBSCA"). Plaintiff argued that the SBSCA applied to Defendant because it operated the Meadowland Racetrack on land owned by the New Jersey Sports and Exposition Authority ("NJSEA") through an agreement with that public agency. *Id.* at 1. Defendant argued that the prevailing wage requirements of the SBSCA were not applicable because it was not a contractor or sub-contractor that provided building services on property that the State owned or leased. *Id.* at 2. Defendant asserted that it entered into the lease with the NJSEA to privatize the Racetrack and to divest the State of the financial burden associated with the Racetrack's operation while preserving jobs in the racing industry, and therefore it was not a contractor or sub-contractor who entered into an agreement with the State to furnish building services, as required for application of the SBSCA. *Id.* at 3. The Court granted Defendant's motion to dismiss. The Court found that, even affording Plaintiff every reasonable inference, Plaintiff had not stated a cause of action against Defendant under the plain language of the SBSCA. *Id.* at 11. The Court noted that the SBSCA clearly states that the wage requirements are limited to employees of contractors or sub-contractors. Under the SBSCA, a "contractor" is defined as a business entity that enters into a contract for the furnishing of building services for any property or premises owned or leased by the State, and a "sub-contractor" is defined as any sub-contractor or lower-tier sub-contractor of a contractor. *Id.* at 10. The Court noted that Defendant directly hired employees who furnished building services at the racetrack and paid its employees with its own funds, the State did not reimburse Defendant the costs, and Defendant did not provide building services pursuant to any contract or sub-contract with the State or anyone else. *Id.* at 3. Thus, according to the Court, the fact that Defendant's employees performed building services on a state-owned or state-leased property was insufficient to trigger the prevailing wage requirements. The Court, therefore, concluded that Plaintiff failed to establish that Defendant was subject to wage requirements of the SBSCA. *Id.* at 11. Accordingly, the Court granted Defendant's motion to dismiss.

(vii) New York

***Ackerman, et al. v. New York Hospital Medical Center Of Queens,* 2015 N.Y. App. Div. LEXIS 2888 (N.Y. App. Div. 2d Dep't April 8, 2015).** Plaintiff, a paramedic, brought a class action alleging that Defendant incorrectly determined Plaintiff's wages and also improperly withheld the wages and overtime compensation that he had earned in violation of the New York Labor Law. Plaintiff alleged that the time-keeping system that Defendant utilized rounded down to the nearest quarter-hour when employees worked past their scheduled shift, and never rounded up. The trial court denied Defendant's motion to dismiss the class action allegations of the complaint for failure to state a cause of action. *Id*. at *2. Upon Defendant's appeal, the New York Court of Appeal affirmed the trial court's order. The Court of Appeal found that the trial court properly denied Defendant's motion to dismiss because the causes of action were sufficiently particular to give the trial court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action. Specifically, the complaint alleged that Plaintiff was Defendant's employee, Defendant determined his wages on the basis of time, and that Defendant improperly withheld Plaintiff's wages and overtime. *Id*. at *3. Further, the Court of Appeal opined that the trial court properly found that the complaint adequately pleaded the class action allegations with sufficient particularity, and included factual allegations addressing each of the five prerequisites to class certification. *Id*. at *3-4. Finally, the Court of Appeal found that Defendant's

contention was without merit in asserting that the class action allegations should be dismissed on the ground that Plaintiff failed to actually demonstrate the prerequisites for class certification. The Court of Appeal noted that pursuant to CPLR § 902, a motion to determine whether a class action may be maintained is to be made within 60 days after the time to serve the responsive pleading has expired. *Id*. at *4. However, Defendant filed the motion pursuant to CPLR § 3211(a)(7) prior to the service of the answer and, thus, the Court of Appeal concluded that the issue of whether class certification should or should not be granted was not properly raised in the context of such a motion. *Id*. Accordingly, the Court of Appeal affirmed the trial court's order.

Ch. 7, Sec. B

***Ansah, et al. v. A.W.I. Securities & Investigation, Inc.,* 129 A.D. 538 (N.Y. App. Div. 1st Dep't 2015).** Plaintiffs brought a putative class action on behalf of themselves and others who worked as security guards and fire safety workers for Defendants seeking to recover prevailing wages, supplemental benefits, and overtime pay in connection with work they performed on various public construction projects. The trial court denied Defendants' motion for summary judgment, and granted Plaintiffs' motion for an extension of time to file a motion for class certification. The New York Appellate Division affirmed the trial court's order. The Appellate Division found that the trial court properly denied Defendants' motion for summary judgment as premature because the merits of Plaintiffs' claims could not be determined prior to production of the relevant public work contracts. Moreover, the conflicting affidavits the parties produced concerning the nature of the work performed by Plaintiffs precluded summary judgment. *Id*. at 540. Defendants also argued, for the first time on appeal, that the contracts required arbitration. The Appellate Division found that Defendants did not preserve their argument, and even if they had preserved it, the argument would fail since Plaintiffs never agreed to arbitrate. *Id*. at 2. Accordingly, the Appellate Division affirmed the trial court's order.

***Kent, et al. v. Cuomo,* 2015 N.Y. App. Div. LEXIS 690 (N.Y. App. Div. Jan. 29, 2015).** Plaintiffs, a group of state workers, brought an action seeking overtime compensation for all hours worked more than 40 per week during Hurricane Sandy. Under the New York Civil Service Law, the State Budget Director has discretionary authority to grant overtime compensation to such employees when they work beyond a normal workweek during an extreme emergency. *Id.* at *2. Pursuant to that authority, the Budget Director issued Bulletin G-1034, declaring Hurricane Sandy to be an extreme emergency and authorized overtime compensation for otherwise ineligible employees who worked more than 47.5 hours in a week as a result of the storm. *Id.* Although Plaintiffs worked more than 40 hours per week as a result of Hurricane Sandy, Defendant did not compensated them for weekly hours greater than 40 and less than 47.5. The trial court partially dismissed Plaintiffs' application to the extent that it sought to require this 40-hour threshold. On appeal, the New York Appellate Division affirmed. Although the Civil Service Law provides that the workweek for basic annual salary for employees eligible for overtime shall not exceed 40 hours, overtime-ineligible employees are expressly excluded from the coverage of that section, and nothing in the legislation defines the phrase "normal workweek" as used in Civil Service Law § 134 (6) for such employees or prescribes the number of hours contained in such a workweek. *Id.* at *3. The Appellate Division thus found that the number of hours in the "normal workweek" of an overtime-ineligible state employee necessarily implicates the Budget Director's specialized knowledge of state employment practices and involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom. *Id.* at *3-4. Further, the Appellate Division noted that the Division of the Budget ("DOB") issued a bulletin stating that employees normally ineligible to be compensated for work in excess of 40 hours per week may, under special emergency circumstances, be made eligible for compensation for such hours of work and, in order to receive such compensation, must work a number of hours clearly in excess of the hours his or her position should reasonably require. *Id.* at *4. Although the 47.5-hour threshold is not referenced in this bulletin, a DOB official affirmed that it had been in place for many years and noted that overtime-ineligible state employees routinely might be called upon in non-emergency situations to work more than 40 hours in a week without additional compensation. The Appellate Division observed that the 47.5-hour threshold took this factual assessment into account by adding an additional full workday of 7.5 hours to the 40-hour workweek, and applied the

47.5-hour threshold in other emergency circumstances. *Id.* at *5. The Appellate Division thus disagreed that the threshold was arbitrary on the ground that it departed unreasonably from the DOB's approach in other emergency situations, and upheld the Budget Director's imposition of the 47.5-hour threshold for work related to Hurricane Sandy. Additionally, the Appellate Division noted that the statutory provisions pertaining to overtime-ineligible employees make no reference to a 40-hour workweek, while those pertaining to overtime-eligible employees do not use the phrase "normal workweek" that appears in the provisions pertaining to ineligible employees. *Id.* Thus, the Appellate Division opined that the Legislature acted intentionally in using different language for the two classes of employees, in failing to define a "normal workweek" for overtime ineligible employees in terms of a specified number of hours, and in according discretion to the Budget Director with regard to the payment of emergency overtime compensation for employees who are ordinarily ineligible for overtime. *Id.* at *6-7. Accordingly, the Appellate Division affirmed the trial court's order.

***Papantoniou, et al. v. Barile Electrical Contracting, Inc.,* 2015 N.Y. Misc. LEXIS 4236 (N.Y. Sup. Nov. 18, 2015).** Plaintiffs, a group of employees, brought an action alleging that Defendants failed to pay them prevailing wages and supplemental benefits for work performed on public projects pursuant to contracts by Barile Inc., Barile Electrical Contracting, Inc., and their affiliates with various governmental entities pursuant to the New York Labor Law, including the New York City Housing Authority ("NYCHA"), as mandated by §§ 191 and 220. *Id.* at *2-3. Plaintiffs also alleged that Defendant Fidelity and Deposit Co. of Maryland was liable for payment of the prevailing wages and supplemental benefits not paid to Plaintiffs pursuant to the terms of the Fidelity bonds. *Id*. at *3. Proposing a class of all individuals employed by Defendants who performed construction work from January 2006 through the present, and excluding any clerical, administrative, professional, or supervisory employees, Plaintiffs moved to join Denis Ramos as a named Plaintiff and class representative, to amend the complaint to add claims by him as a class representative, and for class certification. *Id*. Fidelity and Deposit Co. cross-moved for summary judgment, maintaining that neither the original named Plaintiff Papantoniou, nor Ramos demonstrated a viable claim against Fidelity and Deposit Co., and Plaintiffs' delay in seeking to add Ramos would cause additional legal expenses. *Id.* at *3. The Court disagreed and granted Plaintiffs' motion. The Court noted that the allegations of both Papantoniou and Ramos specifically identified Barile Inc. and thus their claims were against the entity at minimum to which Fidelity and Deposit Co. issued bonds for public works projects. *Id.* at *5-6. Since Fidelity and Deposit Co. articulated no further reason to deny joinder and amendment other than Plaintiffs' delay, which alone was an insufficient reason to deny the relief, the Court granted Plaintiffs' motion to amend the complaint. Fidelity and Deposit Co. also argued that the Davis Bacon Act barred Plaintiffs' claims under state law as the payroll records Plaintiffs presented to support their motion showed that Defendants paid Papantoniou the prevailing wages and supplemental benefits according to the schedule set under the Davis Bacon Act. *Id*. at *8. The Court found that the payroll records did not support Fidelity and Deposit Co. because they only related to NYCHA projects in 2007, and Plaintiffs' claimed under-payment on public works projects throughout their employment with Defendants from 2001 to 2011. *Id.* at *8-9. The Court therefore denied Fidelity and Deposit Co.'s cross-motion for summary judgment. Further, the Court then granted Plaintiffs' motion for class certification, finding that Plaintiffs met all the prerequisites of C.P.L.R. § 901(a). The Court held that the proposed class of at least 40 workers met the numerosity requirement for certification, and the predominant legal claims for all class members were Defendants' failure to pay the prevailing wage rates, supplemental benefits, and overtime compensation timely as mandated by New York Labor Law and in breach of contracts for public works projects. *Id*. at *12-14. The Court determined that nothing in the record suggested that the named Plaintiffs or the attorneys for the putative class would not act in the class' best interests, and thereby individual actions outweighed any anticipated difficulties in managing a class action. *Id*. at *16. Accordingly, the Court granted Plaintiffs' motion for class certification, and the motion to amend the complaint to join Ramos as named Plaintiff.

***Vasquez, et al. v. National Securities Corp.,* 2015 NY Slip Op 25143 (N.Y. Sup. May 1, 2015).** Plaintiff, a broker, brought a putative class action alleging that Defendants failed to pay the legally required minimum wage and overtime in violation of the New York Labor Law ("NYLL"). Defendants moved to dismiss the putative class action for lack of standing on the ground that Plaintiff had been paid the entire

amount of his individual claim. Plaintiff did not oppose the dismissal, but contended that the notice to the putative class must be given pursuant to CPLR § 908, and sought approval of his proposed class notice. The Court granted the motions in part. At the outset, the Court noted that CPLR § 908 provides that a class action shall not be dismissed, discontinued, or compromised without the approval of the Court, and that notice must be given to the class members. *Id*. at *2. The Court further observed that in *Avena v. Ford Motor Co.*, 447 N.Y.S.2d 278 (1st Dept. 1982), the Appellate Division held that New York law requires notice to the class, where, as here, an individual settlement is reached prior to a decision on the merits of a motion to dismiss or a motion for class certification. *Id*. *Avena* likened a class representative and his counsel to a fiduciary and spoke in terms of a fiduciary's obligation of undivided loyalty to the party he represented. Defendants urged the Court to follow modern federal case law, which differs from the rule set forth in *Avena* and its progeny. The Court however, found that this case was brought under Article 9, and therefore, it must follow the Appellate Division's clear precedent to allow notice. *Id*. at *5-6. The Court did not rule on the sufficiency of notice because Defendants did not state their objections to the notice; instead, they merely requested an opportunity to do so if the Court held that notice under CPLR § 908 was required. *Id*. at *6. Accordingly, the Court granted Defendants' motion to dismiss, and Plaintiff's motion to compel notice to the class, but reserved judgment on the manner and substance of such notice. *Id*. at *7.

(viii) Ohio

***Sheet Metal Workers International Association Local Union No. 33, et al. v. Courtad, Inc.,* 2015 Ohio App. LEXIS 1478 (Ohio. App. 5th Dist. April 13, 2015).** Plaintiff brought a class action alleging that Defendant intentionally violated Ohio's prevailing wage laws by failing to properly classify and pay its employees the correct prevailing wage rate on a project involving the construction of the Stark State College Business & Entrepreneur Center. Finding that Defendant intentionally violated the prevailing wage laws, the trial court levied payments and penalties against Defendant regarding five employees and awarded Plaintiff $33,732.84 for attorneys' fees. Upon Defendant's appeal, the Ohio Court of Appeals affirmed. Although Defendant argued that the trial court erred in not identifying a proper work classification that made up the "not less than" prevailing wage rate, the Court of Appeals found that the trial court was not required to discuss or enumerate the lowest trade applicable to the work performed in order to determine compliance with prevailing wage law. *Id.* at *6. Defendant further argued that the trial court erred in finding that Defendant could not take credit for vacation days, bonuses, lump sum wage payments, and personal vehicle and gasoline benefits as part of its payment of the prevailing wage rate. The Court of Appeals, however, confirmed the trial court's analysis that the vacation policy, bonus payment, and personal vehicle and gasoline benefits did not constitute enforceable commitments. It was undisputed that Defendant paid the five employees throughout the project an hourly rate from $12.00 to $30.00 per hour and a prevailing wage rate of $35.64 per hour. *Id.* at *9. Pursuant to R.C. § 4115.03(E)(3)(h), vacation pay may be included in the prevailing wage if it is an "enforceable commitment" that is a "legally binding contractual obligation of an employer." *Id.* Defendant argued that its employee handbook included a vacation policy to establish an enforceable commitment. The trial court, however, found it unenforceable as Defendant's policies required vacation days to be taken within a particular year or the vacation days and were forfeited. *Id.* at *9-10. Agreeing with the trial court, the Court of Appeals found that the lack of uniformity coupled with the lack of ability to cash out unused vacation time negated Defendant's argument that its vacation policy was an enforceable commitment. *Id.* at *11. Because there was no set schedule for the award of bonuses, and there was no proof of a written agreement between Defendant and the employees for the use of a company vehicle and gasoline to be included in the prevailing wage, the Court of Appeals also found that the trial court rightly excluded these in the calculation of the prevailing wage rate. *Id.* at *12-13. Defendant justified paying a less than prevailing wage hourly rate on the fact that prior to commencement of work, the employees agreed that Defendant could make up the difference with a differential lump sum payment. The Court of Appeals, however, determined that the trial court correctly held that no agreement by an employee to waive his right to prevailing wages was valid, as employees under a collective bargaining process in the private construction sector were guaranteed a daily hourly prevailing wage, and thus Defendant's differential lump sum payment was contrary to law and public policy. *Id.* at *13-17. Finally, Defendant argued that it was not an intentional violator. The Court of Appeals, however, found sufficient substantive proof of Defendant's intentional acts including false and misleading certified payroll reports. *Id.* at *18. Because the statute authorized attorneys' fees to the prevailing party

and Plaintiff prevailed on the prevailing wage issue, the Court of Appeals concluded that the trial court did not abuse its discretion in the amount of the attorneys' fees award. *Id.* at *19-22. Accordingly, the Court of Appeals affirmed the trial court's findings.

(ix) Oregon

***Maza, et al. v. Waterford Operations, LLC*, Case No. 14-CV-3147 (Ore. Cir. Ct. April 16, 2015).** Plaintiffs, a group of former non-exempt hourly employees, brought a class action alleging that Defendants failed to pay them all wages due to them. Defendants, a group of health services providers, had a uniform non-exempt employee time-keeping procedure and practice through the implementation of an electronic time-keeping system called Kronos, which recorded the employees' worktime. *Id*. at *2. The data from Kronos was transmitted to the payroll system, "Ultipro," that calculated hours and pay rates and disseminated wage payments to employees at uniform times of the month. *Id*. Defendants also established a uniform electronic health record and charting system called Point Click Care ("PCC"). *Id*. In 2011, Defendants established a policy that all non-exempt employee wages following voluntary and involuntary separations would be paid by a pay card called the Money Network System pay card. *Id*. at *3. Separated employees were not allowed to elect to receive their final payment by check or any other method, and in using pay cards at ATM's a fee would be charged, unless it was used at a Wal-Mart store. *Id*. All three named Plaintiffs encountered circumstances where they were performing patient charting on PCC, but were not logged-on to Kronos and, thus, were not being paid for charting work they were performing. *Id*. Plaintiffs also encountered incidents where their lunch break period was less than 30 minutes and for which they were not paid for a full 30 minute lunch break as required by law. *Id*. Plaintiffs sought class certification, which the Court granted by certifying three sub-classes, including: (i) the PCC class; (ii) the meal period class; and (iii) the pay card class. At the outset, the Court found that the adequacy and fairness requirements were satisfied as there was no challenge based upon potential conflicts or antagonism between the class representatives and class members. *Id*. at *5. The Court also determined that the commonality requirement was satisfied because of common questions, such as: (i) did Defendants use Kronos as a means to record and track all work hours performed by their non-exempt hourly employees; and (ii) did Defendants require their hourly employees to use PCC to perform all patient charting. *Id*. at *6. Accordingly, the Court concluded that commonality requirement was satisfied as to the PCC class. As to the meal period class, the Court noted that common questions included: (i) if Defendants used Kronos as a means to record and track all work hours performed by their non-exempt hourly employees; (ii) were all employees required to clock-off for lunch and clock-back in following their 30 minute lunch break. *Id*. at *7. Similarly, as to the pay card class, the Court found questions of law and fact were common across the class, and accordingly, found that commonality was satisfied. Defendants argued that several factual and legal determinations were specific to individuals and could not be resolved through a class-wide inquiry. As to the PCC class, Defendants pointed out that to be found liable for failure to pay wages while employees were logged-on to the PCC, but while they were not logged-on to Kronos at the same time, Plaintiffs must prove that Defendants either knew or should have known that the practice was occurring. *Id*. at *10. The Court, however, noted that *Pearson v. Phillip Morris, Inc.*, 257 Or. 106 (2013), determined that the issue of reliance and knowledge could be litigated and resolved on a class-wide basis. *Id*. The Court explained that this was ultimately a jury question and it was for the jury to determine whether the information Defendants had available was sufficient to put them on notice to justify a finding that Defendants knew or should have known this practice was occurring. *Id*. Likewise, the Court found that individual issues did not predominate as to the meal period and pay card class, and certified those claims too.

(x) Pennsylvania

***Ford, et al. v. Lehigh Valley Restaurant Group, Inc.,* 2015 Pa. Dist. & Cnty. Dec. LEXIS 11 (Pa. Common Pleas Ct. April 24, 2015).** Plaintiffs, two former servers, brought a putative class action alleging that Defendant violated the Pennsylvania Minimum Wage Act of 1968 ("MWA") by including kitchen workers in servers' tip pools. Defendant owned and operated 20 Red Robin restaurants in central and eastern Pennsylvania. Plaintiffs alleged that Defendant subsidized the sub-standard wages it paid to back-of-the-house kitchen staff, such as cooks, dishwashers and janitors, by improperly splitting with them the

pooled tips meant only for front-of-the-house staff, such as servers, hosts, bartenders and bus boys. *Id.* at *1-2. Plaintiffs asserted that the "customarily and regularly receive tips" test limited tip pool sharing to servers, bartenders, hosts, and bus boys who directly interact with customers, and does not permit back-of-the-house staff to participate as they do not typically interact with customers and regularly receive tips. *Id.* Defendant filed preliminary objections seeking to dismiss the MWA claim on the ground that customer interaction was irrelevant in determining whether particular employees customarily and regularly receive tips so as to be entitled to share in tip pool funds. *Id.* at *2-3. Particularly, Defendant asserted that because the FLSA does not require that an employee have direct customer interaction to "customarily and regularly receive tips," then the MWA, which features identical language, likewise does not require that employees have direct customer interaction to receive tip pool funds. *Id*. at *8. The Court of Common Pleas overruled Defendant's preliminary objections, finding that direct customer interaction remains a relevant factor in determining the eligibility to share in tip pool under § 3(d) of the MWA. *Id.* at *3. While neither the FLSA nor the MWS provides any guidance as to the specific types of employees who customarily and regularly receive tips, the U.S. Department of Labor ("DOL") has listed waiters, waitresses, bellhops, countermen, bus boys, and service bartenders as employees who customarily and regularly receive tips, with janitors, dishwashers, chefs, and laundry room attendants as employees not eligible to participate in a valid tip pool. *Id.* at *15-16. In a series of opinion letters, the DOL has also indicated that waiters, bellhops, waitresses, countermen, bus boys, and service bartenders were among those who might participate in a tip pool, and that an employer might lose the benefit of the exception from the tip-retention requirement if tipped employees were required to share their tips with employees who do not customarily and regularly receive tips, such as janitors, dishwashers, chefs, or laundry room attendants. *Id.* at *15-17. The Court of Common Pleas noted that although no Pennsylvania case law authority has had occasion to interpret the phrase "customarily and regularly receive tips," in light of the clear majority of the federal case law rulings and the DOL's opinion letter, it concluded that direct customer interaction remain a relevant factor in determining whether employees customarily and regularly receive tips for purposes of tip pool eligibility under MWA. *Id.* at *30-31.

***Sciliano, et al. v. Albert/Carol Mueller T-A McDonalds*, Case No. 2013-7010-619 (Pa. Common Pleas Ct. May 14, 2015).** Plaintiffs, a group of current and former hourly employees, brought a class action alleging that Defendants violated § 260.3 of the Pennsylvania Wage Payment and Collection Law by mandating that their employees receive payment of their wages via a JP Morgan Chase payroll card ("payroll card"). Section 260.3 provides that wages must be paid in lawful money of the United States or check. Since a payroll card is neither lawful money of the United States or a check, Plaintiffs asserted that they were entitled to damages set forth in § 260.9a and § 260.10 of the Pennsylvania Wage Payment and Collection Law. *Id*. at *2. Plaintiffs moved to certify a class of current and former employees who worked at one of the 16 McDonald's restaurants owned and operated by Defendants who received payments exclusively via a payroll card and made use of the debit card. *Id*. at *2-3. The Court of Common Pleas granted the motion and certified the class. In its certification analysis, the Court of Common Pleas determined that the class satisfied the numerosity requirement, as the class consisted over 2,380 members. *Id*. at 4. The Court of Common Pleas observed that Plaintiffs' legal theory essentially revolved around the issue that Defendants' payment by way of the payroll cards was a *per se* violation of the Pennsylvania Wage Payment and Collection Law, and therefore, the proof would be identical as among all Plaintiffs, *i.e.*, that they received wage payments via the payroll card and used it. *Id*. at 5. The Court of Common Pleas similarly found that the claims of the representative parties were typical of the claims of the class, and that the representative parties would fairly and adequately assert and protect the interests of the class. *Id*. The Court of Common Pleas also ruled that a class action was an efficient method of adjudication, as it satisfied the requirements specified in Pennsylvania Rule of Civil Procedure 1708. *Id*. at 7. Accordingly, the Court of Common Pleas certified the class.

***Siciliano, et al. v. Albert/Carol Mueller T-A McDonalds,* Case No 13-CV-7010 (Pa. Common Pleas Ct. May 29, 2015).** Plaintiffs, a group of employees, brought a class action alleging that Defendants required them to receive their wages through a payroll card in violation of § 260 of the Pennsylvania Wage Payment and Collection Law ("WPCL"), which requires that wages be paid United States currency or by check. *Id.* at 2. Defendants moved for summary judgement, which the Court denied. Defendants contended that the

payroll card was in the broad sense "money" and that it was also "check" or at the least the "functional equivalent" of a check. *Id.* Further, Defendants argued that because the funds loaded on to the payroll card could readily be converted to cash at a bank or an ATM, they constituted money for the purposes of the statute. The Court, however, remarked that the § 260.3 did not merely use the term "money," but that it used the term "lawful money of the United States," which had a more specific legal definition than the more general term "money." *Id.* at 2-3. Further, the Black's Law Dictionary defines the term "lawful money" as "money that is the legal tender for the debts." *Id.* at 3. The Court also observed that "legal tender" is the money approved in a country for the payment of debts, the purchase of goods, and other exchanges for value. *Id.* Further, § 260.2 a defines "check" as "a draft drawn on a bank and payable on demand," and the Court observed that a "draft" is "an unconditional written order signed by one person directing another person to pay a certain sum of money on demand or at a definite time to a third person or to the bearer. *Id.* Although Defendants asserted that the payroll cards were issued by a bank and were capable of being withdrawn on demand, the Court remarked that the payroll cards were not "unconditional written orders." *Id.* Thus, because the payroll cards constituted neither lawful money nor checks, the Court denied Defendants' motion for summary judgment.

(xi) South Carolina

***Zinn, et al. v. CFT Sales & Marketing, Ltd.,* 2015 S.C. App. LEXIS 244 (S.C. Ct. App. Nov. 25, 2015).** Plaintiffs, a group of sales representatives, brought an action alleging that Defendant, a timeshare developer of several resorts, violated the South Carolina Payment of Wage Act ("Wages Act") by failing to pay them appropriate wages. Plaintiffs' employment contracts with Defendant addressed their compensation both during their employment and after their respective discharges from Defendant. *Id.* at *3. Defendant paid its sales representatives on a commission basis for each sale of a timeshare interest, allocated to a "reserve account," and each sales representative contractually agreed to fund the reserve account with 10% of the commissions earned. *Id.* at *3-4. The amount of the commission already paid to the sales representative was charged against the balance of the reserve, commonly referred to as a "charge back," whenever a timeshare purchaser defaulted. *Id.* at *5. Each such defaulted sale resulted in a charge back until the reserve balance was exhausted, and this allowed Defendant to recover a portion of the commissions paid to sales representatives for sales on which Defendant did not receive payment of the purchase price. *Id.* Plaintiffs asserted that Defendant owed them thousands of dollars in unpaid commissions. Defendant moved for summary judgment, arguing that the doctrine of *res judicata* barred Plaintiffs' action. *Id.* at *9. In September 2007, Judith Parker brought an action alleging that Defendant's practices regarding payment of wages was inconsistent with statutory laws (the "*Parker* action"). *Id.* Plaintiffs in *Parker* also claimed that the reserved account and charge back provisions of Defendant's employment contracts violated the Wages Act in several respects, including the timing for final payments made after a sales representative had been discharged from employment. *Id.* On January 11, 2010, the *Parker* action settled for $650,000. *Id.* at *8. Plaintiffs alleged that they were entitled to unpaid wages far in excess of the amounts in the reserved accounts maintained by Defendant and claimed in the *Parker* action. *Id.* The trial court ruled that the doctrine of *res judicata* expressly barred Plaintiffs from any claims that they either raised or could have raised in the *Parker* action, including the validity of the reserve and chargeback clauses under the Wages Act. *Id.* at *10. After a trial, the jury entered a verdict as to the breach of contract claims, finding that Defendant's employment contracts with Plaintiffs violated the Wages Act, and the contract was void as against public policy. *Id.* at *13. On appeal, Defendant asserted that the trial court erred in finding that the reserve and charge back components of Defendant's employment contracts with Plaintiffs violated that Wages Act. Defendant argued that the doctrine of *res judicata* barred the trial court's post-trial review of the legality of Defendant's reserve and charge back systems under the Wages Act, and the language of the order contradicted its oral ruling at trial as well as the jury's verdicts against all Plaintiffs. *Id.* at *16. Defendant further contended that because the identical parties previously litigated the legality of Defendant's reserve and/or charge back systems under the Wages Act in the *Parker* action, the trial court properly ruled that the doctrine of *res judicata* precluded any subsequent re-litigation. *Id.* The South Carolina Court of Appeals affirmed the trial court's verdict. The Court of Appeals found that Defendant established the identical nature of the subject matter in the *Parker* action and this action. *Id.* at *19. Plaintiffs argued that *Parker* did not specifically rule on whether Defendant's contractually implemented reserve and/or charge back procedure violated the Wage Act. The Court of Appeals,

however, agreed with Defendant that the issue had been adjudicated because the *Parker* action addressed the validity of the reserve and charge back procedure under the Wages Act. *Id.* at *19. Accordingly, the Court of Appeals concluded that the doctrine of *res judicata* barred the trial court's post-trial review of the legality of Defendant's reserve and charge back systems under the Wages Act.

(xii) Utah

***Heaps, et al. v. Nuriche, LLC*, 2015 U.S. Utah LEXIS 47 (Utah Jan. 30, 2015).** Plaintiffs, a group of employees and founding members of Nuriche, LLC, brought a class action alleging that other founding members of Nuriche promised them compensation and benefits of $150,000 and that Defendants refused to provide the promised compensation after their terminations in violation of the Utah Payment of Wages Act ("UPWA"). The individual Defendants moved for summary judgment, arguing that Nevada limited liability company law controlled Plaintiffs' claim for unpaid wages and that, under Nevada law, managers could not be held personally liable for unpaid wages. *Id*. at *2. The trial court granted Defendants' motion for summary judgment, and Plaintiffs appealed. The Utah Supreme Court affirmed. Plaintiffs first argued that the trial court erred because the UPWA imposes personal liability on managers of limited liability corporations for unpaid wages. Defendants asserted that Nevada law, rather than Utah law, applied because under the Utah Revised Uniform Limited Liability Company Act ("URULLCA"), the law of the jurisdiction of formation of a foreign limited liability company governs the liability of members and managers for debts, obligations, or other liabilities of the company. *Id*. at *5. The Supreme Court held that, while Nevada law might govern the managers' liability for the obligations of Nuriche, Plaintiffs were not seeking to hold the individual Defendants liable for an obligation of Nuriche; rather, Plaintiffs sought to hold the individual Defendants directly liable under the UPWA. Therefore, unlike claims that rely on derivative liability to render individual officers responsible for obligations of a company, Plaintiffs premised their claims on a theory of direct liability, and the URULLCA's governing law provision, which limited its applicability to those cases implicating officer liability for the obligations of the company, did not apply. *Id*. at *5-6. Further, the Supreme Court held that the individual Defendants did not employ Plaintiffs within the meaning of the UPWA. The statutory definition of employer includes every person, firm, partnership, association, corporation, or receiver "employing any person in this state." *Id*. at *8. The Supreme Court found that the phrase "employing any person in this state" modified each of the terms in the preceding list and, therefore, limited the definition of employer to "one who employs." *Id*. Here, Plaintiffs conceded they were employed by Nuriche, not by the individual Defendants in their individual capacities. Although the individual Defendants might have exercised supervisory power over Plaintiffs, any supervisory power arose from their positions as officers and agents of Nuriche and not from any direct employment. *Id*. The Supreme Court, therefore, concluded that the individual Defendants were not personally liable for unpaid wages under the UPWA. *Id*. at *9. Accordingly, the Supreme Court affirmed the trial court's order granting summary judgment to the individual Defendants.

(xiii) Washington

***Cruz, et al. v. Chavez,* 2015 Wash. App. LEXIS 757 (Wash. App. April 13, 2015).** Plaintiffs, a group of former employees, brought a class action alleging that Defendant withheld and underpaid wages owed to them. Plaintiffs, who were Mexicans and spoke no English, claimed that Defendant took advantage of them throughout their employment. The case proceeded through arbitration, and the trial court entered an arbitration award in Plaintiffs' favor. *Id*. at *2. Subsequently, Defendant's counsel Michael Jacobson contacted the former place of employment of named Plaintiff Epifano Rios, and falsely stated that he represented Rios and sought confidential records regarding Rios employment. *Id*. at *3. Meanwhile the Defendant settled with another named Plaintiff, Giberto Ramirez, and Ramirez agreed not to sue Defendant in exchange for $4,000. The other Plaintiffs were unaware of the settlement. The remaining Plaintiffs settled in mediation, and Defendant moved to enforce the agreement with Ramirez. The trial court denied enforcement of the Ramirez agreement, finding that the manner in which it was obtained was inappropriate and it imposed sanctions in the amount of $5,000. *Id*. at *6. On appeal, the Washington Court of Appeals affirmed. At the outset, the Court of Appeals remarked that it would apply the general principles of contract law to settlement agreements, and an essential element of the valid formation of a contract is the parties' objective manifestation of mutual assent. *Id*. at *8. Here, Plaintiff Manuel Cruz

stated that Defendant had contacted him directly, and encouraged him to settle his claims without the assistance of counsel. *Id*. at *9. Plaintiffs also submitted evidence that through Jacobson's advice, Defendant urged Ramirez to sign a contract without the assistance of counsel. The Court of Appeals noted that the evidence showed that Jacobson's acts were contrary to Professional Conduct Rule 4.2, which prohibits an attorney from communicating directly with a represented party. *Id*. at *10. Accordingly, the Court of Appeals held that the trial court did not err in declining to enforce the agreement. The Court of Appeal also awarded costs to Plaintiffs.

***Demetrio, et al. v. Sakuma Brothers Farms, Inc.*, 2015 Wash. LEXIS 807 (Wash. July 16, 2015).** Plaintiffs, two seasonal and migrant agricultural workers, brought a class action against Defendant for unpaid wages, specifically their rest breaks, and asserted several state and federal claims. Defendant, berry farm operator, hires hundreds of migrant and seasonal workers to hand-pick its crop each year. *Id.* at *3. Defendant paid a "piece-rate" wage based on the workers' productivity, *i.e.*, an amount per pound or per box of fruit harvested. *Id.* The piece-rate is the only compensation workers received. *Id.* While the case was pending in federal court and after some discovery, Defendant agreed to settle each of the workers' retroactive claims, but denied liability and expressly preserved its challenge to the workers' prospective claim that Defendant must pay for the time piece-rate workers spend in rest breaks under WAC § 296-131-020(2). *Id.* at *4. Thus, the settlement did not affect the workers' claim for declaratory relief requiring pay separate and apart from the piece-rate for those brief rest periods going forward. *Id.* The federal court granted Plaintiffs' motion to certify two questions to the Washington Supreme Court related to that claim. *Id.* The first certified question was whether a Washington agricultural employer had an obligation under WAC § 296-131-020(2) and/or the Washington Minimum Wage Act ('MWA'), ch. 49.46 RCW, to separately pay piece-rate workers for the rest breaks to which they were entitled. *Id.* at *4-5. The Supreme Court noted the regulation provides each employee at least ten minutes rest period in each four-hour period of employment on the employer's time. For purposes of computing the minimum wage on a piece-work basis, the time allotted an employee for rest periods shall be included in the number of hours for which the minimum wage must be paid. *Id.* at *6. The Supreme Court focused on the meaning of the phrase "on the employer's time," finding that the only reasonable interpretation was that it required pay separate from the piece-rate for rest breaks. *Id.* at *6-7. The Supreme Court also emphasized its function in furthering the intended purpose of the regulation. *Id.* at *7. The Supreme Court rejected Defendant's argument that WAC § 296-131-020(2) permits an all-inclusive piece-rate because "the system incentivizes employees by awarding harder-working and more productive workers with greater earnings," on the grounds that it incentivized missed rest breaks at the expense of the employee's health. *Id.* at *10-11. The Supreme Court remarked that Defendant's interpretation was inconsistent with the plain language of the regulation and contrary to its basic purpose in protecting employees' health. *Id.* at *11. Further, the Supreme Court considered the second question regarding the rate of pay required for the employees' rest break time. *Id.* at *12. Defendant argued that Washington law requires only the minimum wage per hour for piece-workers, although the Supreme Court noted it admitted paying rest breaks for its hourly employees at the employees' hourly rate. *Id.* at *12. The Supreme Court cited case law interpreting the MWA and WAC § 296-131-020(2) that treated rest periods as hours worked and rejected that argument, stating that because all hours worked "on the employer's time" were treated equally, WAC § 296-131-020(2) entitles piece-workers to their regular rate of pay for rest break time. *Id.* at *16-17. The Supreme Court clarified that to calculate a piece-worker's regular rate, employers must tally the total piece-rate earnings and divide those earnings by the hours the piece-worker works, excluding the time spent resting. *Id.* at *17. Finally, the Supreme Court concluded that in the absence of a separate agreement, pay separate from the piece-rate must equal at least the applicable minimum wage or the piece-worker's regular rate of pay, whichever is greater. *Id.* at *19.

***Romney, et al. v. Franciscan Medical Group,* 2015 Wash. App. LEXIS 322 (Wash. App. Feb. 17, 2015).** Plaintiffs, a group of medical professionals, brought a putative class action against their employer for damages, statutory penalties, and equitable relief for wage violations. Defendant moved to compel arbitration pursuant to the employment contract Plaintiffs entered into that included agreements to arbitrate all employment-related disputes between the parties. The trial court denied the motion, finding the arbitration agreement unconscionable. *Id*. at *2-3. Upon appeal, the Washington Court of Appeals

reversed and remanded. Plaintiffs argued that the agreement was procedurally unconscionable because they had no meaningful choice in negotiating and signing the contract. The Court of Appeals pointed out that "[t]he fact that a contract is an adhesion contract is relevant but not determinative," and "[a]n adhesion contract is not necessarily procedurally unconscionable." *Id.* at *6. According to the Court of Appeals, "the key inquiry is whether the party lacked meaningful choice." *Id.* The Court of Appeals found that Plaintiffs had a meaningful choice in entering the employment agreement, since Plaintiffs could choose employment elsewhere. *Id.* at *10. Further, the arbitration clause, printed in the same size font as the rest of the agreement under a bolded heading, appeared understandable. *Id*. The Court of Appeals rejected Plaintiffs' contention that they had no time to consider the contract, finding that they all signed multiple employment agreements which contained the arbitration addendum. The Court of Appeals therefore concluded that arbitration agreement was not procedurally unconscionable. *Id.* The Court of Appeals further found that the agreement was not substantially unconscionable, as the terms of the agreement were not one-sided. *Id.* at *11. Plaintiffs contended that the agreement was overly harsh because it required them to arbitrate all claims, but allowed Defendant to seek limited relief in the court system. Plaintiffs cited two exhibits in the agreement that permitted Defendant to seek injunctive relief and other remedies. The Court of Appeals, however, pointed out that "substantive unconscionability does not concern whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so "'one-sided' as to render it patently overly harsh." *Id.* at *13. Since neither of the exhibits was at issue here, the Court of Appeals declined to decide the issue of their unconscionability. The Court of Appeals reasoned that even if they were unconscionable, they easily could be severed from the agreement and give effect to the provisions of the arbitration agreement as the agreement itself provided that if any "portion of this Addendum is adjudged by any Court to be void or unenforceable in whole or in part, such adjudication shall not affect the validity and enforceability of the remainder of the Addendum." *Id.* at *14. Because Defendant indicated its consent to release confidentiality, if required, the Court of Appeals further declined to find the confidentially provision in the agreement to be substantially unconscionable. *Id.* at *17. The Court of Appeals therefore concluded that the arbitration agreement was not procedurally or substantively unconscionable, and accordingly, remanded the action to trial court to enter an order compelling arbitration.

(xiv) Wisconsin

***Aguilar, et al. v. Husco International, Inc.*, 2015 Wis. LEXIS 165 (Wis. 2015).** Plaintiffs, a group of employees, brought a wage & hour class action against Defendant seeking wages due to them under Wis. Stat. § 109.03(5). In 1983, the union had negotiated a collective bargaining agreement ("CBA"), which made workers have a short work shift than they would have if the schedule complied with the regulations on unpaid meal breaks. *Id*. at *2. This provision was in conflict with Wis. Admin. Code § 274.02, which requires employers to pay employees for meal breaks that were shorter than 30 minutes. *Id*. Plaintiffs' action began when a union-initiated complaint was filed with the Wisconsin Department of Workforce Development ("DWD") alleging that Defendant owed wages for 20-minute unpaid meal breaks to the employees. The DWD investigated and rendered a decision that it would not seek collection of back wages on the ground that the factors favoring a waiver were present in this case. *Id*. at *3. On appeal, the Wisconsin Labor Standards Bureau affirmed the decision, and Plaintiffs then filed their suit. The trial court denied summary judgment to Plaintiffs, but the Wisconsin Court of Appeals reversed, reasoning that the CBA could not trump the DWD meal break regulation. On further appeal, the Wisconsin Supreme Court reversed and remanded. At the outset, the Supreme Court noted that § 301 of the Labor Management Act governed suits for violation of contracts between an employer and a labor organization representing employees, and controls over state law. *Id*. at *5. The Supreme Court observed that preemption does not apply where its application would not accomplish those purposes, and in this case the preemption depended on whether the state law claim required the interpretation of a CBA. Here, there was no assertion that the CBA's terms were violated or that the CBA itself required that Defendant pay employees for the meal break time. *Id*. at *15. The only question was whether the DWD's interpretation of its own rule was reasonable. The Supreme Court concluded that federal law did not govern the analysis, because answering that question did not require the construction of any of the terms of the CBA. *Id*. at *17-18. The Supreme Court noted that the trial court asked the parties for their positions on the significance of the DWD decision, and both parties agreed with the characterization that what the DWD did was not binding on the trial court. *Id*. at *21. The Supreme Court remarked that the correct question was not whether the DWD

decision was binding, but whether there is an agency interpretation of its own regulations, and if so, whether that interpretation was reasonable and consistent with the purposes of the regulation. *Id*. at *22. Here, there was no dispute that the regulation was promulgated by DWD and no question that it was the agency charged with administering and resolving employment disputes. *Id*. at *24. Therefore, the Supreme Court treated the DWD decision as one by an agency interpreting its own rules. The Supreme Court noted that the DWD decision rested in part on the investigator's determination that the failure to obtain the waiver that would have satisfied the regulation was a technical violation that did not warrant awarding back pay because the factors required to approve a waiver or modification of § 272.02 were present in this case. *Id*. at *25. The Supreme Court held that where the regulation contained an exemption that applied under specific circumstances and the exemption may be granted in the Department's discretion, the regulation's purpose is served where the Department has made such a determination. *Id*. at *26. Accordingly, the Supreme Court reversed the Court of Appeals' decision and remanded for entry of summary judgment in Defendant's favor.

C. Rulings In Breach Of Employment Contract/Miscellaneous Workplace Claims

(i) California

***In Re Google Inc. Shareholder Derivate Litigation,* Case No. 14-CV-261485 (Cal. Super. Ct. Nov. 24, 2015).** Plaintiffs, the Police Retirement System of St. Louis, Marilyn Clark, and Pradeep Shah, brought a consolidated shareholder derivative action against Defendants, Google and various officers and directors of Google, alleging that Defendants entered into illegal "gentleman's agreements" with numerous other companies to prevent each company from actively recruiting each other's employees in order to eliminate hiring competition and drive down employee wages. *Id.* at 4. Defendants moved for summary judgment, arguing that Plaintiffs' derivative claims were barred by the applicable three-year statute of limitations. The Court agreed and granted Defendants' motion. The Court noted that Plaintiffs had admitted that the operative consolidated complaint was based on the anti-competitive agreements uncovered by the Antitrust Division of the U.S. Department of Justice ("DOJ") in 2009, which resulted in a September 2010 settlement that required Defendants and five other companies to end their anti-competitive agreements. *Id.* at 8. Thus, the Court noted that all derivative action stemming from the agreements disclosed in September 2010 became time-barred in September 2013 unless Plaintiffs, who filed the action on February 28, 2014, could establish equitable tolling. *Id.* Plaintiffs argued that the statute of limitations was tolled during the concealment by Defendants of their wrongful acts. *Id.* at 5. Plaintiffs also asserted that they did not and could not have discovered Defendants' liability until Plaintiffs in *In Re High-Tech Employee Antitrust Litigation* filed an unredacted case management conference statement that quoted the contents of certain internal documents and when the public learned for the first time of Plaintiffs' allegations of anti-competitive practices. *Id.* at 4-5. The Court, however, found that the September 2010 DOJ complaint, settlement, and press release on their own, and particularly when combined with the evidence of the subsequent media attention given to the DOJ's action, were sufficient evidence to establish inquiry notice under an objective reasonable investor standard. *Id.* at 9. According to the Court, the 2010 DOJ complaint and press release were evidence that Defendants had already suffered harm because each company's ability to attract talented high-level employees had been artificially stifled by the illegal agreements. *Id.* Plaintiffs thus failed to show that an investigation begun at this time could not have discovered facts that would support allegations as to who was responsible for the injury. *Id.* Because both a cognizable harm to the corporation and list of potentially responsible individuals had been identified after the DOJ's September 2010 announcement, the Court ruled that Plaintiffs failed to show that an investigation commenced after September 2010 would not have obtained information necessary to file a "viable" complaint. *Id.* at 10. The Court therefore held that the three-year statute of limitations provided Defendants a complete defense, and accordingly, granted Defendants' motion for summary judgment.

***Mallano, et al. v. Chiang,* Case No. BC 533770 (Cal. Super. Ct. Dec. 16, 2015).** Plaintiff, a retired justice of the California Court of Appeal, brought a class action alleging that the State of California refused to pay the full amount of constitutionally and statutorily mandated judicial salaries and benefits to California justices, judges, and judicial retirees and their survivors. Plaintiff sought a declaration as to the active judicial salaries during each of the fiscal years from 2008-2009 through 2014-2015. *Id.* at 2. Defendants,

the Controller of the State of California, the Judges' Retirement System, and the Judges' Retirement System II, denied the allegations of the complaint and asserted that § 68203 of the California Government Code did not warrant automatic and mandatory judicial salary increases. *Id.* at 3. At trial, Defendants contended that the Controller could not pay increased judicial salaries without a specific appropriation by the Legislature. *Id.* at 6. The Court disagreed with Defendants and noted that "the California Constitution provides that a specific appropriation is not necessary, since statutes that set judicial salaries, by themselves, constitute self-executing appropriations." *Id.* Defendants also contended that § 68203(a) should be interpreted to include not only state employee salary increases, but also decreases as well. Disagreeing again, the Court noted that § 68203(a) uses the exclusive term "average percentage salary increase," and not "average percentage salary increase or decrease" or "average percentage salary net increase" or "average percentage salary change." *Id.* at 9. The Court therefore held that salary decreases were not considered a part of the definition of "salary increase" in § 68203(a). *Id.* Because § 68203, by itself, constituted a self-executing appropriation by the Legislature of the funds necessary to pay judicial salary increases, the Court reasoned that the Controller of the State of California has the ministerial duty to draw warrants to pay the judicial salary increases mandated by § 68203, and the Boards of Administration for the Judges' Retirement Systems I and II have the ministerial duty to recalculate benefits payable to judicial retirees and their survivors so as to reflect the judicial salary increases mandated by § 88203. Hence, the Court concluded that Plaintiff had established the entitlement to declaratory relief as to the appropriate increases in the judicial salaries and benefits. *Id.* at 15-16. The Court further determined the mandated increased judicial salaries and judicial retiree benefits vested on particular certain dates, and held that Plaintiff and the putative class members were entitled to interest, at 10% per year, on the unpaid salaries and benefits from the dates on which the sums vested until the increases and benefits were paid. *Id.* at 16-17. Accordingly, the Court entered judgment in Plaintiff's favor at the conclusion of the trial.

(ii) Connecticut

***Kiewlen, et al. v. City Of Meriden*, 2015 Conn. LEXIS 157 (Conn. June 9, 2015).** Plaintiffs, a group of widows of deceased police officers or firefighters, and retired police officers or firefighters who were divorced or widowed since they retired, brought a class action challenging the health insurance emoluments, which they received as part of their pension. The City assigned insureds to one of the three plans, including: (i) the City placed an insured who claimed no dependents in the "single" plan; (ii) an insured who claimed one dependent in the "member plus one" plan; and (iii) an insured who claimed more than one dependent in the "family" plan. *Id.* at *9. The City reduced Plaintiffs' health insurance emoluments after the number of dependents that they could claim decreased. Plaintiffs sought a writ of mandamus compelling the City to pay them the health insurance emoluments that they received at the time of the retiree's retirement or, in the case of Plaintiff widows, at the time of the death of their respective spouses, without any change in their status to reflect the death of, or their divorce from, their spouses. *Id.* at *14. The trial court ruled in favor of Defendant. On appeal, the Connecticut Supreme Court reversed in part. The Supreme Court examined the city charter provisions at issue and noted that the § 85G of the charter established that the surviving spouse of a police officer or firefighter was entitled to receive one half of the compensation that his or her deceased spouse was collecting at the time of his or her death. *Id.* at *20. Absent from either §§ 85D or 85G was any reference to the precise amount to which a retiree or surviving spouse is entitled for his or her health insurance emolument, or how the health insurance emolument is to be administered. Rather §§ 85D and 85G only set forth in relative terms the pension benefits to which retirees and surviving spouses are entitled. *Id.* Further, the Supreme Court observed that under § 85G, widows were entitled to collect a pension that was one half of what their spouses were collecting at the time of their deaths, and at the time of their deaths, two of those spouses were collecting a pension that included the member plus one health insurance emolument, one was collecting the family health insurance emolument, and one was an active employee. *Id.* at *21. Thus, the Supreme Court opined that according to § 85G, two of the widows were entitled to collect one half of the member plus one health insurance emolument for retirees, which was equal to the member plus one health insurance emolument for widows, one was entitled to collect one half of the family emolument for retirees, which was equal to the family emolument for widows, and one was entitled to collect one half of the health insurance emolument that her husband received as an active employee at the time of his death. *Id.* Since the City transferred the widows to the single plan and reduced their health insurance emoluments, the Supreme

Court opined that the City violated § 85G. The Supreme Court also observed that § 85D controlled the retirees' pension benefits, and unlike § 85G, § 85D did not require retirees' benefits to be determined as of a particular point in time. *Id.* at *27-28. Rather, § 85D expressly made retirees' pension benefits dependent on the compensation of active police officers and firefighters, as fixed from time to time by the state board of public safety. *Id.* Thus, because § 85D tied a retiree's health insurance emolument to that of an active employee, the Supreme Court reasoned that the determinative factor for purposes of § 85D was how the city treated active employees when there was a change in the number of dependents they could claim for health insurance purposes. *Id.* As Plaintiffs failed to present any evidence to establish that the City did not change the status of active police officers and firefighters for health insurance purposes when the number of dependents they could claim changed, the Supreme Court remarked that the retirees failed on their claim that the City improperly reduced their health insurance emoluments under § 85D. Thus, the Supreme Court affirmed the trial court's order rejecting their claim. Accordingly, the Supreme Court found that the City improperly reduced the health insurance emoluments of the widows in violation of § 85G, but not those of the retirees.

(iii) Florida

***Celebrity Cruises, Inc. v. Rankin, et al.,* 2015 Fla. App. LEXIS 13778 (Fla. Dist. Ct. App. 3d Dist. Sept. 16, 2015).** Plaintiffs, a group of doctors who worked under contract with Defendant, brought an action alleging that Defendant refused to pay them the commissions that they were entitled to under their contracts. According to the complaint, Defendant contracted with the doctors to pay them a commission on "total medical revenues;" however when paying those commissions, Defendant excluded revenues generated by the sale of the medications. *Id*. at *1. The trial court granted Plaintiff's motion for class certification, and rejected Defendant's argument that individual issues predominated over common issues. *Id*. at *2. On appeal, the Florida District Court of Appeal affirmed. The District Court of Appeal remarked that this was not a case where the class members sought commissions or bonuses based upon unwritten contracts with potentially different terms for different class members. *Id*. at *5. The District Court of Appeal further opined that this was also not a case where the class members failed to allege the existence of a common contract under which the company employed all class members. *Id*. at *6. Instead, the District Court of Appeal noted that the breach of contract claim was based on Defendant's refusal to pay the class members who were the beneficiaries of identical written contractual provisions. *Id*. The District Court of Appeal remarked that this case posed the same basic legal question for all class members, *i.e.*, whether, according to signed contracts, Plaintiffs' commissions should be based on total medical revenue, or whether the revenue from the sale of medications should be excluded. *Id*. Although the damage calculation would be different for each class member, the District Court of Appeal concluded that a mechanical method can be used to calculate the class members' damages. *Id*. Accordingly, the District Court of Appeals affirmed the trial court's order certifying the class.

(iv) Georgia

***Borders, et al. v. City Of Atlanta,* 2015 Ga. LEXIS 786 (Ga. Nov. 2, 2015).** In a class action challenging a 2011 City of Atlanta Ordinance (the "Ordinance") and the consequent amendment of three defined pension plans, the Supreme Court of Georgia ruled in favor of the City in concluding that the City did not violate the Georgia Constitution or breach the employment contract of its employees when it amended the plans to increase the required employee contributions. On June 29, 2011, in an effort to address the City's unfunded pension liabilities, the City enacted the Ordinance, which increased prospective annual employee contributions for the City's defined benefit pension plans, including the General Employees' Pension Plan, the Police Officers' Pension Plan, and the Firefighters' Pension Plan (collectively, the "Plans"). *Id.* at *1-2. The amendments to the Plans took effect on November 1, 2011. Prior to that date, the Plans required the participants to contribute 7% of their annual salary to their pension plan if they did not have a designated eligible beneficiary, and 8% of their annual salary if they did have a designated eligible beneficiary. *Id.* at *2. After November 1, 2011, the amendments increased the mandatory employee contributions by an additional 5%, such that participants were required to contribute 12% of their annual salary, or 13% with a beneficiary. *Id.* at *3-4. The Ordinance also provided that mandatory employee contributions might be increased by an additional 5%, up to 17% or 18% of annual compensation, if the City's required

contributions to the Plans exceed 35% of the City's total payroll. *Id.* The Ordinance did not change a participant's benefit formula or the actual benefit amount payable at the time of the participant's retirement. *Id.* at *4. Plaintiffs, a group of City employees who participated in the Plans prior to November 1, 2011, and who had not retired before that date, alleged that the City breached their employment contracts and violated the impairment clause of the Georgia Constitution by increasing the amounts that Plaintiffs were required to contribute to the Plans, but providing Plaintiffs with the same retirement benefits to which they were already entitled prior to the passage of the Ordinance. *Id.* at *4. The trial court granted summary judgment to the City, holding that "government employees and their beneficiaries have no vested rights in an unchanged benefit plan where the pension or retirement plan at issue unambiguously provides for subsequent modification or amendment." *Id.* at *5-6. The trial court thus found no ambiguity in the City's enrolment provisions at issue and determined that the provisions clearly authorized the City to amend the Plans without breaching Plaintiffs' employment contracts or violating the impairment clause. *Id.* at *6. On review, the Georgia Supreme Court agreed with the trial court. The Supreme Court found that "the language of the enrolment provisions was plain, unambiguous, and capable of only one reasonable construction in regard to the two points critical to the resolution of the challenge in this case: that the receipt of an applicant's executed enrolment or application card evidenced the applicant's irrevocable consent to participate in the applicable retirement plan, and that the applicant would do so under the plan's governing laws as then amended, or as might be amended in the future. Thus, Plaintiffs did not acquire a vested contractual right in a retirement plan unaltered in the manner at issue." *Id.* at *18. Thus, according to the Supreme Court, the Ordinance did not alter Plaintiffs' pension benefits, but rather modified their pension obligations, and in no manner divested Plaintiffs of their earned pension benefits so as to implicate constitutional concerns. *Id.* at *23. The Supreme Court therefore concluded that the trial court properly granted summary judgment in favor of the City.

(v) Illinois

***American Federation Of State, Country & Municipal Employees, Council 31, et al. v. State Of Illinois,* 2015 Ill. App. LEXIS 389 (Ill. App. Ct. 1st Dist. May 19, 2015).** In this class action involving the reduction of collective bargaining unit membership among management-level state employees pursuant to the Illinois Public Labor Relations Act (the "Act"), the Illinois Appellate Court affirmed the Illinois Labor Relations Board's ("ILRB") approval of the excluded positions. In 2013, the Illinois General Assembly passed the Act. The Act narrowed the class of individuals who could be considered "public employees," set up a process by which the Governor could designate up to 3,580 positions as excluded from collective bargaining units, and exempted certain specific state employment positions from designation. *Id.* at *3. Consistent with the Act, the Illinois Department of Central Management Services, on behalf of the Governor, filed petitions with the ILRB seeking to exclude positions from collective bargaining units. Plaintiff, on behalf of the employees, filed objections to the petitions. The ILRB approved the Governor's decision, relying exclusively on the positions' titles for its determination that the Governor's action was appropriate. *Id.* at *3-4. Affirming the ILRB, the Appellate Court found no violation. *Id.* at *10. Plaintiff challenged the ILRB's refusal to grant an evidentiary hearing, contending that the individuals did not perform managerial duties and, therefore, Plaintiff should have had an opportunity to prove that assertion. The Appellate Court found that, based on the Act's plain language, the designated employees were not entitled to an evidentiary hearing when their positions clearly were among those subject to designation under the Act. *Id.* at *10. Plaintiff argued that the delegation was improper because the Act gave the Governor legislative authority by authorizing him to determine classifications of employees without sufficient guiding principles. The Appellate Court determined that the Act provided a detailed framework to guide the Governor in his exercise of discretion to expedite removing from collective bargaining units those employees whose duties were incompatible with collective bargaining unit membership and to address the problem of excessive union membership of management-level public sector employees of Illinois. *Id.* at *12-13. Further, the General Assembly set up the framework in such a way that the ILRB could review the Governor's action. The Appellate Court, therefore, concluded that the Governor was not given a blank check, and that the Act did not delegate any authority to the Governor that he did not already possess. *Id.* at *13-14. The Appellate Court also rejected Plaintiff's constitutional argument, based on alleged violation of the individuals' equal protection rights, finding that the Act does, in fact, permit certain employees to be treated differently than other employees but not in an unconstitutional manner. *Id.* at *19. The Appellate Court explained that, if the individuals

were managerial employees, then they had no right to collectively bargain in the first place. Removing them from collective bargaining units did not violate their constitutional rights because they had neither fundamental rights nor property rights at stake. *Id.* Even assuming the presence of equal protection concerns, the Appellate Court found that a reasonable set of facts supported treating the individuals differently from other public workers who might be classified as managerial-type employees because, even if the positions had the same working title or same pay grade, there was a tremendous variance in the duties performed by different high-level positions in different state agencies. *Id.* at *20. The Appellate Court stated that, "[u]nder the circumstances, separating certain managerial employees from other managerial-type employees is a permissible classification where the State's needs demand that the Governor has undivided loyalty from some chosen top-level managers." *Id.* at *20-21. The Appellate Court further held that the established procedures for adding or removing positions from the collective bargaining unit had long been in place, and a re-classification of employees did not constitute a breach or an impairment of an existing collective bargaining agreement. *Id.* at *28. Accordingly, the Appellate Court affirmed the decision of the ILRB.

***American Federation Of State, County And Municipal Employees, Council 31, et al. v. State Of Illinois*, Case No. 15-CH-475 (Ill. Cir. Ct. Nov. 25, 2015).** Plaintiffs, several unions representing Illinois workers, brought this action to compel Illinois officials to issue paychecks to state employees following the state's failure to enact appropriations statutes for the 2016 fiscal year. Plaintiffs alleged that Defendant should pay union members in a timely manner, and Defendant's failure to appropriate funds for the payment of employees constituted an impairment of Defendant's contractual obligation to pay the union members. Plaintiffs moved for a temporary restraining order ("TRO") and alleged that failure to pay union members their full salaries constituted an unconstitutional impairment of contract. Plaintiffs asserted that the executive and legislative branches of state government failed to reach an agreement on the budget and froze appropriations beginning July 1, 2015. *Id.* at 2. The Court granted Plaintiffs' motion finding that Plaintiffs had demonstrated a clearly ascertainable right in need of protection. *Id.* The Court held that, "[w]hile the employees have complied with the CBA in all respects, the fiddle while burning posture of the other branches of State government provokes the judicial branch to act to preserve the status quo because it is necessary for the State to secure the financial stability of SEIU Health Fund for 2015 and 2016." *Id.* The Court further noted the consequences that could flow from out-of-pocket payment of medical and pharmaceutical costs, including non-monetary issues like the worsened health. *Id.* at 3. The Court therefore concluded that the failure to supplement Plaintiffs' Health Fund violated the prohibition of impairment of contracts as guaranteed by Article 1 of the Illinois Constitution. *Id.* Accordingly, the Court ordered Defendant to take all necessary steps to see that Plaintiffs were made whole, for all contributions owed, within 10 days and to continue monthly payments to Plaintiffs on an on-going basis. *Id.* at 4.

***In Re Pension Reform Litigation,* 2015 Ill. LEXIS 499 (Ill. May 8, 2015).** Plaintiffs, a group of individual members of four retirement systems, challenged the constitutionality of the adoption of Public Act 98-599 (the "Act") in these consolidated class actions. Effective June 1, 2014, the Act amended the Illinois Pension Code by reducing retirement annuity benefits for individuals who first became members of four of Illinois' five state-funded pension systems prior to January 1, 2011, including the General Assembly Retirement System, the State Employees' Retirement System of Illinois, the State Universities Retirement System, and the Teachers' Retirement System of the State of Illinois. *Id.* *1. The "centerpiece" of the Act is a comprehensive set of provisions designed to reduce annuity benefits for members entitled to Tier 1 benefits by: (i) delaying when members become eligible to begin receiving retirement annuities; (ii) capping the maximum salary that might be considered when calculating a member's retirement annuity; (iii) changing the system under which annual increases were determined; (iv) eliminating one to five annual annuity increases depending on the age of the member at the time the Act become effective; and (v) altering how the base annuity amount would be determined for purposes of the "money purchase" formula. *Id.* at *22-23. Additionally, the Act created a new payment schedule, a mechanism by which pension boards could initiate mandamus proceedings if Defendant failed to make required contributions to their respective systems, and special directives with respect to certain payments to the pension systems. *Id.* Plaintiffs alleged that the "centerpiece" provisions of the Act violated numerous provisions of the Illinois Constitution of 1970. Particularly, Plaintiffs alleged that the reduction in retirement annuity benefits for Tier

1 employees violated: (i) Article XIII, Section, 5, the pension clause of Illinois Constitution, (ii) Article I, Section 16, which provides that no law impairing the obligation of contracts shall be passed, (iii) Article I, Section 15, the takings clause, and (iv) Article I, Section 2, the equal protection clause. *Id.* at *30-31. The trial court declared the Act unconstitutional in its entirety and permanently enjoined its enforcement. In doing so, the trial court found that the Act would diminish benefits of membership in the four affected State-funded retirement systems and that the pension protection clause of the Illinois Constitution did not support Defendant's argument that the legislature possessed implied or reserved power to diminish or impair the pensions. *Id.* at *33-34. Upon appeal, the Illinois Supreme Court affirmed. The Supreme Court found that the Act would clearly diminish the retirement annuities to which Tier 1 members of the affected systems became entitled when they joined those systems. *Id.* at *38. Defendant argued that, because membership in public retirement systems was an enforceable contractual relationship, it should be subject to the same limitations as all other contractual rights, and it remained subject to modification, even invalidation, by the General Assembly through the exercise of State's police power. *Id.* at *46. The Supreme Court, however, pointed out that the law was clear that the promised benefits would have to be paid and that the responsibility for providing Defendant's share of the necessary funding fell squarely on the legislature's shoulders. *Id.* at *50. The Supreme Court noted that Defendant made no showing that it had no less drastic measures available to meet the financial crisis. *Id.* at *51. According to the Supreme Court, the General Assembly might find the State's fiscal condition in crisis, but it was a crisis that other public pension systems managed to avoid and it was a crisis for which the General Assembly itself was largely responsible, and thus, not an excuse to abandon the rule of law. *Id.* at *51-68. Accordingly, the Supreme Court affirmed the trial court's order declaring the Act unconstitutional.

***Vugmayster, et al. v. Grossinger Motorcorp.*, 2015 Ill. App. Unpub. LEXIS 804 (Ill. App. Ct. 1st Dist. Mar. 31, 2015).** Plaintiff, a car salesperson, brought a putative class action alleging that Defendants unilaterally changed the terms of his contract and as a result, he was shorted compensation due under his commission-based sales position. Plaintiff alleged that Defendants improperly deducted a bank fee from his compensation when a customer had marginal credit. *Id*. at *3. Plaintiff alleged that Defendant paid a $300 bank fee that was calculated in determining Defendant's profit and loss, and Plaintiff received $25, which was half of his mini-commission. *Id*. at *5. Defendants moved to dismiss. The trial court granted Defendant's motion. On Plaintiff's appeal, the Illinois Appellate Court noted that in a class action, a Defendant's tender of relief may create mootness where the class representatives had not filed a motion for class certification before Defendant made its tender. *Id*. at *21. Defendants had tendered a check sufficient to cover the maximum recovery potentially available to Plaintiff before he had moved for class certification. *Id*. Thus, the Appellate Court observed that no other class members' interests were before the trial court, and it concluded that Defendants' tender rendered this action moot. Accordingly, the Appellate Court affirmed the trial court's order.

(vi) Michigan

***AFT Michigan, et al. v. State Of Michigan,* Case No. 148748 (Mich. April 8, 2015).** Plaintiffs, various unions representing public school employees, brought an action in the Michigan Court of Claims asserting various constitutional challenges to 2012 PA 300, which amended the Public School Employees Retirement Act (the "Act"). In 2010, the Act required all current school employees to pay 3% of their salaries to fund health benefits for both current and future retirees. The Court of Claims found this unconstitutional as it violated both the takings clauses and due process clauses of the Michigan and U.S. Constitutions respectively. *Id.* at 3. Upon appeal, the Michigan Court of Appeals affirmed. *Id.* at 4. Defendant appealed further and the Michigan Supreme Court held the case in abeyance. In the meantime, the Legislature enacted 2012 PA 300, which further amended the Act. Under this amendment, PA 300 enabled current public school employees to opt-out of retiree healthcare and avoid paying 3% retiree health contribution. As an alternative, employees could participate in a 401(k) type retirement account. PA 300 also provided a separate retirement allowance for public school employees who elect to pay 3% contributions but who subsequently fail to qualify for retiree healthcare benefits. *Id.* at 6. Plaintiffs challenged the amendment claiming that PA 300 was also unconstitutional like PA 75. The Court of Claims, however, refused to find PA 300 unconstitutional, finding that the provisions of the earlier statute had been sufficiently ameliorated by the amendment, in particular by the choice given to employees. *Id.* at

8. In affirming, the Court of Appeals concluded that because contributions to the retiree healthcare program would be made voluntarily, it was free of constitutional infirmity, and that the Act did not affect any obligation of contracts between Defendant and Plaintiffs regarding pension modification because Defendant had no obligation to provide future pension benefits to public school employees. *Id.* at 8-9. Upon Plaintiffs' further appeal, the Michigan Supreme Court affirmed, holding that PA 300 did not violate the U.S. or Michigan Constitutions in any respect. The Supreme Court noted that, unlike PA 75, PA 300 did not give rise to an uncompensated taking because the retiree healthcare contributions were completely voluntary, and voluntary healthcare contributions did not violate the Constitutions. *Id.* at 21. Plaintiffs alleged that PA 300 was invalid because by requiring them to make contributions in order to qualify for retiree healthcare, Defendant had attached an unconstitutional condition to the receipt of a government benefit. *Id.* at 25. The Supreme Court found Plaintiffs' argument unavailing. The Supreme Court explained that Defendant did not coerce Plaintiffs into giving up their constitutional rights but merely sought, as a condition for receiving access to retiree healthcare benefits, the assistance of Plaintiffs in paying for these benefits. Because the retiree healthcare contribution was inextricably and directly linked to the governmental benefits being offered, and Defendant did not coerce any Plaintiff into participating in the program, the Supreme Court concluded that PA 300 did not infringe Plaintiffs' constitutional rights. *Id.* at 33. The Supreme Court further ruled that, because Defendant was not obligated to provide future pension benefits to Plaintiffs, PA 300 did not affect any obligation of contracts between Plaintiffs and Defendant. *Id.* at 40. Finally, the Supreme Court held that Defendant might reasonably request Plaintiffs to assist in funding a retiree healthcare benefit system to which they belonged, and it was entirely proper for Defendant to seek the continuation of an important retirement benefits for Plaintiffs while simultaneously balancing and limiting a strained public budget. *Id.* at 47-48. Accordingly, the Supreme Court affirmed the Court of Appeals' judgment.

***Baumgartner, et al. v. Perry Public Schools*, 2015 Mich. App. LEXIS 519 (Mich. Ct. App. Mar. 12, 2015).** Plaintiffs, hundreds of laid-off teachers, brought suits challenging their dismissal from employment before the Michigan Department of Education. After the State Tenure Commission ("STC") instructed Administrative Law Judges ("ALJs") to hear Plaintiffs' suits, the ALJs rejected Plaintiffs' claims and granted Defendants summary judgment. The ALJs ruled that the 2011 Amendments to the Teacher Tenure Act ("TTA") and School Code made clear that the STC lacked jurisdiction and that Plaintiffs only could pursue their claims through the court system. Plaintiffs appealed the ALJs' decisions to the STC, and the STC rejected the holdings, concluding that Michigan case law, which pre-dated the 2011 Amendments, gave it jurisdiction over lay-off claims that asserted "subterfuge." *Id.* at *9. Defendants appealed the STC's orders to the Michigan Court of Appeals. The Court of Appeals held that it had jurisdiction to review interlocutory orders of the STC, and the STC lacked jurisdiction to hear Plaintiffs' cases. First, the Court of Appeals recognized that it cannot review an interlocutory order of an administrative agency unless the agency's final decision or order will not provide an adequate remedy. *Id.* at *11. In rare circumstances, the Court of Appeals has taken jurisdiction over appeals from interlocutory administrative orders where, among other things, the appeals rested entirely on jurisdictional grounds. *Id.* at *13. The Court of Appeals held that, in this case, because the STC clearly lacks jurisdiction over teacher lay-offs, hearing the cases would make the administrative process more efficient by eliminating any need for further ALJ proceedings and expediting the appeal of hypothetical ALJ holdings that inevitably would follow. Accordingly, the Court of Appeals ruled that these appeals presented a textbook illustration of the rare circumstances in which the Court of Appeals may accept an interlocutory administrative appeal. Second, the Court of Appeals determined that the STC's jurisdiction and administrative expertise was limited to questions traditionally arising under the TTA, and it does not possess jurisdiction over disputes arising under separate legislative acts. *Id*. at *16. Although the TTA mentions "discharge" and "demotion" as matters that fall within the ambit of the STC, the TTA is silent about "lay-offs" and does not provide the STC with jurisdiction over such matters. *Id*. at *16-17. The Court of Appeals noted that although one case law precedent asserted that the STC had jurisdiction over a small number of lay-off cases under the judicially-created "subterfuge" doctrine, that case was no longer binding and was rendered null and void by the 2011 Amendments. *Id.* at *20. In 2011, the Michigan Legislature enacted a package of amendments to the TTA, the School Code, and the Public Employee Relations Act that, among other things, made clear that the courts – not any administrative agency, including the STC – have jurisdiction over lay-off claims. *Id.* at *21. Accordingly,

the Court of Appeals concluded that STC improperly exercised jurisdiction over Plaintiffs' lawsuits. For this reason, the Court of Appeals reversed the orders of the STC and dismissed Plaintiffs' actions.

***Michigan Coalition Of State Employee Unions, et al. v. State Of Michigan,* 2015 Mich. LEXIS 1773 (Mich. July 29, 2015).** Plaintiffs, the Michigan Coalition of State Employee Unions and others, brought a class action in the Court of Claims against the State of Michigan and various state agencies alleging that portions of 2011 PA 264, which amended the State Employees' Retirement Act ("SERA"), MCL 38.1 *et seq.*, were unconstitutional because the resulting changes to retirement benefits altered "rates of compensation" or "conditions of employment," which were within the exclusive authority of the Civil Service Commission (the "Commission") to regulate. *Id.* at *1. Particularly, Plaintiffs challenged changes that required employees, who had maintained membership in the State-defined benefit pension plan to choose either to contribute 4% of their income to that plan or to switch to the 401(k) defined contribution plan applicable for state employees, without a required contribution. *Id.* at *7-9. Plaintiffs also challenged the change in overtime applied to the calculation of "final average compensation." *Id.* The Michigan Court of Claims granted Plaintiffs' motion for summary judgment, finding PA 264 unconstitutional. On Defendant's appeal, the Michigan Court of Appeals affirmed in part, reversed in part, and remanded, holding that the State properly classified SERA retirement benefits as both "rates of compensation" and "conditions of employment," neither of which was subject to legislative alteration. *Id.* at *10. On further appeal, the Michigan Supreme Court reversed. The Supreme Court held that the amendment of PA 264 did not infringe the Commission's authority to fix "rates of compensation" because the ratifiers of Michigan's 1963 Constitution did not understand that phrase to include pensions or other fringe benefits. *Id.* at *11. The Supreme Court noted that textual indicators in the Constitution uniformly indicate that "rates of compensation" was commonly understood to include only salaries and wages, and this understanding was confirmed in various parts of the Constitution, the Address to the People, and the transcript of the Constitutional Conventions debates. *Id.* at *12. Because PA 264 did nothing to change an employees' salary or wages, the Supreme Court found that it did not implicate the Commission's constitutional authority over classified civil servants' rates of compensation. *Id.* at *17-18. Further, the Supreme Court held that the Commission did not have the authority to require the Legislature to exercise its lawmaking power regarding conditions of employment. Assuming for the limited purpose of the case that a pension was a condition of employment and that the Commission's authority to regulate all conditions of employment included the authority to establish, maintain, and amend a pension, the Supreme Court found that the Commission had no authority to prevent the Legislature from enacting PA 264 any more than it had authority to compel the enactment of the SERA because either act would have constituted an unconstitutional exercise of legislative authority under the Constitution of 1963, Art. 3, § 2. *Id.* at *18-19. The Supreme Court explained that the Commission's authority was part of the executive branch's power, which could not be used to enact or amend statutes, and it could not mandate appropriations relating to conditions of employment as it was resided in the Legislature. *Id.* at *21-22. Because no provision in the Constitution of 1963, Art. 11, § 5 granted the Commission any legislative or appropriation authority when regulating conditions of employment, the Supreme Court also held that the Commission had no explicit authority to require the Legislature to exercise its lawmaking power regarding conditions of employment, and when the Commission wish to regulate conditions of employment, it could proceed within its own sphere, using its own constitutionally provided tools. *Id*. at *23-24. Finally, the Supreme Court ruled that the Legislature did not violate the Commission's constitutional authority by enacting PA 264. Because the Commission itself had acquiesced in the application of the SERA to the employees of the civil service system and that it never rescinded its acquiescence, the Supreme Court reasoned that the presumed infringement of PA 264 presented no constitutional problem, and thus, Plaintiffs' objections failed to establish a basis for relief. *Id.* at *26-28. The Supreme Court therefore reversed and remanded the action to the Court of Claims for further proceedings.

(vii) New Jersey

***Burgos, et al. v. State Of New Jersey,* 2015 N.J. LEXIS 566 (N.J. June 9, 2015).** Plaintiffs, a group of individuals and unions acting on behalf of New Jersey State public employees, brought a class action alleging that the State's failure to appropriate funds to reduce the unfunded liability of State pensions' impaired their contract rights. The State's public pension systems guaranteed participants a calculable

amount of benefits payable upon retirement based on the participant's salary and time spent in the pension system. *Id.* at *1. In 2011, the Legislature added language in Chapter 78 explicitly declaring that each member of the State's pension systems shall have a contractual right to the annual required contribution amount and the failure of the State to make the required contribution shall be deemed to be an impairment of the contractual right. *Id.* at *2. On May 20, 2014, the Governor issued an Executive Order reducing the State's payments into the pension systems because of a severe and unanticipated revenue shortfall. *Id.* at *3. Plaintiffs argued that Chapter 78 created an enforceable contract that was entitled to constitutional protection against impairment, and that the budgetary and debt limiting clauses of the State Constitution conflicted with any binding agreement created by Chapter 78. *Id.* at *20. Accepting Plaintiffs' argument that Chapter 78 created a contract and that the State's failure to appropriate the full value of annually required contribution ("ARC") substantially impaired Plaintiffs' right under the contract, the trial court granted summary judgment to Plaintiffs. *Id.* at *34-35. The trial court rejected the State's argument that Chapter 78 was unenforceable as violative of the debt limitation clause, the appropriations clause, and the gubernatorial line-item veto power. *Id.* at *35. Upon appeal and direct certification, the Supreme Court of New Jersey reversed. While the Supreme Court acknowledged that the Legislature and Governor had clearly expressed an intent that Chapter 78 create a "contract right" to timely and recurring ARC payments to reduce the unfunded liability of the pension funds to safe levels, it noted that the essential question was whether legislative authority could be exercised through Chapter 78 to create a legally binding, enforceable contract compelling future appropriations to pay down the unfunded liability. *Id.* at *42. The Supreme Court found no legally enforceable financial obligation imposed on the State by virtue of Chapter 78's enactment. *Id.* at *68. While the debt limitations clause of the New Jersey Constitution provided that the Legislature might not create a debt or liabilities that exceed one percent of the amount appropriated in a given fiscal year, the appropriations clause vested the power and authority to appropriate funds in the Legislature. *Id.* at *45-58. The Supreme Court noted that, through these clauses, the Legislature retained its constitutionally enshrined power to annually appropriate funds as necessary for the fiscal health of the State. *Id.* at *64. According to the Supreme Court, Chapter 78's purported creation of an enforceable long-term financial contractual obligation fell squarely within the debt limitation clause. *Id.* The amount of monies that Chapter 78 purported to contractually require the State annually to dedicate to pay down the unfunded liability of the various pension substantially exceeded the limits annually allowed under the debt limitation clause. *Id*. at *66. Further, voter approval was required to render this a legally enforceable contractual agreement compelling appropriations of this size covering succeeding fiscal years; otherwise, this agreement was enforceable only as an agreement that was subject to appropriation, which under the appropriations clause rendered it subject to the annual budgetary appropriations process. *Id*. The Supreme Court therefore concluded that contract rights set forth in Chapter 78 did not create a legally binding financial contract enforceable against the State. The Supreme Court further held that the budget process remained squarely with the Legislature and Executive branches, and the Judiciary was ill-suited to enter into the political decision-making that accompanies the balancing of competing spending priorities. *Id*. at *83-84. Accordingly, the Supreme Court reversed the trial court's order.

(viii) New York

***Bransten, et al. v. State Of New York,* Case No. 159160/12 (N.Y. Super. Ct. Mar. 25, 2015).** Plaintiffs, a group of justices and retired members of the New York State Judiciary, brought a class action alleging that Defendant's decision to reduce its contribution to the Justices' health insurance benefits violated the Compensation Clause of the New York State Constitution. In 2011, the Legislature negotiated agreements with certain public sector unions under which Defendant agreed to refrain from laying-off thousands of state workers if workers paid a larger share of the contributions to their health insurance premiums. *Id.* at 2. The Legislature then amended § 167.8 of the Civil Service Law to allow the Civil Service Department to extend the terms of the union agreement to cover unrepresented state employees and retirees. This resulted in an increase of judges' contribution to the cost of their health insurance by 6%, retired judges' contributions by 2%, and contributions for any judges retiring on or after January 1, 2012 by 6%. *Id.* at 2-3. Plaintiffs then initiated this action and argued that, because "compensation" included health benefits, Defendant's action diminished the value of their compensation in violation of Compensation Clause, which guarantees that Plaintiffs' compensation shall not diminish during their term in office. *Id.* at 3. Plaintiffs moved for summary judgment, which the Court granted. The Court found that Defendant failed to raise an

issue of fact or to establish that § 167(8) did not violate the Compensation Clause. *Id.* at 13. The undisputed facts demonstrated that Defendant's reduction in its contributions resulted in an increase of judges' contributions to their health insurance benefits, which directly diminished their compensation. *Id*. The Court had earlier denied Defendant's motion to dismiss, agreeing with Plaintiffs that judges' compensation included health benefits. Defendant had then appealed, arguing that changes in law only indirectly reduced judges' pay and were non-discriminatory, and thus did not violate the Compensation Clause. *Id.* at 4. Defendant had also argued that a pay raise for judges enacted six months after the increase in contributions cured any violation, and that the express language of the Compensation Clause rendered it inapplicable to "retired" justices and judges. *Id.* The New York Appellate Division, however, had affirmed that ruling on the basis that judicial compensation under the Compensation Clause included both the wages and benefits, and that § 167(8) uniquely discriminated against judges because it imposed a financial burden on them for which they received no compensatory benefit. *Id.* at 5. Plaintiffs reiterated their previous arguments against dismissal, and sought a declaration that the reductions were void *ab initio* and an injunction enjoining further enforcement as to judges both active and retired. In granting Plaintiffs' motion, the Court found that Plaintiffs established their entitlement to judgment as matter of law. *Id.* The Court noted that the Compensation Clause protects judges from overly broad laws that have the direct effect of diminishing their compensation. *Id.* at 13-14. The evidence indicated that judges comprised the only category of state employees who received no benefits from the negotiated union agreement, and who were unrepresented and not eligible for collective bargaining. *Id.* at 14-16. The Court therefore granted Plaintiffs' motion for summary judgment declaring that § 167(8), including the regulations adopted thereunder, were unconstitutional as applied to Plaintiffs.

(ix) Oregon

***Moro, et al. v. State Of Oregon*, 2015 Ore. LEXIS 277 (Ore. April 30, 2015).** Plaintiffs, a group of active and retired members of the Public Employee Retirement System ("PERS"), brought a class action challenging two legislative amendments aimed at reducing the cost of retirement benefits. The amendments involved Senate Bill ("SB") 822 (2013), which eliminated income tax off-set benefits for non-resident retirees and modified the cost-of-living adjustment ("COLA") applied to PERS benefits, and SB 861 (2013), which further modified the COLA entitlements for PERS. There were more than 330,000 PERS system members, and about 900 participating public employers. *Id*. at *9. PERS was a defined benefit plan, and had two post-retirement calculations that could increase the benefits to the members: COLA, and an income tax off-set. Both the benefits were based on a percentage of the service retirement allowance and were funded through employer contributions. *Id*. at *16. During the 2008 recession, PERS investments lost 27% of the fund's value, and left the fund substantially under-funded. *Id*. at *22. By December 2008, one year after determining that PERS was 98% funded, the Public Employee Retirement Board determined that PERS was only 71% funded and had about $16.1 billion in unfunded actuarial liability. *Id*. at *23. To balance those losses, the Board was required to increase employer contribution rates, but based on the schedule for setting and implementing employer contribution rates, the next rate increase would not go into effect until July 2011. *Id*. Accordingly, in 2012, the Board set the employer contribution rates; at that time, the fund's recent investment performance had been mixed, and left the funded status of PERS similar to what it has been in December 2008. *Id*. Whereas PERS was 71% funded in December 2008 with $16.1 billion in unfunded actuarial liabilities, PERS was only 73% funded in December 2011, and maintained about $16.3 billion in unfunded actuarial liabilities. *Id*. The 2013-2015 collared rate was 21.4%, and without the statutory amendments at issue in this case, the Board projected that the rate would rise to about 25% and would remain at that rate through 2029. *Id*. Plaintiffs contended that SB 822 and SB 861 unconstitutionally impaired their employment contracts in violation of the contract clause of the Oregon Constitution, as well as the U.S. Constitution. The Supreme Court of Oregon granted the petition in part. At the outset, the Supreme Court noted that the State contract clause states that no law impairing the obligation of contracts shall be passed. *Id*. at *39. The Supreme Court observed that because PERS offered promised remunerative pension benefits as compensation for employment, the offered may include provisions that defined the eligibility for benefits or the scope of benefits. *Id*. at *61. Plaintiffs contended that the 1991 and 1995 tax off-sets were terms of the PERS contract. The Supreme Court observed that the 1991 off-set included mandatory wording without the same expressly non-contractual wording as the 1995 off-set, but the legislative history indicated that the 1991 off-set was not a

part of the PERS contract, but included it as a type of preemptive damage payment to mitigate a claim for breach of the PERS contract. *Id*. at *65. The Supreme Court found that the 1991 and 1995 off-sets were not terms of the statutory PERS contract, and therefore, were not obligations under that contract that could be impaired for purposes of applying the contract clause. *Id*. at *71. The Supreme Court ruled that the 1991 and 1995 off-sets were, however, covered by the terms of a 1997 class action settlement agreement, and the amendments contained in SB 822, which reduced the benefits provided to non-resident retirees under that settlement agreement, neither impaired nor breached the terms of that agreement. The Supreme Court explained that this was so because the agreement expressly contemplated, and provided a means for, seeking relief for such benefit reductions. *Id*. Plaintiffs also argued that in *Strunk v. PERB*, 338 Ore. 145 (2005), it had already ruled that the pre-amendment COLA provision was contractual, and had temporarily prevented the Board from making COLA adjustments to the service retirement allowances of certain retirees. *Id*. at *72. The Supreme Court remarked that the legislature intended the COLA requirement to be read with the pre-amendment COLA cap, and the COLA bank as determining the overall value of the COLA benefit. The Supreme Court observed that before the amendments at issue in this case, the COLA provisions had been in place and unchanged for 40 years, and a substantial number of PERS retirees worked their careers while the pre-amendment COLA provisions were in effect and then retired. The Supreme Court concluded that Plaintiffs had a contractual right to receive the pre-amendment COLA benefits that they earned before the effective dates of the amendment. Insofar as they applied retrospectively, the Supreme Court concluded the COLA amendments impaired the PERS contract and violated the state contract clause.

(x) Pennsylvania

***Pennsylvania Restaurant & Lodging Association, et al. v. City Of Pittsburgh*, Case No. 15-GD-16442 (Pa. Common Pleas Ct. Dec. 21, 2015).** In this action, the Court granted Plaintiffs' motion for summary judgment, finding that the City of Pittsburgh had no authority to pass and enforce the "Paid Sick Leave Ordinance." *Id.* at 1. The Ordinance applied to almost all employers doing business in the City, and it required employers to provide a minimum of one hour of paid sick leave for employees for every 35 hours they work. Employers of fifteen or more employees must permit the accrual of up to 40 hours of paid sick time per calendar year. Employers of fewer than fifteen employees are required to permit the accrual of up to 24 hours of paid sick time per calendar year. *Id*. at. 2. The Court noted that the City is a home rule charter municipality created pursuant to the Pennsylvania Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2901. Section 2962(f) forbids a municipality which adopts a home rule charter from determining duties upon businesses, occupations, and employers. *Id*. Further, the City has neither a board nor a department of health; therefore, it is not empowered to enact an ordinance or issue rules and regulations relating to disease prevention and control under the Disease Prevention and Control Law. *Id*. at 3. The Ordinance also cited to provisions of the Second Class City Code, 53 P.S. §§ 23101 and 23145. The Court, however, found that this Code did not apply to the City, because it is a home rule municipality. The Court noted that the Pennsylvania Supreme Court had addressed a similar issue in *Building Owners & Managers Association of Pittsburgh v. City of Pittsburgh*, 985 A.2d 711 (Pa. 2009). The Supreme Court had held that the City exceeded its authority and violated the Home Rule Charter when it passed the "Protection of Displaced Contract Workers Ordinance" imposing affirmative duty upon employers with new service contracts to keep the employees of the prior contractor for at least 180 days. *Id*. at 4. In this case, the Court reasoned that a municipality has no power to enact the ordinance except as authorized by the legislature. The Court found that the Ordinance that placed affirmative duties on businesses, occupations, and employers fell within the limitations on the City's authority to enact any ordinance determining any duty, responsibility, or requirement of a business or private employer. *Id*. at 5. Accordingly, the Court found that the Ordinance was invalid and unenforceable.

(xi) Texas

***Klumb, et al. v. Houston Municipal Employees Pension System*, 2015 Tex. LEXIS (Tex. Mar. 20, 2015).** Plaintiffs, a group of employees near retirement, brought an action alleging violations of the Texas Constitution and breach of contract. The Houston Municipal Employees Pension System ("HMEPS"), was established under Article 6243(h) of the Texas Revised Civil Statutes, and required cities with a population

of more than 1.5 million to make contributions to an employee pension fund. *Id*. at *3. The City of Houston attempted to reduce it pension fund contributions, and outsourced part of its workforce. *Id*. at *5. To keep abreast with the changing plans of the city, the Pension Board announced that the definition of employee would include full-time employees who would be under the control of a Texas local government controlled by the city, but left the discretion to determine the status of an employee to its External Affairs Committee. *Id*. at *6. The city then formed a non-profit corporation called Convention and Cultural Services, Inc. ("CCSI"), and expressly disavowed any right or ability of the City to control CCSI. *Id*. at *8. Plaintiffs sought monetary damages and a declaration that they were no longer city employees as defined in Article 6243(h). The trial court dismissed the action for want of jurisdiction, which was upheld by the Texas Court of Appeals. On further appeal, the Texas Supreme Court affirmed. At the outset, the Supreme Court noted that Article 6243(h) defined employee as an eligible person who held a municipal position, and whose name appeared on a regular full-time payroll of the city. *Id*. at *19. The statute expressly authorized the Pension Board to construe the statute, add language it deemed necessary for administration of the pension fund, and determine all eligibility questions. *Id*. at *21. Plaintiffs contended that the Pension Board acted *ultra vires* by delegating the decision-making authority to the External Affairs Committee. The Supreme Court, however, noted that Article 6243(h) generally permits delegation. *Id*. at *26. Plaintiffs also contended that the Pension Board treated them differently than former city employees who now worked for separate legal entities due to municipal outsourcing. For example, Plaintiffs argued that the employees working at the Houston Zoo became employees of Houston Zoo, Inc., and that the pension fund determined a separation of service occurred as a result. The Supreme Court remarked that even assuming that the Pension Board did treat similarly-situated employees differently, Plaintiffs failed to plead a viable equal protection claim because the Board's actions were rationally related to at least two legitimate government objectives that were promoted by the challenged classification. *Id*. at *30. First, the Supreme Court noted that the Pension Board had a legitimate interest in preserving sources of pension funding that were adequate to meet the demands on the fund. *Id*. at *31. Second, the Supreme Court noted that the Pension Board had a legitimate interest in policies that lessened the risk of over-paying pensioners or allowing them to double dip. *Id*. at *32. Accordingly, the Supreme Court concluded that the equal protection claims failed as a matter of law. Finally, Plaintiffs contended that they were deprived of vested property rights without due process. Plaintiffs alleged that HMEPS unconstitutionally denied them retirement benefits they would otherwise have been eligible to collect after a separation of service from the city. The Supreme Court noted that *City of Dallas v. Trammell*, 129 Tex. 150 (1937), considered the constitutionality of a statutory amendment that effected a substantial reduction in the monthly pension benefits payable to a police department retiree, and held that the right of a pensioner to receive monthly payments from the pension fund was predicated upon the anticipated continuance of existing laws, and was subordinate to the right of the legislature to abolish the pension system. *Id*. at *35. Based on this rule, the Supreme Court held that Plaintiffs had no vested rights in the retirement benefits and pension plan contributions. Accordingly, the Supreme Court affirmed the Court of Appeals judgment.

(xii) Wisconsin

***Black, et al. v. City Of Milwaukee*, 2015 Wis. App. LEXIS 536 (WiS. Ct. App. July 21, 2015).** Plaintiff, a police association, brought a class action seeking a judgment declaring that the City's residency ordinance and resolution were enforceable. Milwaukee City Ordinance 5-02 requires all city employees to live in the City of Milwaukee, and the competing state statute, Wis. Stat. § 66.0502, abolished local residency requirements. The City of Milwaukee Common Council adopted Milwaukee City Ordinance 5-02 and concluded that the new statute violated Article XI, § 3(1) of the Wisconsin Constitution, which allows cities and villages to determine their local affairs government. *Id*. at 527. The parties cross-moved for summary judgment, and the trial court issued an order declaring that the Ordinance 5-02 and the Common Council's Resolution were void and unenforceable to the extent that they violated terms of § 66.052. On appeal, the Wisconsin Court of Appeals affirmed in part. At the outset, the Court of Appeals noted that the City of Milwaukee derived its authority to govern its affairs from the state constitution and the statute. *Id*. at *12. The Court of Appeals remarked that there was no dispute that the authority for Milwaukee City Ordinance 5-02 derived from constitutional "home rule" power. *Id*. The Court of Appeals disagreed with Plaintiff that § 66.0502's residency requirements were a matter of state-wide concern simply because the legislature said so was not persuasive. Plaintiff merely argued that the legislature can do what it wants. The Court of

Appeals found that the argument that – § 66.0502 concerned a state-wide matter because it involved the legislature's authority to regulate employment, where it related to matters of public safety and welfare – was also unpersuasive. The Court of Appeals explained that the argument failed because there was no evidence in the record to conclude that § 66.0502 was drafted with the public's health, safety, or welfare in mind. *Id*. at *20. The Court of Appeals noted that the parties pointed to no such proof either in their briefs or at oral argument, and therefore, it could not conclude that such a measure involved the health, safety, or welfare of the people of Wisconsin in any demonstrable way. The Court of Appeals also opined that the residency requirements such as Milwaukee City Ordinance 5-02 have been consistently found to be constitutional; therefore, it could not be held that prohibiting residency requirements protects employees against unfairly restrictive conditions. *Id*. at *21. In addition, the Court of Appeals remarked that § 66.0502 undoubtedly interfered with the ability of many municipalities to promptly respond to emergencies. The Court of Appeals found that by abolishing the local residency requirements, § 66.0502 directly affected the City's strong interest in having employees who are genuinely invested in the City's welfare and progress. The Court of Appeals cited the explanation of Milwaukee's Common Council that having police, fire department, health, water utilities, neighborhood services and City development personnel, among other employees, live in the City provides then with better knowledge of the challenges facing the City, increased understanding of the neighborhoods, and enhanced relationships with residents. *Id*. at *27. Accordingly, the Court of Appeals concluded that § 66.0502 did not involve a matter of state-wide concern, nor did it affect every city or village uniformly; therefore, it did not, pursuant to the home rule amendment, trump the City of Milwaukee's residency requirement. Accordingly, the Court of Appeals reversed the trial court's decision that Milwaukee Ordinance 5-02 was unenforceable. The Court of Appeals, however, concluded that § 66.0502 did not create a protectable liberty interest, and therefore, reversed the trial court's decision to the contrary and affirmed the trial court's decision declaring that the City's did not deprive any Police Association members of their constitutional rights.

D. Other State Law Rulings Affecting The Defense Of Workplace Class Action Litigation

(i) Alabama

***Baldwin Mutual Insurance Co. v. McCain, et al.*, 2015 Ala. LEXIS 22 (Ala. Feb. 20, 2015).** Plaintiff brought a putative class action alleging that Defendant wrongfully reduced the amount paid on claims made on actual cash value policies by deducting some amount for depreciation not only of the damaged materials and the labor costs of initially installing those damaged materials (based on their condition prior to the covered damage and their expected life span), but also of the labor costs associated with the removal of the damaged materials. Plaintiff owned a house on which she held a homeowner's insurance policy issued by Defendant. *Id.* at *1. That policy provided that any covered property losses would be settled "at actual cash value at the time of loss but not exceeding the amount necessary to repair or replace the damaged property." *Id.* In July 2005, after a windstorm damaged Plaintiff's house, she filed a claim with Defendant, and Defendant thereafter retained an independent adjuster to examine Plaintiff's damaged property and to prepare an estimate to repair the damage. Defendant paid Plaintiff's claim in accordance with the estimate prepared by the adjuster. *Id*. at *2. In June 2006, Plaintiff filed another claim after her house suffered damage as a result of a lightning strike. After the same adjuster prepared an estimate, Defendant paid the new claim in accordance with the adjuster's estimate. *Id.* Plaintiff argued that it was improper and impossible to depreciate the labor costs, because they had not previously been incurred at some defined time in the past; rather, they were being incurred at the time of the current repair. *Id.* at *3. Noting that hundreds or thousands of Defendant's policyholders were likely affected by its practices in that regard, Plaintiff sought class certification of her claims. *Id.* at *5. Plaintiff originally sought certification on behalf of all Alabama policyholders, who had suffered a loss within the last six years for which Defendant reduced the actual cash value of the same by reduction for the loss of value of undepreciable loss elements. *Id.* After the certification hearing, however, Plaintiff filed a brief in support of class certification proposing a new class definition to include Defendant's customers with replacement cost policies, in addition to those with actual cash value policies. *Id.* at *5-6. After the certification hearing and after supplemental briefing, and over objections from Defendant, the trial court certified the class in accordance with that subsequent, broader definition. *Id.* at *6. Defendant appealed, and argued that the

trial court exceeded its discretion in certifying the requested class because Plaintiff failed to meet her evidentiary burden under Rule 23 and the trial court failed to comply with § 6-5-641 Alabama Code. *Id.* at *8. The Alabama Supreme Court agreed and reversed the trial court's order. *Id.* The Supreme Court cited the almost identical case of *Baldwin Mutual Insurance Co. v. Edwards*, 63 So. 3d 1268 (Ala. 2010), and pointed out that the class definition proposed by Plaintiff in her brief submitted after the class certification hearing was materially different from the class definition offered by Plaintiff in her original complaint. *Id.* at *11. The Supreme Court noted that both Plaintiff's proposed class and the initially proposed classes in *Edwards* were limited to those of Defendant's customers who held actual cash value policies, but the class definitions proposed following the class certification hearing, which were accepted by the trial court, also included those of Defendant's customers who held replacement cost policies. *Id.* at *11-12. Accordingly, because the trial court exceeded its discretion in certifying the class in accordance with a definition proposed by Plaintiff without giving Defendant the opportunity to oppose the certification of the proposed class at a hearing conducted for that purpose pursuant to § 6-5-641, the Supreme Court reversed that certification order.

(ii) Arizona

***Rader, et al. v. Greenberg Traurig, LLP,* 2015 Ariz. App. LEXIS 98 (Ariz. App. June 23, 2015).** Plaintiffs, a group of investors, brought a class action against Defendant asserting five claims, including: (i) primary statutory liability under Arizona Revised Statutes ("ARS") § 44-2003(A); (ii) aiding and abetting common law securities fraud; (iii) aiding and abetting breach of fiduciary duty; (iv) intentional misrepresentation and (v) negligent misrepresentation and nondisclosure. In 2006, Mortgages Ltd., a now-bankrupt Arizona real estate investment company, had retained Greenberg Traurig LLP, a law firm, to review and draft private offering memoranda to solicit investors. Plaintiffs relied on the offering memoranda to invest in securities offered by Mortgages Ltd. between March 2006 and June 2008. On May 11, 2010, Mortgages Ltd. investors filed a putative class action against Greenberg Traurig and others in the District Court of Arizona entitled *Facciola v. Greenberg Traurig LLP,* No. 10-CV-1025 (the "*Facciola* action"). After the putative class in the *Facciola* action was certified and a settlement agreement was preliminarily approved, Plaintiffs filed a notice of intent to opt-out of that settlement. On August 31, 2012, the same day the court in the *Facciola* action confirmed that Plaintiffs had properly excluded themselves from the class and the settlement, they filed this action. Previously, the trial court granted Greenberg Traurig's motion to dismiss, finding Plaintiffs' claims time-barred. On Plaintiffs' appeal, the Arizona Court of Appeals affirmed the dismissal. At issue on appeal was whether Arizona should adopt cross-jurisdictional tolling, whereby the filing of a class action in one jurisdiction tolls the limitations period for claims by class members in a different jurisdiction during the pendency of the class action. Intra-jurisdictional tolling, whereby the filing of a class action may toll the limitations period for claims by class members in the same jurisdiction during the pendency of the class action, was first recognized in *American Pipe & Constr. Co. v. Utah,* 414 U.S. 538 (1974), where the U.S. Supreme Court held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. *Id*. at *5-7. Although binding precedent in federal court, state courts have taken different positions when addressing *American Pipe* tolling. Plaintiffs asked the Court of Appeals to adopt cross-jurisdictional tolling, which they conceded Arizona had never done. Three Arizona appellate court decisions had considered *American Pipe* tolling and the third decision considering *American Pipe* tolling was *Albano v. Shea Homes Ltd. Partnership,* 254 P.3d 360 (2011), which did not address or resolve the issue presented here. *Id*. at *9-13. Contrary to Plaintiffs' argument, *Albano* did not adopt intra-jurisdictional tolling in Arizona. *Id*. at *13. Moreover, the trial court observed that even if *Albano* could be construed as adopting intra-jurisdictional tolling, it would not apply to Plaintiffs' state court claims here, given the *Facciola* action was a federal case, which the court certified as a class action. *Id*. As *Albano* noted, however, whether class certification was granted could be an important consideration in addressing subsequent tolling requests. *Id*. at *13-14. Further, although Plaintiffs cited federal cases applying *American Pipe* tolling after a class action was certified, those cases, however, were distinguishable because unlike Arizona after the enactment of ARS § 12-504, there is no general savings statute in federal civil actions. *Id*. at *15. Arizona's saving statute applies to an action timely filed in another jurisdiction and later re-filed in Arizona. The Court of Appeals found that Plaintiffs had not shown that Arizona should adopt broader cross-jurisdictional tolling by case law. *Id*. at *18. Thus, the Court of

Appeals concluded that the trial court properly dismissed Plaintiffs' claims as time-barred, and accordingly, affirmed the judgment. *Id*.

(iii) Arkansas

***Diamante, LLC v. Dye, et al.*, 2015 Ark. LEXIS 392 (Ark. May 28, 2015).** Plaintiffs, a group of lot owners at Defendant's golf club, brought an action seeking a declaratory judgment that certain obligations and restrictions known as tie-in rights associated with the land were unenforceable. After the trial court denied Defendant's motion to dismiss, Plaintiffs moved for class certification. Defendant moved to compel arbitration. The trial court denied Defendant's motion, finding that Defendant had waived its right to demand arbitration through unnecessary delay that prejudiced Plaintiffs. *Id.* at *4. On appeal, the Arkansas Court of Appeals affirmed. Thereafter, on remand, Plaintiffs amended their motion for class certification. The trial court granted Plaintiffs' motion and certified the class. Defendant appealed to the Supreme Court, arguing that the trial court abused its discretion by including members of the class who signed documents agreeing to arbitrate controversies and, therefore, the claims and defenses of Plaintiffs could not be "typical" of the claims and defenses of the class members. The Supreme Court affirmed. *Id.* at *5. The Supreme Court noted that the trial court found the differences in the by-laws and club membership agreements with regard to arbitration to have no effect on the pending litigation, and Defendant did not appeal that finding. *Id.* at *6. The Supreme Court also noted that, when the trial court granted class certification, it already had heard and rejected Defendant's motion to compel arbitration with Plaintiffs. *Id.* Plaintiffs, acting as class representatives, then filed a second amended motion for a declaratory judgment. Defendant responded and listed "arbitration" as an affirmative defense. Defendant then moved to compel arbitration a second time, arguing that the Court of Appeals had determined that the arbitration agreement was valid. *Id.* at *6-7. The trial court denied the motion. On appeal, the Supreme Court reversed and remanded. The Supreme Court observed that the law-of-the-case doctrine prohibited a trial court from reconsidering issues of law and fact that already had been decided on appeal. *Id.* at *8. The Supreme Court, however, found that the Court of Appeals only had addressed the issue of whether Defendant had waived the right to compel arbitration as to Plaintiffs as individuals, not as class representatives in a class action. The Supreme Court, therefore, held that the Court of Appeals' decision was not conclusive on the issue of whether Defendant had waived arbitration as to the class members who subsequently were added to the lawsuit upon class certification. *Id.* at *9. The Supreme Court held that, although the Court of Appeals found a valid arbitration agreement between the parties, that ruling did not apply to the subsequent motion to compel arbitration as to the unnamed class members. Accordingly, the Supreme Court reversed and remanded the action to the trial court to determine whether there was a valid agreement to arbitrate between Defendant and the unnamed class members.

***GGNSC Arkadelphia, LLC v. Lamb, et al.,* 2015 Ark. LEXIS 409 (Ark. June 4, 2015).** Plaintiffs, a group of nursing home residents, brought a putative class action alleging that Defendants, a group of nursing home facilities, breached their statutory and contractual obligations by failing to properly staff the facilities and by failing to meet minimum staffing requirements. Specifically, Plaintiffs asserted that the alleged practice of chronically understaffing the nursing homes breached the facilities' standard admission agreement and violated the Arkansas Long-Term Care Residents' Rights Act. *Id.* at *6. Plaintiffs moved for class certification. After conducting two hearings, the trial court entered an order granting certification to a class of all residents and estates of residents who resided at the Golden Living nursing homes from December 2006 onward. The trial court found that Plaintiffs established commonality by asserting the central issue of whether Defendants' alleged business practice breached the standard admission agreement and violated the Residents' Rights Act. *Id.* at *7. Upon Defendant's appeal, the Arkansas Supreme Court affirmed the trial court's order. Although Defendants argued that the experiences and injuries of the residents varied and that individualized proceedings would be necessary to determine if any alleged injury was proximately caused by the alleged understaffing, the Supreme Court found core issues common to each class member on the issues of liability. *Id.* at *9-14. According to the Supreme Court, the questions of whether Defendants had a duty to provide appropriate staffing pursuant to the admission agreement and the Residents' Rights Act, and whether Defendants failed to meet the statutory and contractual obligations by chronically understaffing the facilities, had the capacity to reveal the possibility for a claim against Defendants or wipe out the possibility of a claim for every class member. *Id.* at *14-15.

The Supreme Court reasoned that the common, overarching issues concerned whether Defendants were liable for chronic understaffing under the admission agreement and the asserted statues, and these central issues could be decided on a class-wide basis and it manifestly predominated over individual issues concerning a class member's right to recovery, which could be determined in bifurcated proceedings. *Id.* at *16. The Supreme Court therefore concluded that the trial court did not abuse its discretion in ruling that Plaintiffs met the predominance requirement based on the common issues of establishing liability. Defendants also argued that the existence of arbitration agreements with a substantial number of class members provided another individual issue that predominated over common issues. *Id.* at *17. Since the current record did not reflect that a significant number of class members had agreed to arbitration so as to override the certification of the class, the Supreme Court rejected Defendants' argument. *Id.* Defendants also failed to demonstrate that the admissions agreement were materially different for each class member and if the trial court would have to determine whether the contracts were standard, identical, or substantially similar before determining any breach. *Id.* The Supreme Court therefore concluded that a class action was the superior method for resolving the question of Defendants' liability, and accordingly, affirmed the trial court's grant of class certification.

***Philip Morris Cos., Inc. v. Miner, et al.*, 2015 Ark. LEXIS 83 (Ark. Feb. 26, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendants violated the Arkansas Deceptive Trade Practices Act ("ADTPA") by falsely representing that its Marlboro Lights cigarettes were healthier and contained less tar and nicotine than regular cigarettes. Plaintiffs moved for class certification. The trial court certified the class, and on appeal, the Arkansas Supreme Court affirmed. Defendants argued that each element of Plaintiffs' ADTPA claim – misrepresentation, causation, and damages – contained issues that defeated the predominance requirement. Defendants asserted that misrepresentation was an inherently individualized issue because whether the representation for Lights cigarettes was false depended on each class member's smoking habit. *Id*. at *8. The Supreme Court noted that the question was whether Defendants made false representation or engaged in a deceptive practice. The Supreme Court noted that Plaintiffs alleged that Defendants falsely represented Lights cigarettes as having lower tar and nicotine, and that they employed deceptive techniques to reduce machine-measured levels of tar. The Supreme Court found that these allegations went beyond whether each consumer who bought Lights actually received less tar or nicotine, and individual issues regarding smoking behavior were not dispositive. *Id*. at *11. Defendants further argued that proof of causation required proof of reliance, and since each buyer bought Lights for different reasons, those individual reasons destroyed predominance. *Id*. at *13. The Supreme Court rejected Defendants' position. It noted that in *Asbury Automobile Group v. Palasack*, 366 Ark. 601 (2006), Plaintiffs brought a class action against a car dealership, alleging that Defendants violated two ADTPA by charging a $100 document preparation fee. *Id*. Defendants argued that questions such as how each class member paid for a vehicle destroyed predominance. *Asbury* rejected this argument, reasoning that questions concerning the fee and the reason the dealership charged it were overarching issues that could be resolved before the trial court reached any individual issues, such as the degree of reliance of each class member on the misrepresentation. *Id*. at *13. Likewise, in this case, the Supreme Court reasoned that the misrepresentation element of Plaintiffs' ADTPA claim could be proved by class adjudication, and then to the extent that causation and reliance required individual inquiries, the trial court could decertify the class in a bifurcated proceeding. *Id*. at *11. Finally, Defendants argued that each individual's damage claim depended on his or her smoking habits, which also destroyed predominance. *Id*. The Supreme Court found that as with the issue of causation, bifurcation would solve the damages issue as well. Accordingly, the Supreme Court found that the predominance requirement was satisfied. Defendants also argued that the class was not ascertainable because each class member would have to present receipts in order to opt-in to the class. *Id*. at *16. The Supreme Court remarked that there was no receipt requirement in order to join a class action, and one of the rationales for the class action mechanism was to provide individual consumers with an effective way to pool resources and collectively bring a claim that would otherwise be unremunerative if brought individually. *Id*. at *17. Accordingly, the Supreme Court affirmed the class certification order.

(iv) California

***Adjamian, et al. v. L'Oreal USA SD, Inc.*, 2015 Cal. App. Unpub. LEXIS 5072 (Cal. App. 2d Dist. July 20, 2015).** Plaintiff, a customer, brought an action alleging that Defendant engaged in a pattern or practice of knowingly requesting and recording customers' personal identification information ("PII") at its California retail stores during credit card transactions in violation of the Song-Beverly Credit Card Act. Plaintiff sought certification of a class consisting of all California citizens who shopped at Kiehl's, a store operated by Defendant, who were requested to provide and who provided PII. The trial court denied the motion because it found that Plaintiff failed to present substantial evidence of a policy or practice by Kiehl's, specific to credit card transactions, of requiring PII or causing a reasonable customer to perceive such a requirement. *Id.* at *16. On Plaintiff's appeal, the California Court of Appeal affirmed. Plaintiff asserted that the Act prohibits any and all requests for PII of any customer who ends up paying with a credit card, regardless of the circumstances of the request. *Id.* at *22. The Court of Appeal disagreed, holding that the Act forbids businesses from requesting or requiring cardholders to provide PII as a condition of accepting the credit cards. *Id.* at *23. The Act does not forbid merchants from requesting that consumers voluntarily provide their e-mail addresses or other identifying information for use in e-mail marketing programs, and it does not prohibit a retailer from soliciting a consumer's address and telephone number for a store's mailing list, if the consumer provides such information voluntarily. *Id.* at *24. Kiehl's trained its salesclerks to ask customers for their contact information, starting at the point the customers walked into the store, until the time that the customers left. Kiehl's asked customers for their contact information when the clerk first greeted the customers upon arrival, when the customers sat down for skin consultations, and when Kiehl's provided product samples. *Id.* at *25. Thus, the Court of Appeal found that Kiehl's sought to obtain contact information from customers at various times, and through various efforts, before customers presented credit cards for payment and, in at least some instances, requested PII before customers even thought about purchasing merchandise with a credit card. *Id.* Thus, because a retailer is liable for a violation of § 1747.08(a)(2) only if a consumer would perceive the store's "request" for information as a condition of the use of a credit card, the Court of Appeal opined that the varied circumstances in which Kiehl's requested PII from its customers presented individualized factual issues that could not be tried in a class action. *Id.* at *26. The circumstances of each customer interaction would have to be evaluated to determine what a reasonable customer would have perceived about the request for PII vis-à-vis the subsequent credit card transaction and, therefore, whether the request constituted a violation of the Act. *Id.* at *26-27. Accordingly, the Court of Appeal agreed with the trial court that individualized issues predominated and affirmed the denial of class certification.

***Aguirre, et al. v. Amscan Holdings, Inc.,* 2015 Cal. App. Unpub. LEXIS 933 (Cal. App. 3d Dist. Feb. 11, 2015).** Plaintiff brought a putative class action alleging that Defendant violated the Song-Beverly Credit Card Act by routinely requesting and recording personal identification information, namely ZIP Codes, from customers using credit cards in its retail stores in California. Plaintiff sought to represent a proposed class of all persons in California from whom Defendant requested and recorded a ZIP code in conjunction with a credit card purchase for a defined period. The proposed definition also included a list of those excluded from the class. *Id.* at *7. Defendant moved to strike and dismiss Plaintiff's class allegations, and to deny class certification. The trial court granted the motion, finding that Plaintiff failed to establish the existence of an ascertainable class. The trial court relied on Plaintiff's inability to clearly "identify, locate, and notify" class members through a reasonable expenditure of time and money to conclude that the proposed class was not ascertainable. *Id.* at *15. Upon Plaintiff's appeal, the California Court of Appeal reversed the trial court's decision. The Court of Appeal found that the trial court applied an erroneous legal standard in determining that the proposed class was not ascertainable. *Id.* at *2. The Court of Appeal held that, contrary to the trial court's order, the representative Plaintiff need not identify, much less locate, individual class members to establish the existence of an ascertainable class. *Id.* at *17. The Court of Appeal determined that Plaintiff's proposed class definition described a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the class description. *Id.* Moreover, in response to Defendant's claim that the parties lacked an adequate means for identifying class members, Plaintiff pointed to sales receipts and credit card statements, noting that potential class members have the ability to present a receipt or credit card statement showing that a credit card transaction was entered into on a specific date, at a specific store

location, and the specific amount of purchase, and that such receipt or credit card statement could be cross-referenced with Defendant's records to show that a ZIP Code that Defendant had requested associated with that specific purchase. *Id.* at *19-20. The Court of Appeal concluded that there was no need to identify the individual members in order to bind all class members by the judgment, because Plaintiff showed the existence of an ascertainable class and as Plaintiff's claims and those of the unnamed class members were not separate and distinct. *Id.* at *22. Accordingly, the Court of Appeal reversed the trial court's order striking and dismissing Plaintiff's class allegations, and remanded the action for further proceedings.

***Ambers, et al. v. Beverages & More, Inc.*, 2015 Cal. App. LEXIS 370 (Cal. App. 2d Dist. May 4, 2015).** Plaintiff, a purchaser, brought a class action seeking penalties for violation of § 1747.08 of the Song-Beverly Credit Card Act which prohibits merchants from requesting or requiring and recording a consumer's personal identifying information ("PII") during a credit card purchase transaction. *Id.* at *1. Plaintiff alleged that he purchased alcohol on-line through Defendant's website and elected to pick up his order at Defendant's store. Further, Plaintiff alleged that he provided his PII, which was a condition to completing the on-line purchase, and that he completed the transaction and paid for the merchandise with his credit card. *Id.* at *2. Defendant demurred to the complaint, which the trial court sustained. Thereafter, Plaintiff filed a first amended complaint wherein he alleged that the on-line request for his PII violated § 1747.08 because that information was unnecessary to the completion of his store pick up transaction or to prevent fraud because Defendant required him to show the store employee his photo identification and credit card before receiving his merchandise. *Id.* at *3. Plaintiff also alleged the transaction was not completed until he went to the store, showed the clerk both his photo identification and credit card, and physically received his merchandise. Defendant again demurred, which the trial court sustained. It held that Plaintiff had failed to explain why he was not bound by his previous allegation that the transaction was completed during the on-line purchase. *Id.* at *4. The trial court also held that Plaintiff owned the merchandise after he made his on-line payment. On appeal, the California Court of Appeal affirmed. The Court of Appeal noted that § 1747.08 (c)(4) allows PII to be collected if it is required for a special purpose incidental but related to the individual credit card transaction, including information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders. *Id.* at *7. Further, the Court of Appeal observed that *Apple Inc. v. Superior Court*, 56 Cal. 4th 140 (2013), concluded that § 1747.08 (d) demonstrated the Legislature's intent to permit retailers to use and even record PII when necessary to combat fraud and identity theft. *Id.* at *11. Additionally, *Apple* held that the safeguards against fraud that are provided in § 1747.08(d) are not available to an on-line retailer selling an electronically downloadable product. *Id.* The Court of Appeal remarked that Defendant had no means, without obtaining Plaintiff's PII, of verifying that he was an authorized user of the credit card number entered on its website before the purchase transaction was completed, and that such verification was also necessary because ownership of the merchandise purchased on passed immediately to Plaintiff upon completion of the on-line transaction, when Plaintiff's credit card was charged. Although Plaintiff contended that his purchase transaction was not completed on-line, and that the transaction was completed only upon his taking physical possession of the merchandise, the Court of Appeal opined that Plaintiff was bound by the allegation in his initial complaint that the transaction was completed on-line when he paid for the merchandise with his credit card. *Id.* at *13. The Court of Appeal noted that the California Commercial Code states in relevant part that unless otherwise explicitly agreed, "title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of the goods." *Id.* at *14. When Plaintiff made his on-line purchase through Defendant's website, he agreed to the website terms and conditions of use, which stated that the title to purchased merchandise was transferred to the buyer at the time his or her credit card was charged. Thus, Plaintiff became the owner of the purchased items when his credit card was charged upon completion of the on-line transaction. Accordingly, the Court of Appeal held that that portion of the Commercial Code did not apply to Plaintiff's on-line purchase of merchandise that he subsequently retrieved at a retail store, and affirmed the dismissal of the action.

***Animal Protection And Rescue League, et al. v. The City Of San Diego,* 2015 Cal. App. LEXIS 459 (Cal. App. 4th Dist. May 27, 2015).** Plaintiffs brought a petition for writ of mandate against the City of San

Diego and its Planning Commission ("the City"), seeking to vacate the city planning commission's denial of their application to install a guard rope at the La Jolla Children's Pool to protect harbor seals from humans. About three months after Plaintiffs filed the petition, the City conceded that the commission erred when it denied the permit for an annual rope barrier. Thereafter, Plaintiffs moved for an entry of judgment on its writ petition and the City filed a non-opposition to the motion. The trial court then granted Plaintiffs' petition for writ of mandate and issued a corresponding peremptory writ of mandate. Plaintiffs then sought an award of private attorney general fees amounting to $123,243.75, and sought fees for work performed during and prior to the filing of the litigation in this case, as well as for work performed in services rendered in a related case, where they had sought a preliminary injunction requiring installation of the guideline rope at issue in this case. *Id.* at *5-6. The City opposed the motion, arguing that they were never the opposing party because they had confessed error at the inception of the action. The trial court awarded $82,717.50 to Plaintiffs, including $82,162.50 in attorneys' fees and $555 in costs. On appeal, the California Court of Appeal affirmed. The Court of Appeal noted the reasoning in *Connerly v. State Personnel Board*, 37 Cal. 4th 1169, (2006), which held that the opposing party liable for attorneys' fees is the person or agency sued, which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation. *Id.* at *11. Here, the City was the named respondent to Plaintiffs' writ petition, and the City via its planning commission was the entity responsible for initiating and maintaining actions or policies that gave rise to the litigation. *Id.* Thus, the Court of Appeal opined that the City fit squarely within the definition of "opposing party" provided in *Connerly. Id.* at *12. Although the City contended that it was not an opposing party because it had never taken a position adverse to Plaintiffs, the Court of Appeal stated that under *Connerly*, it is generally the entity responsible for the actions that gave rise to the litigation that is an opposing party. *Id.* Here, Plaintiffs sought and obtained a peremptory writ of mandate requiring the City to vacate and set aside the planning commission's denial of a permit for the year-round guideline rope. The Court of Appeal remarked that fact that the City confessed its error and agreed to have a judgment entered against it did not provide a reasonable basis for concluding that the City may not be subject to an attorneys' fee award. *Id.* at *12-13. Additionally, the Court of Appeal observed that under the catalyst theory, a trial court may award attorneys' fees even when litigation does not result in a judicial resolution if Defendant changes its behavior substantially because of, and in the manner sought by, the litigation. *Id.* at *14. The Court of Appeal explained that there was no reason why § 1021.5 of the California Code of Civil Procedure should be interpreted to permit an award of attorneys' fees pursuant to a catalyst theory of recovery where Defendant changes its behavior without judicial resolution, but to deny recovery where an entity confesses error in response to ligation. *Id.* Thus, the Court of Appeals held that the City was an opposing party, and affirmed the award of attorneys' fees

***Audio Visual Services Group, Inc., et al. v. Superior Court,* 2015 Cal. App. LEXIS 50 (Cal. App. 2d Dist. Jan. 21, 2015).** Plaintiff, an audio-visual technician, brought a class action on behalf of audio-visual workers employed by PSAV Presentations Services ("PSAV") under the California Unfair Competition Law ("UCL") for violation of the Los Angeles Hotel Service Charge Reform Ordinance. PSAV provided audio-visual services to hotels within the Century Corridor Property Business Improvement District ("Corridor") adjacent to the Los Angeles International Airport ("LAX"), and the Ordinance required hotels within the Corridor, with 50 or more guest rooms, and no collective bargaining agreement, to pass along the entire service charge to the hotel workers who actually performed the services for which the charges were collected. *Id.* at *4. Plaintiff alleged that PSAV violated the Ordinance, and thus the UCL. PSAV demurred to the complaint arguing that the first claim for violation of the Ordinance was barred by the statute of limitations, and that Plaintiff's second cause of action failed to state a claim because the Ordinance was intended to protect the wages of "traditionally tipped hotel workers," which did not apply to Plaintiff and the class members. *Id.* at *8. Plaintiff conceded that his first claim was time-barred, but argued that the Ordinance did not limit its reach only to those hotel workers who traditionally received gratuities for their services. Agreeing with Plaintiff, the trial court had overruled the demurrer to the UCL claim. The trial court had found that PSAV might be a "hotel worker" within the meaning of the Ordinance because Plaintiff performed his work inside a hotel routinely and the hotel incorporated PSAV's bill including the "service charge" element into its master bill for meeting functions held at the hotel. *Id.* at *9. The trial court thus held that "hotels and hotel sub-contractors who choose to 'un-bundle' their bills with line items described as 'service charges'" within the Corridor were required to pay service charges to audio-visual workers. *Id.* at

*10. On appeal, the California Court of Appeal reversed, finding that audio-visual workers do not fall within the class of employees protected by the Ordinance because they were not the type of employees who traditionally relied on gratuities as part of their wages. *Id.* at *3. The Court of Appeal utilized a traditional statutory construction analysis focusing on the list of examples following the general definition of "hotel worker" provided in the Ordinance. The examples included hotel workers "who work banquets or catered meetings, deliver food and beverages, and carry baggage," whose wages typically included gratuities. *Id.* at *16. According to the Court of Appeal, if the city council had intended the term "hotel worker" to be used in its broadest sense – to include workers such as plumbers or audio-visual workers such as Plaintiff – then the examples provided in the Ordinance would have been unnecessary and surplusage. *Id.* at *17. The Court of Appeal found nothing in the stated purpose of the Ordinance to support Plaintiff's argument that the city council intended to address all "services charges" that were separate line items on hotel bills, and thus held that Plaintiff was not among the class of hotel workers the city intended to protect when enacting the Ordinance. *Id.* at *20-23. Accordingly, the Court of Appeal reversed the trial court's order denying PSAV's demurrer.

***Branning, et al. v. Apple, Inc.,* 2015 Cal. App. Unpub. LEXIS 576 (Cal. App. 6th Dist. Jan. 28, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant calculated warranty and AppleCare contract periods using estimated purchase dates as opposed to actual purchase dates, and thus caused their warranty and AppleCare coverage to expire prematurely. *Id.* at *5-6. Plaintiffs also claimed that Defendant wrongfully refused repair service as a result of the alleged shorting, and asserted claims under the California Unfair Competition Law ("UCL"), Consumers Legal Remedies Act ("CLRA") and False Advertising Law ("FAL"). In October 2009, the trial court certified a class with respect to Plaintiffs' causes of action for violation of the UCL, FAL, and the CLRA. In a separate ruling, the trial court found that Plaintiffs failed to produce any evidence that Defendant denied valid warranty of AppleCare coverage claims, and thus, the named Plaintiffs lacked standing to pursue their shorting claims. *Id.* at *12. Defendant then filed a motion to decertify the class, asserting that individual issues predominated over a common one given the trial court's ruling on Plaintiffs' lack of standing. *Id.* at *13. The trial court granted Defendant's motion and allowed the parties to address the standing issues in a summary adjudication motion. Plaintiffs then filed a motion for new trial asserting a new claim based on misenrollment or non-enrollment of AppleCare plan. The trial court modified its order on standing to reflect that the order did not apply to Plaintiffs' new "enrollment claims." *Id.* at *14. The trial court later distinguished Plaintiffs' "shorting claims" from their "enrollment claims," and ruled that none of the class representatives had standing to assert a shorting claim but only the enrollment claims. *Id.* at *15. Because individual issues related to enrollment claims predominated as to both liability and damages, the trial court concluded that class action would not be a superior method for resolving these claims. *Id.* at *18. Plaintiffs moved for reconsideration of the decertification order, but the trial court denied the motion in December 2010. Upon appeal, the California Court of Appeal affirmed the trial court's orders. First, the Court of Appeal found that the trial court's determinations – that none of the named Plaintiffs had standing and Plaintiffs' assertion of new enrollment claims – was a "change of circumstance" that justified revisiting the order granting certification. *Id.* at *26-28. Further, the Court of Appeal determined that the trial court did not conflate typicality and standing because the trial court summarily adjudicated Plaintiffs' shorting claims against them, and thus their class claims failed for a lack of a proper class representative. *Id.* at *33. The Court of Appeal rejected Plaintiffs' contention that the shorting claims and enrollment claims were related to each other and summary adjudication was not permitted on any aspect of a cause of action that were related to each other. The Court of Appeal opined that Plaintiffs' claims involved two different primary rights, *i.e.*, the right to be free from shorting of the one-year limited warranty and the right to be free from misenrollment or nonenrollment in AppleCare and thus, they were separate and distinct, so that did not preclude the trial court from summarily adjudicating it separately. *Id.* at *37. Because the summary judgment rulings established that none of the Plaintiffs in fact lost money or property as a result of Defendant's use of estimate purchase dates, the Court of Appeal held that the trial court properly dismissed the assertions as speculative. *Id.* at *42. Finally, the Court of Appeal ruled that the trial court properly considered and determined that individualized issues of liability and fact of damages made class certification inappropriate here. Defendant's evidence, including different contracts for different products and the issue of plan confirmation only with a validated warranty start date, supported the trial court's

conclusion that establishing a class member's right to recover for misenrollment or non-enrollment would require individualized inquiries. *Id.* at *56-57. Accordingly, the Court of Appeal affirmed the trial court's orders.

***Brinkley, et al. v. Monterey Financial Services, Inc.*, 2015 Cal. App. LEXIS 1029 (Cal. App. 4th Dist. Nov. 19, 2015).** Plaintiff brought a putative class action asserting causes of action for invasion of privacy and unlawful recording of telephone calls. Plaintiff contended that she signed up to receive real estate coaching classes from Real Estate Investor Education ("REIE"), one of Defendant's customers, and she financed for the classes through REIE's Retail Installment Contract ("RIC"). *Id*. at *3. Plaintiff alleged that Defendant called her requesting payments for the classes and the conversations were recorded without her knowledge. *Id*. at *8. The RIC had an arbitration clause, and Defendant therefore moved to compel arbitration, which the trial court granted. On appeal, the California Court of Appeal affirmed in part. Plaintiff argued that the Federal Arbitration Act did not govern the arbitration agreement, as the parties agreed to the application of state rules for any arbitration under their contract. *Id*. at *12. The Court of Appeal noted that the relevant language in the RIC contemplated an existence of an interstate transaction. *Id*. at *13. The choice-of-law provision indicated that the law to be applied was the law of the consumer's state. Because Plaintiff was a Washington resident, and REIE was a Utah entity, the Court of Appeal concluded that the RIC clearly evidenced an interstate transaction. *Id*. at *14. Plaintiff further asserted that Washington law governed the interpretation of the contract. The parties agreed that Washington and California law were substantially similar with respect to the issues raised in the appeal, and Defendant did not object to applying Washington law. *Id*. at *17. Accordingly, the Court of Appeal concluded that Washington law governed the interpretation of the contract. Plaintiff contended that she asserted that claims of invasion of privacy, unlawful recording of telephone calls, and unlawful and unfair business practices, which were not covered under the terms of the RIC. Plaintiff asserted that her telephone conversations were recorded by Defendant, and all her claims arose from that alleged conduct. Defendant relied on a specific term in the RIC that specified that a default by the consumer will trigger a demand for immediate payment of the total amount owing and granted REIE permission to use all legal rights of enforcement to collect the monies due. *Id*. at *28. Accordingly, the Court of Appeal concluded that a dispute regarding the legality of any conduct that Defendant undertook in its collections efforts was a dispute related to the RIC. *Id*. The Court of Appeal also found that the arbitration agreement was not procedurally unconscionable. The Court of Appeal explained that the RIC specifically informed consumers that the REIE may assign the agreement to any third-party without prior notice, and that such third-party would become the holder of the agreement with the creditor. *Id*. at *44. Plaintiff further asserted that the arbitration agreement was substantively unconscionable due to the prohibitive costs of arbitration that she would have to incur. Defendant asserted that the AAA's Consumer-Related Disputes Supplementary Procedures would limit Plaintiff's costs to a $200 filing fee, and that all other costs would be borne by Defendant, including the arbitrator's fee and the arbitrator's travel and other expenses. *Id*. at *52. The Court of Appeal remarked that because Defendant made a judicial admission that the Consumer Supplementary Procedures, including the fee provisions, applied to any arbitration dispute with Plaintiff, it followed that Plaintiff would not incur prohibitive costs of arbitration. *Id*. at *54. The Court of Appeal, however, concluded that the availability of class arbitration was a matter for the arbitrator to decide. *Id*. at *75. Accordingly, the Court of Appeal reversed the portion of the trial court's order compelling Plaintiff to arbitrate her individual, but not class, claims. The Court of Appeals also reversed the order dismissing the complaint, and directed the trial court to send the matter to arbitration. *Id*.

***Connor, et al. v. First Student, Inc.*, 2015 Cal. App. LEXIS 695 (Cal. App. 2d Dist. Aug. 12, 2015).** Plaintiff, a school bus driver, brought a class action alleging that Defendants failed to get her written consent before conducting background checks on her, in violation of California's Investigative Consumer Reporting Agencies Act ("ICRAA"). Plaintiff worked for Laidlaw Education Services, which was acquired by Defendants in 2007. *Id.* at *4. Following the acquisition, Defendants hired HireRight Solutions, Inc., to conduct background checks on Plaintiff and all other former Laidlaw bus drivers, which included information from criminal record checks and searches of sex offender registries. *Id.* Before conducting the background checks, Defendants sent each employee a notice stating that HireRight may request an "investigative consumer report" that would include details of previous employers, reasons for termination of

employment, work experience, accidents, academic history, or any other information that may reflect on the employee's potential for employment. *Id.* at *4-5. The notice informed the employee that they may view or obtain a copy of their file, and included a box the employee could check if they wanted to obtain a copy of the report, and included the requisite disclosures. *Id.* at *5. Defendants moved for summary judgment, which the trial court granted based upon the holding of *Ortiz v. Lyon Management Group, Inc.*, 157 Cal. App. 4th 604 (Cal. App. 2007). *Id.* at *6. *Ortiz* held that the ICRAA was unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information because unlawful detainer information related to both creditworthiness and character. *Id.* at *2. According to *Ortiz*, the ICRAA and the Consumer Credit Reporting Agencies Act ("CCRAA") presented a statutory scheme that required information in consumer reports to be categorized as either character information (governed by the ICRAA) or creditworthiness information (governed by the CCRAA); when the information could be categorized as both, the statutory scheme could not be enforced constitutionally because it did not give adequate notice of which Act governed that information. *Id.* Plaintiff appealed, and contended that the ICRAA applied to the background checks at issue in this case, and the fact that the CCRAA might also apply to those same background checks did not render the ICRAA void for vagueness. *Id.* at *7. The California Court of Appeal reversed, holding that the trial court's reliance on *Ortiz* was erroneous. *Id.* The Court of Appeal found the background checks included information on the employees' (or prospective employees') character, general reputation, personal characteristics, or mode of living, and thus were investigative consumer reports used for employment purposes that required compliance with the requirements of the ICRAA. *Id.* at *10-11. Defendants argued that the ICRAA was unconstitutionally vague because the CCRAA also applied to the background checks at issue, and an employer could not determine whether the CCRAA or the ICRAA applied. *Id.* at *11. The Court of Appeal held the CCRAA did not apply to the background checks in this case, as there was no evidence the background checks sought any information regarding the employees' creditworthiness. *Id.* at *12-13. Further, nothing in the language of the ICRAA or the CCRAA precluded the application of both to the same consumer report. *Id.* at *15. The Court of Appeal noted the statutes' legislative history also showed the CCRAA always governed consumer reports that included character information on creditworthiness, as long as that information was not obtained through personal interviews. *Id.* at *18. Similarly, the Court of Appeal observed that consumer reports that included any character information, regardless of how it was obtained, were governed by the ICRAA. *Id.* at *19. Thus, the Court of Appeal concluded the fact that the two Acts overlapped in their coverage of some consumer reports did not render them unconstitutionally vague to the extent of that overlap. *Id.* at *20. Accordingly, the Court of Appeal reversed summary judgment in Defendants' favor. *Id.* at *23.

***Elijahjuan, et al. v. Mike Campbell & Associates, Ltd.,* 2015 Unpub. LEXIS 7904 (Cal. App. 2d Dist. Nov. 4, 2015).** Plaintiffs, a group of truck owners, brought a class action alleging that Defendants misclassified them as independent contractors. Plaintiffs operated under the U.S. Department Transportation Federal Motor Carrier Safety Administration and were permitted by the California Department of Motor Vehicles. *Id*. at *5. Plaintiffs paid their own operating expenses, including insurance, repair, and maintenance, and some Plaintiffs even formed corporations and hired employees. *Id*. Plaintiffs entered into agreements with Defendants to provide motor carrier services. Plaintiffs alleged causes of action for failure to reimburse business expenses, unlawful deduction of wages, and unlawful coerced purchases. The trial court entered summary judgment for Defendants, finding that if Plaintiffs were employees, Defendants would need to hire additional drivers, would need to reimburse operating expenses, and purchase trucks at a cost of over $90 million. The trial court also found that Defendants would have to obtain its own motor carrier authorization from the U.S. Department of Transportation, and that these changes would affect prices, routes, and services defined by the Federal Aviation Administration Authorization Act ("FAAAA"). On appeal, the California Court of Appeal reversed and remanded. The Court of Appeal noted that after the trial court entered summary judgment, several courts, including the California Supreme Court, had held that similar lawsuits were not preempted by the FAAA. The Court of Appeal noted that in *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal. 4th 771 (2014), the California Supreme Court found that preemption applies when claims derive from the enactment or enforcement of state law, and relates to a motor carrier's prices, routes, or services with respect to the transportation of property. *Id*. at *8. The Supreme Court held that FAAA does preempt generally applicable employment laws. *Id*. The Court of Appeal noted that in *Pac Anchor*, the Supreme Court relied

on *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d. 1184 (9th Cir. 1998), where the Ninth Circuit held that the FAAA did not preempt California's prevailing wage law. *Id*. at *10. The Ninth Circuit concluded that state regulation in an area of traditional state power and having no more than an indirect or tenuous effect on motor carriers' prices and routes were not exempted. *Id*. Defendants conceded that the claims brought in this case were not facially preempted, but emphasized that in contrast to *Pac Anchor*, here, Defendants did not own the drivers' trucks and did not have the authority to engage in cargo transport. *Id*. at *17. Additionally some Plaintiffs had corporations themselves, which had employees, and they would have to reimburse $90 million, which was so exorbitant it would necessarily affect prices. *Id*. The Court of Appeal, however, noted that the ultimate determination of whether Plaintiffs were independent contractors had no bearing on FAAAA preemption. The Court of Appeal opined that the FAAAA was not contingent on motor carriers owning their own trucks, using their own equipment, or having operational control. *Id*. at *18. Accordingly, the Court of Appeal reversed and remanded.

***Falk, et al. v. Children's Hospital L.A.,* 237 Cal. App. 4th 1454 (2d Dist. 2015).** In this series of class actions filed against Defendant alleging various wage and labor violations, the California Court of Appeal held that filing of a class action tolled the statute of limitations for claims subsequently brought by other class members. Plaintiff worked as a licensed vocational nurse at Defendant's Hospital from March 2006 to August 2006. During May 2007, Thomas Palazzolo, an hourly paid patient care service aide employed by Defendant, brought a class action complaint alleging that Defendant failed to pay all non-exempt or hourly paid employees overtime, denied them meal and rest breaks, failed to reimburse for business expenses and failed to provide proper wage statements ("the *Palazzolo* class action"). *Id.* at 1455-58. During January 2012, another registered nurse, Denise Mays, brought a class action complaint against Defendant alleging similar causes of action ("the *Mays* class action"). *Id.* at 1459. In December 2012, Plaintiff Falk filed this third class action alleging claims for failure to reimburse for business expenses, failure to pay all wages earned, failure to provide proper wage statements, failure to provide meal and rest breaks, and waiting time penalties. *Id.* at 1460-61. Defendant moved for summary judgment, arguing that Plaintiff's claims were not timely and that the *Palazzolo* class action and the *Mays* class action did not toll the statute of limitations. The trial court agreed and entered judgment against Plaintiff. The trial court rejected Plaintiff's claim that the action was timely under the *American Pipe & Construction Co. v. Utah,* 414 U.S. 538 (1974), which established that the statute of limitations on putative class members' claims might be tolled during the pendency of a class action raising a related claim on behalf of the same class. *Id.* at 1457. The trial court found that the *Palazzolo* class action did not have tolling effect because the ruling in *Palazzolo*, while granting summary judgment to Defendant, found none of the claims substantively viable, and *American Pipe* does not permit "piggy-backing" of successive class actions. *Id.* at 1461-62. The trial court also found that the earlier actions did not put Defendant on notice of Plaintiff's "esoteric dual rate" claim. *Id.* at 1462. The Court of Appeal disagreed and held that Plaintiff's class claims were tolled by the filing of the earlier class actions. The Court of Appeal cited to a case in which the Seventh Circuit – *Sawyer v. Atlas Heating*, 642 F.3d 560 (7th Cir. 2011) – applied *American Pipe* to an action in which Plaintiff dismissed the action before class certification was ruled on, leaving the other class members "in the lurch." *Id.* at 1465. In ruling that a subsequent action by another class member was tolled during the pendency of the first action, the Seventh Circuit had rejected the argument that the first action was "never a class action" and noted that the class certification question was never ruled on in *American Pipe* either. *Id.* The Court of Appeal reasoned that the class members in the *Palazzolo* class action were similar to Plaintiffs in two Seventh Circuit cases because the trial court never addressed the merits of class claims in the *Palazzolo* class action, and granted the motion for summary judgment because the named Plaintiff, not the class, failed to state viable causes of action. *Id.* at 1465. The Court of Appeal thus found that the putative class members in the *Palazzolo* class action were, through no fault of their own, left without an action to pursue their claims. *Id.* Because no certification decision was made before the dismissal of the action, the Court of Appeal concluded that *American Pipe* tolling should apply here. Although Plaintiffs' claims were more specific, the Court of Appeal also noted that her claims were substantially similar to those alleged in the *Palazzolo* class action, and that her claims were tolled from the date the *Palazzolo* action commenced until the date of remand of the case to the trial court. *Id.* at 1469. The Court of Appeal therefore held that Plaintiff's claims with a one-year statute of limitations were time-barred, but with three-

year and four-year limitation were still viable. *Id.* Accordingly, the Court of Appeal affirmed in part and reversed in part the trial court's order granting summary judgment to Defendant.

***Fischer, et al. v. Time Warner Cable, Inc.,* 2015 Cal. App. LEXIS 163 (Cal. App. 2d Dist. Feb. 23, 2015).** Plaintiffs, a group of cable subscribers, brought a putative class action alleging that Defendants, a cable provider ("cable provider Defendant") and two professional sports teams ("sports teams Defendants"), violated the California Unfair Competition Law ("CUCL") by entering into exclusive rights deals to broadcast Lakers and Dodgers games over cable, the costs of which were passed on to all customers, including those who did not watch the games, in the form of higher charges. Plaintiffs claimed that each subscriber paid an extra $9 per month for the channels, even though surveys showed that 60% of the population did not watch sports on television. *Id.* at *3. The cable provider Defendant demurred on the ground that the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") expressly permitted bundling of channels, thereby providing a "safe harbor" against UCL claims. *Id.* at *4-5. The sports team Defendants demurred on the ground that they did not engage in unfair completion by entering into the agreements. The trial court sustained the demurrers based on both the "safe harbor" argument and express preemption based on 47 C.F.R. § 76.981(c), which creates an exception to the Cable Act prohibition against "negative option billing." *Id.* at *5. While § 543 of the Cable Act prohibits cable operators from engaging in negative option billing, such that subscribers might not be charged "for any service or equipment that the subscriber had not affirmatively requested by name," 47 C.F.R. § 76.981(c), promulgated by Federal Communications Commission ("FCC"), provides that "the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels" does not constitute negative option billing. *Id*. at *9-12. The FCC regulations also provided that state and local governments cannot enforce consumer protection laws that conflict with this negative option billing prohibition so long as the changes proposed by the cable operator "do not constitute a fundamental change in the nature of an existing service…" *Id.* at *12. The trial court concluded that § 76.981(c) expressly preempted Plaintiffs' UCL claim, and found that Defendant's act of adding three sports channels to its enhanced basic service tier and adjust subscribers' rates accordingly did not fundamentally alter the nature of the existing tier. *Id.* at *15. The trial court therefore dismissed Plaintiffs' complaint. Plaintiffs appealed, and the California Court of Appeal affirmed the trial court's finding. The Court of Appeal rejected Plaintiffs' contention that the addition of the three sports channels constituted a "fundamental change" to the basic service tier that brought it outside the preemptive effect of § 76.981(c). The Court of Appeal cited *Time Warner Cable v. Doyle,* 66 F.3d 867 (7th Cir. 1995), in which the Seventh Circuit overturned a ruling against a cable provider for changing its rate structure by removing channels from its basic and standard tier, the price of which was then reduced, with the removed channels being offered a la carte. The Seventh Circuit observed that 47 U.S.C. § 552 permits the enforcement of state consumer protection laws absent their express preemption by the Cable Act. The Seventh Circuit held that FCC had reasonably interpreted § 543(8)(f) to preempt state challenges to negative option billing practices that did not fundamentally alter a service tier, as expressly permitted by 47 C.F.R. § 76.981(c). *Id*. at *18-19. The Court of Appeal found that the same reasoning would apply to Plaintiffs' challenge to the addition of the three sports channels. An FCC order, interpreting § 76.981, had found such types of changes as minor, even if coupled with a price adjustment. *Id*. at *22. The Court of Appeal therefore concluded that the trial court had properly held that § 76.981(c) preempted Plaintiffs' UCL claim, and accordingly affirmed the trial court's order.

***Franco, et al. v. Arakelian Enterprises, Inc.,* 2015 Cal. App. LEXIS 186 (Cal. App. 2d Dist. Feb. 26, 2015).** Plaintiff brought a putative class action alleging that Athens Disposal Co., Inc. d/b/a Athens Services, engaged in systematic and illegal California Labor Code and wage-order violations. Athens Services filed a motion to compel arbitration pursuant to Plaintiff's employment agreement, which contained a mutual arbitration policy ("MAP"). The MAP provided that it would govern all disputes arising out of Plaintiff's employment. The trial court granted Athens Services' petition to compel arbitration. Upon Plaintiff's appeal, the California Court of Appeal reversed, concluding that the MAP's provisions requiring arbitration and waiving class actions were unenforceable. *Id.* at *6-7. On remand to trial court, counsel for Athens Services argued that Plaintiff's employer was not Athens Services but Arakelian, doing business as

Athens Services. Subsequent discovery confirmed that Athens Disposal Co., Inc. had never employed Plaintiff. Plaintiff then amended the complaint to add Arakelian, doing business as Athens Services, as a John Doe Defendant. Arakelian filed a second petition to compel arbitration, relying on the MAP again. In April 2011, the trial court denied the petition, reasoning that: (i) the law of the case doctrine required enforcement of the first decision denying arbitration; and (ii) Arakelian waived its right to compel arbitration by failing to identify itself as Plaintiff's true employer until after its lawyers had prosecuted the original petition to compel arbitration and exhausted the appellate process. *Id.* at *8-9. Arakelian appealed, and the Court of Appeal affirmed the trial court's denial of second petition to compel arbitration. The California Supreme Court, however, granted review of the denial, deferring action until disposition of a related issue in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). In June 2014, the California Supreme Court ruled in *Iskanian* that recent U.S. Supreme Court precedents had abrogated California case law that had provided that arbitration agreements containing class action waivers limiting employees' ability to pursue statutory protections are unenforceable, and that the Federal Arbitration Act ("FAA") preempts state law rules against such waivers if they interfere with fundamental attributes of arbitration. *Id.* at *11. Bound by *Iskanian*, the Court of Appeal then vacated, reversed, and remanded its second ruling in which it had affirmed the denial of Arakelian's motion to compel arbitration of Plaintiff's class claims. The Court of Appeal found that arbitration agreement between Plaintiff and Arakelian was "enforceable unless it is found to be unconscionable on grounds that exist 'for the revocation of any contract,' within the meaning of the FAA." *Id.* at *12. The Court of Appeal held that the law of the case doctrine could not be applied here because it would lead to unjust results, particularly, where there has been an intervening change in the law on which the earlier decision was based. *Id.* at *14. The Court of Appeal also ruled that Arakelian's delay in identifying itself as Plaintiff's employer did not waive its right to compel arbitration as the belated identification did not prejudice Plaintiff's ability to obtain the legitimate benefits of arbitration. *Id.* at *18-19. The Court of Appeal, however, held that MAP's waiver of Plaintiff's claim under California Private Attorneys General Act was unenforceable because it was contrary to the public policy and the laws of the state. *Id*. at *25. Accordingly, the Court of Appeal reversed the trial court's order denying arbitration of Plaintiff's claims in part.

***Gutierrez, et al. v. Girardi,* 2015 Cal. App. Unpub. LEXIS 169 (Cal. App. 2d Dist. Jan. 12, 2015).** Plaintiff brought class action against Defendants, attorneys who represented him in a civil action against Lockheed Corporation alleging that Defendants mishandled settlement funds in the Lockheed Litigation. Plaintiff alleged that Defendants breached their fiduciary duty by failing to disburse to their clients their rightful shares of the settlements, and disbursing settlement funds to third-parties without the clients' knowledge and consent. Plaintiff moved for certification of a class comprised of individuals who were represented by Defendants in connection with the Lockheed Litigation whose claims had been adjudicated or settled as to all Defendants in the Lockheed Litigation, except for those class members who settled their claims against Defendants or who are currently represented by Defendants. The trial court denied the motion, holding that superiority was lacking. On appeal, the California Court of Appeal affirmed. First, Plaintiff contended that the trial court improperly precluded him from pursuing this action on behalf of Defendants' existing clients and this error prejudicially tainted the superiority determination. The Court of Appeal, however, remarked that the trial court's order did not make a final determination as to the size or scope of a certified class, nor did it prohibit Plaintiff from seeking to certify a broader class in a subsequent class certification motion. *Id.* at *11. The Court of Appeal also noted that the order did not address class certification requirements or preclude Plaintiff from establishing those requirements for a more broadly defined class. Although Plaintiff asserted that the proposed class consisted of approximately 25 putative class members, Defendant's evidence showed that seven class members were deceased, which left a class with only 17 members. The trial court opined that trying a dozen or 24 cases of individual Plaintiffs was not an impossible burden for the trial court, especially since it was unclear that most of such persons would initiate their own suits if class certification was denied. *Id.* at *15-16. Thus, the Court of Appeal opined that the benefits of litigating the case as a class action were minimal. The trial court had remarked that certification would effectively empower Plaintiff to waive the attorney-client privilege on behalf of absent class members to the extent necessary for Defendants to defend the action. *Id.* at *16-17. Further, because there was no supporting declaration to show that absent class members would have affirmatively and voluntarily waived the privilege on their own behalf, the trial court found Plaintiff failed to establish

superiority. The Court of Appeal observed that ordinarily a client may not sue for breach of the attorney's duties and also simultaneously prevent the attorney from defending himself by invoking the privilege, and that the holder of the privilege, the client, implicitly waives the privilege by filing such a suit. *Id.* at *17. Here, however, the absent class members had not filed suit against Defendant nor taken any affirmative action upon which to premise an implied waiver. Under Plaintiff's proposed methodology, these absent class members would be presumed to have waived the privilege simply by failing to opt-out of the class. Considering the important interests advanced by the attorney-client privilege, the Court of Appeal noted that the shortcomings of this passive waiver proposition did not make class action a superior method for adjudicating the small number of individual claims at issue. For these reasons, the Court of Appeal affirmed the denial of class certification.

***Harrold, et al v. Levi Strauss & Co.,* 2015 Cal. App. LEXIS 427 (Cal. App. 1st Dist. May 19, 2015).** Plaintiff, a customer, brought a class action alleging that Defendants violated the Song Beverly Credit Card Act (the "Act") by requesting and recording e-mail addresses while making purchases with a credit card. Plaintiff did not recall whether Defendants requested her e-mail address before or after she had signed for the purchase, but testified that it was before they bagged and handed to her the purchased merchandise. *Id.* at *4-5. The trial court held that § 1747.08 of the Act prohibits requests for personal identification information only as a condition to accepting the credit card as payment and that, therefore, such a request made after the credit card transaction has been completed does not violate the statute. *Id.* at *6. Consequently, the trial court opined that class certification was inappropriate, which on appeal, the California Court of Appeal affirmed. The Court of Appeal observed that § 1747.08 prohibits businesses from requesting that cardholders provide personal identification information during credit card transactions, and then recording that information. *Id.* at *8. Although the Court of Appeal agreed with Plaintiff that the prohibition applies at all times during and prior to the completion of a credit card transaction, it opined that the prohibition does not continue beyond that point. *Id.* Defendants' policy did not permit the sales clerk to ask the customer about joining its e-mail program or to request the customer's e-mail address prior to conclusion of a credit card purchase. The Court of Appeal stated that the transaction having been concluded, such a request cannot reasonably be considered as a condition of acceptance of the credit card as a form of payment. *Id.* Further, the Court of Appeal noted that in 1991, § 1747.8 was broadened to § 1747.08, forbidding businesses from requesting or requiring as a condition to accepting the credit card, the cardholder to provide personal identification information. *Id.* at *10. The stated purpose of the amendment was to clarify that merchants may neither require nor request, as a condition to accepting the credit card, the taking or recording of personal identification information from the cardholder. Additionally, the Court of Appeal opined that the Act is not intended to forbid merchants from obtaining such information voluntarily, if the customer understands that the information need not be disclosed in order to use a credit card. The Court of Appeal determined that the legislative intent suggested that the 1991 amendment clarified that a request for personal identification information was prohibited if it immediately preceded the credit card transaction, even if the consumer's response was voluntary and made only for marketing purposes. *Id.* at *12. Thus, because the merchants violate the Act only if they make a request for e-mail addresses under circumstances in which the customer could reasonably understand that the e-mail address was required to process the credit card transaction, and because such an understanding could not reasonably be conveyed by a request made after the transaction has been concluded, the Court of Appeal affirmed the denial of class certification on the basis that Plaintiff's claims did not meet those requirements. *Id.* at *16.

***Heller, et al. v. Carmel Partners, Inc.*, 2015 Cal. App. Unpub. LEXIS 801 (Cal. App. 2d. Feb. 4, 2015).** Plaintiff, a property manager, brought an action alleging that Defendant misclassified him as exempt from overtime compensation. After the trial court denied class certification, a jury tried Plaintiff's individual claims, and awarded Plaintiff for his unpaid overtime wages and rest period claims, and also for unreimbursed business expenses. Plaintiff then sought attorneys' fees of $387,750 as the prevailing party, claiming that he incurred this sum trying his individual claims. The trial court denied Plaintiff's motion. On appeal, the California Court of Appeal reversed. At issue was whether the trial court may deny all attorneys' fees if the demand is so overinflated that it shocks the conscience, overriding a statute mandating an award of fees. *Id.* at *5. The Court of Appeal observed that under § 1194 (a) of the

California Labor Code, in a civil action an employee is entitled to recover the unpaid balance of the full amount of overtime compensation, including interest and reasonable attorneys' fees and costs. *Id*. Further, the Court of Appeal noted that *Serrano v. Unruh,* 32 Cal. 3d 621 (1982), held that a fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. *Id.* at *6. Although the trial court relied upon *Serrano* in denying any attorneys' fees to Plaintiff, the Court of Appeal observed that the attorneys' fee statute applied in *Serrano* was discretionary, and that in contrast, the attorneys' fee provision in § 1194 is mandatory. *Id.* at *7. The Court of Appeal noted that § 1194 embodies a clear public policy specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers; the one-way attorneys' fees clause encourages employees to seek redress in situations where it would otherwise not be economical to sue. *Id.* at *8. Thus, considering the statutory mandate to award reasonable attorneys' fees, the Court of Appeal opined that it was an abuse of discretion for the trial court to deny fees altogether. Further, the Court of Appeal observed that reasonable attorneys' fees must be awarded under § 1194 even if the trial court assesses a reasonable amount to be far less than what is requested. *Id.* at *9. Accordingly, the Court of Appeal reversed the order of the trial court denying Plaintiff's request for attorneys' fees, and remanded the action to the trial court to exercise its discretion and determine a reasonable fee for Plaintiff's attorneys pursuant to § 1194.

***In Re Tobacco Cases II,* 240 Cal. App. 4th 779 (4th Dist. Sept. 28, 2015).** Plaintiffs, a group of cigarette consumers, brought a putative class action alleging that Defendant knowingly used deceptive advertising terms such as "Lights" and "Lowered Tar and Nicotine" in advertising Marlboro Lights, in violation of California's Unfair Competition Law ("UCL") and the False Advertising Law ("FAL"). *Id.* at 784. In 2001, the trial court certified a class of California residents who smoked cigarettes between 1993 and 2001 who were exposed to Defendant's advertising. *Id.* at 785. After extensive litigation and appeals, the trial court conducted a bench trial in 2013 and held that Defendant's advertising of the light cigarettes was deceptive within the meaning of the UCL. *Id.* at 786-87. The trial court found that Defendant knew that "lights" were no less dangerous than any other cigarettes and that their labeling was likely to deceive consumers. The trial court, however, refused Plaintiffs' request for restitution for lack of competent evidence of any loss attributable to the deceptive advertising. *Id.* at 787. Relying on the ruling in *In Re Vioxx Class Cases,* 180 Cal. App. 4th 116 (2009), the trial court found that the Plaintiffs had received value form Marlboro Lights apart from the deceptive advertising. *Id.* The trial court held that the proper theory of restitution under the UCL is "the difference between the price paid and the value actually received" and that a full refund would not be available where Plaintiffs obtained any value apart from the unlawful conduct. *Id*. On appeal, Plaintiffs argued that the trial court erred in finding that the only restitution available in a UCL products case was the measure established in *Vioxx. Id.* at 791. Plaintiffs argued that they did not have to show any loss attributable to the deceptive advertising and that the trial court had the discretion to order Defendant to pay a full refund of consumer expenditures for the purpose of deterrence. *Id.* Finding that Plaintiffs' arguments lacked merit, the California Court of Appeal affirmed the trial court's judgment in full. Citing *Vioxx,* the Court of Appeal held that full refund would be completely unavailable under the UCL if the product had conferred at least some value to consumers, notwithstanding the allegedly deceptive advertising. *Id.* at 796. Although the Court of Appeal did not completely foreclose a situation where a full refund might be available in a UCL case, it opined that such a case would only be in the extremely rare instance where a Plaintiff could prove that he received no value from the product, and even in that case, the *Vioxx* measure would still apply because "the price paid minus the value actually received [*i.e.,* zero] equals the price paid." *Id.* Plaintiffs did not dispute the finding that they obtained value from Marlboro Lights apart from the deceptive advertising, and it appeared inherently implausible to show a class of smokers received "no" value from a particular type of cigarette. *Id.* at 802. The trial court had rejected Plaintiffs' "conjoint survey" which asked survey participants to choose between hypothetical cigarette products based on certain factors, including health risks, because "[t]he survey did not measure the difference between the price paid and the actual value received, but rather measured 'benefit of the bargain' damages not available in a UCL action." *Id.* at 788. Under the circumstances, the Court of Appeal concluded that the trial court's measure of restitution based on *Vioxx* was proper. *Id.* at 802. The Court of Appeal further rejected Plaintiffs' alternate theory that Defendant could be required under the UCL to make a full refund solely for the purpose of deterrence, regardless of whether Plaintiffs received value from the product apart from the

deceptive advertising, concluding that restitution under the UCL could not be awarded exclusively for the purpose of deterrence. *Id.* Accordingly, the Court of Appeal affirmed the trial court's judgment.

***Kempler, et al. v. CLS Transportation Los Angeles,* 2015 Cal. Unpub. LEXIS 7855 (Cal. App. 2d Dist. Nov. 2, 2015).** In an action challenging the award of attorneys' fees and costs by eight arbitrators, the California Court of Appeal affirmed the trial court's order granting the arbitral awards. Plaintiffs' action derived from an earlier lawsuit brought a former employee seeking unpaid meal, rest, and overtime pay, entitled *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). *Id*. at *1. In *Isknaian*, the California Supreme Court eventually granted Defendant's motion to compel arbitration. *Id*. at *3. Subsequently, 61 former class members in *Iskanian* opted-out of the class action and the appeal by filing individual demands for arbitration with the American Arbitration Association. After the arbitration commenced, all claims were settled for amounts ranging from $2,000 to $6,000. *Id*. at *4. Pursuant to the arbitration agreement and settlement agreements, the employees filed separate motions to recover attorneys' fees and costs with each of the eight arbitrators. Each of the arbitrators awarded different amounts. *Id*. at *5. Defendant petitioned the trial court to vacate the awards rendered by three arbitrators who awarded $249,468, $442,448, and $174,832 respectively, which the trial court denied. On Defendant's appeal, the Court of Appeal noted that each employee signed identical arbitration agreements, which stated that the parties would pay their own attorneys' fees and costs, and the arbitrator would not have authority to award attorneys' fees and costs unless a statute or contract at issue in dispute authorized an award of attorneys' fees and costs to the prevailing party. *Id*. at *6. Here, the arbitrators found that the fee awards were compelled by statute. Defendant primarily argued that the arbitrators exceeded their powers by awarding the fees for work not only in the arbitration, but also in the *Iskanian* and *Kempler* matters. The Court of Appeal observed that in *Moore v. First Bank of San Luis Obispo*, 22 Cal. 4th 782 (2000), the California Supreme Court confronted the issue of whether an arbitration panel exceeded its powers by declining to award fees to Plaintiffs who, if the matter were determined in the trial court, would have likely been entitled to an award of fees. *Id*. at *8. The Court of Appeal found that since the fees issue was within the scope of issues submitted to arbitration, the panel did not exceed its authority. *Id*. Similarly, *Moshonov v. Walsh*, 22 Cal. 4th 771 (2000), found that an arbitrator acted within the scope of his authority in denying fees to the prevailing party despite a provision in the contract allowing fees to the prevailing party. *Id*. at *9. The Court of Appeal reasoned that arbitrator's choice of relief did not exceed the arbitrator's powers as long as the relief had a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of the contract found, expressly or impliedly, by the arbitrator. *Id*. Based on the reasoning of those cases, the Court of Appeal remarked that it need not determine whether the three arbitrators actually awarded fees for work on *Iskanian* or *Kempler*, or, if they did, whether such awards would be legally or factually erroneous if made by a trial court. *Id*. at *11. The Court of Appeal noted that each of the three arbitrators found that recovery of fees was compelled by statute, and each found that the employees were the prevailing parties. *Id*. at *12. In addition, the arbitration agreement did not contain any express limitation on the attorneys' work that could be considered by an arbitrator in fashioning a fee award. *Id*. The Court of Appeal found that it also did not explicitly prohibit awarding fees for work that preceded the arbitration proceedings. *Id*. Accordingly, the Court of Appeal affirmed the trial court's order.

***Khalatian, et al. v. Prime Time Shuttle, Inc.*, 2015 Cal. App. Unpub. LEXIS 3369 (Cal. App. 2d Dist. May 15, 2015).** In this wage & hour class action, Defendants moved to compel arbitration, based on an owner-operator sub-carrier agreement that Plaintiff entered into with one Defendant. The trial court denied the motion, holding that Defendants waived the right to arbitrate and that Plaintiff had not agreed to arbitrate his statutory labor law claims. On appeal, the California Court of Appeal reversed. The Court of Appeal noted that the Federal Arbitration Act ("FAA") applies when the contract evidences a transaction involving interstate commerce. Further, the Court of Appeal noted that the purely intrastate transport of passengers to and from an airport may, under certain circumstances, constitute interstate commerce. *Id.* at *7. Defendants provided shuttle service to and from major airports and harbors throughout California, contracted with web vendors to advertise on their websites, and permitted passengers to make a shuttle reservation and pay for their reservation on-line. Plaintiff was a shuttle driver who picked up and dropped off passengers primarily at Los Angeles International Airport. Thus, the Court of Appeal opined that the

agreement between the parties involved interstate commerce. Further, the agreement stated that the parties did not have the relationship of employer/employee, either express or implied, and that the sub-carrier would not be treated as an employee for any purpose. *Id.* at *10. The agreement also provided that any controversy or claim between the parties arising out of or relating to the agreement or any alleged breach thereof would be submitted to binding arbitration. *Id.* Plaintiff alleged that Defendants misclassified him as an independent contractor, and thus he was entitled to protections conferred upon employees by the California Labor Code, notwithstanding the representations made in the agreement. The Court of Appeal opined that this dispute concerned a controversy or claim between the parties arising out of or relating to their agreement, including Plaintiff's claim that the compensation provisions of the agreement were invalid, illegal, voidable, or void. Further, the Court of Appeal observed that broad arbitration clauses such as the one here are consistently interpreted as applying to extra-contractual disputes between the contracting parties. *Id.* at *11. The Court of Appeal noted that statutory claims are arbitrable when the parties' contract involves interstate commerce and is therefore governed by the FAA. *Id.* Thus, considering the preference for arbitration, and the broad language of the agreement, the Court of Appeal opined that Plaintiff's claims that the Labor Code governed his compensation and not the compensation terms of his agreement fell within the ambit of the arbitration clause. Regarding waiver, the trial court found that the 14-month delay between the filing of the complaint and the filing of the motion to compel was unreasonable. The Court of Appeal, however, noted that only one Defendant had propounded discovery, and Defendants had not taken depositions, nor filed any discovery motions. The Court of Appeal observed that Defendants had not stretched out the litigation process, gained information about Plaintiff's case which they could not have learned in an arbitration, or waited until the eve of trial to move to compel arbitration. Thus, the Court of Appeal ruled that Defendants had not waived their right to compel arbitration, and reversed the order denying Defendants' motion to compel arbitration.

***Lewis, et al. v. Safeway, Inc.,* 2015 Cal. App. LEXIS 250 (Cal. App. 1st Dist. Mar. 20, 2015).** Plaintiff brought a putative class action alleging that Defendant recorded Plaintiff's date of birth ("DOB") in its cash register system when Plaintiff purchased an alcoholic beverage with a credit card in violation of the Song-Beverly Credit Card Act (the "Act"). Defendant demurred that the Act obligated it to verify the DOB of customers purchasing alcohol and to keep records of the sales, and its conduct therefore fell within an exception to the Act for an obligation imposed by law. *Id*. at *4. The trial court agreed with Defendant that the exception for an obligation imposed by law under the California Civil Code barred Plaintiff's cause of action. *Id*. at *6-9. While Plaintiff argued that the Alcoholic Beverage Control Act ("ABCA") does not explicitly require that the written records of sales include the DOB, the trial court found that Plaintiff's statement did not follow that the inclusion of the DOB in the record of sale takes the sales transaction out of the legal obligation exception to the Act. *Id*. at *6-7. On appeal, the California Court of Appeal affirmed. First, the Court of Appeal noted that to satisfy its obligations under the ABCA, a licensee is obligated to verify the age of a customer purchasing an alcoholic beverage to ensure that he or she is 21 years of age or older, keep records of its sales of alcoholic beverages, and to make those records available to the Department of Alcoholic Beverage Control ("ABC"). *Id*. at *11-12. The Court of Appeal found that a purchaser's DOB is clearly fundamental to the transaction, and the more detailed the records maintained by a licensee, the more able it is to confirm its compliance with the laws prohibiting the sale of alcoholic beverages to minors. *Id*. at *13. Despite the trial court's ruling that the obligation-imposed-by-law exception exempted Defendant's conduct, the Court of Appeal found that Plaintiff's argument as to why that exception did not apply was unpersuasive. *Id*. at *13-14. Further, the Court of Appeal remarked that Plaintiff sought to read into the ABCA a limitation that the Legislature itself, in enacting the ABCA, chose not to impose. *Id*. at *14. The Court of Appeal observed that Plaintiff's interpretation would interfere with the ABC's authority to regulate its licensees by imposing limitations on the manner in which they must comply with the ABCA. Further, doing so would contravene the mandate that the ABC has the exclusive authority to regulate businesses selling alcohol. *Id*.

***Lofton, et al. v. Wells Fargo Home Mortgage,* Case No. 11-CGC-509502 (Cal. Super. Ct. July 16, 2015).** Following a judgment in a class action filed on behalf of Defendant's consultants alleging misclassification of their positions as exempt from overtime, the Court denied the consultants' attorneys' fees, finding that Plaintiffs' counsel attempted to appropriate to itself $5.4 million in fees without approval.

The law firm, the Initiative Law Group ("ILG"), brought a wage & hour class action on behalf of Plaintiffs against Defendant asserting claims for unpaid overtime, meal and rest break violations, and waiting-time penalties. After decertification of the class, ILG filed multiple lawsuits representing more than 600 Plaintiffs against Defendant. The parties eventually reached a class settlement which called for Defendant to pay $19 million, inclusive of attorneys' fees and costs. *Id.* at 4. The parties then filed the instant action for the sole purpose of seeking the Court's approval of the settlement agreement (the *"Lofton* settlement). The settlement agreement defined the *Lofton* settlement class as "all persons who, at any time from February 10, 2001 up to and including March 26, 2011, are or were employed by Wells Fargo Bank, N.A." as home mortgage consultants in the State of California and "classified by Wells as exempt from overtime." *Id.* at 5. Therefore, all of ILG's clients became members of the proposed *Lofton* class and nearly all of ILG's clients submitted claims in *Lofton.* The *Lofton* settlement paid a total of $1,522,881.05 to the ILG clients, and this extinguished all claims in the ILG actions. *Id.* at 7. The Court granted final approval to the *Lofton* settlement, awarding class counsel $6,333,333 in attorneys' fees and $249,278.73 in litigation costs. *Id.* at 8. Despite final approval, ILG and Defendant continued to negotiate for over a year without the ILG clients' knowledge, consent, or authorization, and ILG sent its clients a letter explaining that ILG would receive more than $5.5 million in attorneys' fees and costs, and that the ILG clients would receive $750 each. The letter justified the $750 award by stating that the *Lofton* settlement did not release the claims that Defendant failed to produce employment records under § 216(b) of the California Labor Code as alleged in *Mather et al. v. Wells Fargo Bank, N.A.* ("*Mather* action"). *Id.* at 9. The letter also mentioned that in order to receive the $750, the client must sign a release and agree to the allocation of attorneys' fees. After the majority of the ILG clients signed the releases, Defendant deposited the amounts and ILG received $5,425,500 toward attorneys' fees and costs. *Id.* at 11. ILG never disclosed these payments to the Court. An ILG client, David Maxon, moved to intervene, accusing ILG of striking a secret deal with Defendant, and sought a temporary restraining order ("TRO") to freeze the unapproved attorneys' fees. ILG then agreed to pay $1,750 to each of its clients from the $6 million common fund, leaving a total of $4.95 million to be distributed to ILG. *Id.* at 13. Upon learning of the situation, the Court issued a TRO requiring ILG to deposit the funds in a secure escrow account. *Id.* at 14. Following a series of case management conferences, the Court determined that ILG was not entitled to any of the claimed fees. The Court found that the $5,425,500, which ILG claimed it was entitled to as attorneys' fees, belonged to the *Lofton* class members. *Id.* at 16. The Court rejected the argument that ILG was entitled to the attorneys' fees because some ILG clients "agreed" to the fee allocation, stating that approval of the ILG's class action attorneys' fees was the exclusive province of the Court, not of ILG's clients. *Id.* ILG argued that the Court could not order the distribution of funds without a trial on the issue and that, due to attorney-client and mediation privileges, ILG could not "defend" itself. *Id.* at 18. The Court rejected both arguments on the basis that no trial was necessary because Courts routinely determine the entitlement to class action attorneys' fees through motions, and ILG could have defended itself in ways that protected its confidential information. *Id.* The Court thus held that, in the absence of an offer of evidence to support ILG's claim to attorneys' fees, it could only conclude that none existed. Accordingly, the Court ordered ILG to distribute the fees to class members in a manner to be decided.

Editor's Note: The decision in *Lofton* represents a remedy in what is perhaps the most glaring example of abuses by class action lawyers in 2015.

***Marenco, et al. v. DirecTV, LLC*, 2015 Cal. App. LEXIS 106 (Cal. App. 2d Dist. Feb. 5, 2015).** Plaintiff brought a putative class action alleging that Defendant violated California state wage and unfair competition laws. Defendant DirecTV LLC acquired 180 Connect. Defendant retained all 180 Connect's employees and issued debit cards in payment of their wages. Defendant required Plaintiff to pay an activation fee of either $.50 or $3.50 and a cash withdrawal fee in order to use the debit card at an ATM machine. *Id.* at *5. Plaintiff alleged that the fees resulted in Defendant's failure to pay full wages in violation of the California Unfair Competition Law and the California Labor Code. Plaintiff had entered into an employment arbitration agreement with 180 Connect before Defendant's acquisition. The agreement required both parties to submit all claims arising from and related to the employment relationship to binding arbitration. Defendant moved to compel arbitration as the successor to the arbitration agreement. The trial court entered an order staying the class claims and compelling arbitration of Plaintiff's individual claims.

On Plaintiff's appeal, the California Court of Appeal affirmed the trial court's order. Defendant contended that it assumed all of 180 Connect's assets, debts, rights, responsibilities, liabilities, and obligations, including "all the rights and obligations arising from 180 Connect's employee relationships." *Id.* at *6. Plaintiff argued that Defendant, as a non-signatory, lacked standing to enforce the arbitration agreement. Affirming the trial court's order, the Court of Appeal found that, although Defendant was not a signatory to the employment arbitration agreement between Plaintiff and 180 Connect, there was no doubt that the agreement formed one of the terms of Plaintiff's employment, and Defendant was entitled to invoke the arbitration clause to compel Plaintiff to arbitrate his claims pursuant to the employment agreement. *Id.* at *16. The undisputed evidence established that Defendant acquired all of 180 Connect's assets, employees, rights, and liabilities, and there was no indication that the original terms of Plaintiff's employment were modified, superseded, revoked, cancelled, or nullified in any manner. *Id.* at *17. The record supported a reasonable inference that the 180 Connect employees who continued working after the acquisition implicitly accepted Defendant's decision to maintain their existing terms of employment, including the arbitration agreement. *Id.* The Court of Appeal, therefore, found the absence of a new arbitration agreement with Defendant an insufficient basis upon which to invalidate his original agreement, which constituted one of the established terms of his employment that was never extinguished, rescinded, altered, or revised. *Id.* at *18. The Court of Appeal further found that the agreement's class action waiver was enforceable under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Accordingly, the Court of Appeal affirmed the trial court's order compelling arbitration of Plaintiff's individual claims.

***Natalini, et al. v. Import Motors, Inc.,* Case No. A133236 (Cal. App. 1st Dist. Dec. 14, 2015).** Plaintiff, a car buyer, brought an action alleging negligent misrepresentation and violation of the California Consumer Legal Remedies Act and Rees-Levering Motor Vehicle Sales and Finance Act, against Defendant, a car dealer, arising out of his purchase of a car. *Id.* at 1-2. Plaintiff alleged that Defendant sold new cars and tires that were actually used. *Id.* at 2. Defendant moved to compel arbitration pursuant to a provision in the car sales contract that Plaintiff had signed when he purchased the car. The trial court denied Defendant's petition to compel arbitration, finding no admissible evidence of establishing that Plaintiff agreed to arbitrate his claim. *Id.* at 3. The trial court also concluded that Defendant waived any right to arbitration and the purported arbitration provision was unconscionable. *Id.* On appeal, Defendant contended that the trial court erred in concluding that it failed to demonstrate the existence of an arbitration agreement, and that it satisfied its burden by attaching the arbitration provision to its counsel's declaration and by setting forth the language of the provision in its petition to compel arbitration. *Id.* at 3-5. The California Court of Appeal disagreed with Defendant. The Court noted that Defendant was not only obligated to allege the existence of an agreement, but also was required to prove the existence of the agreement to arbitrate by a preponderance of the evidence. *Id.* at 5. The Court of Appeal noted that, although Plaintiff attached a contract with an arbitration provision to the complaint, Defendant denied the allegations of the complaint in its answer and did not argue that Plaintiff was estopped from disputing the existence of an arbitration agreement. *Id.* The Court of Appeal therefore concluded that Defendant failed to show that the trial court erred in denying Defendant's petition on the basis that Defendant failed to prove the existence of an agreement to arbitrate. *Id.* at 6. Accordingly, the Court of Appeal affirmed the trial court's order.

***Rubenstein, et al. v. Gap, Inc.,* Case No. BC555010 (Cal. Super. Ct. Mar. 19, 2015).** Plaintiff brought a putative class action alleging that Defendant, the owner of Gap Factory Stores and Banana Republic Factory Stores, deceptively marketed its clothing in a manner that misled consumers. According to the complaint, Defendant labelled its factory store clothing with a tag hidden on the inside of the garment with three squares. The label indicated that Defendant made the clothing specifically for the factory stores at a lesser quality, and nothing in the store or garment suggested that the clothing was not actually sold at the traditional Banana Republic or Gap Stores. Plaintiff alleged that Defendant's strategy exploited the expectations of outlet mall shoppers because Defendant positioned itself to capture consumers looking for the exact clothing Defendant sold at its traditional Banana Republic and Gap stores, at a discount, but instead offered clothing that Defendant never sold at its retail stores. *Id.* at 1. Plaintiff alleged violations of the California False Advertising Law, and other statutory claims. Defendant moved to compel arbitration pursuant to an arbitration clause in cardholder agreements signed by Plaintiff prior to receiving the Gap

Visa Card, GapCard, and BananaCard. The Court denied Defendant's motion, finding no agreement to arbitrate. *Id.* at 2. First, the Court found that Defendant was not a party to either the Gap Visa Card agreement or to the GapCard and BananaCard agreements. The agreements specifically defined the parties as GE Money Bank and all of its respective parents, subsidiaries, and affiliates, and nothing in the agreements indicated that the terms applied to Defendant. *Id*. Next, the Court found that, even assuming that Defendant was a third-party beneficiary of the credit agreements, the arbitration provision did not cover the dispute at issue. The agreements provided that they were contracts for the extension of credit and that any disputes or claims relating to the accounts should be resolved by arbitration. *Id.* at 4. Because Plaintiff brought a consumer fraud case, dealing with the manner in which Defendant presented and sold clothing at its outlets, the Court concluded that the agreements did not have anything to do with the dispute here. *Id.* at 5. The Court, therefore, found no "agreement to arbitrate," and accordingly, denied Defendant's motion to compel arbitration. *Id*.

***Rutledge, et al. v. Hewlett-Packard Co.,* 2015 Cal. App. LEXIS 645 (Cal. App. 6th Dist. July 22, 2015).** Plaintiffs, a group of purchasers of notebook computers manufactured by Defendant brought a putative class action alleging that certain notebook computers contained inverters that Defendant knew would likely fail and cause display screens to dim and darken at some point before the end of the notebook's useful life. *Id.* at *1. Plaintiffs alleged claims for unjust enrichment, breach of express warranty, and for violation of California's Unfair Competition Law ("UCL") and Consumer Legal Remedies Act ("CLRA"). The trial court made a "no merits" determination as to the CLRA claim, and granted Defendant's motion for summary judgment as to Plaintiffs' remaining claims. *Id.* at *7. Plaintiffs appealed, and the California Court of Appeal affirmed in part and reversed in part the trial court's award of summary judgment. First, the Court of Appeal reinstated Plaintiffs' claim under the fraudulent prong of the UCL as well as Plaintiffs' CLRA claim, premised on the allegations that Defendant failed to disclose material information about the faulty inverters. Defendant argued that Plaintiffs did not have a claim for fraudulent concealment because they received notebooks with inverters that functioned for the one-year warranty period and the alleged failure to disclose did not damage the consumers. *Id.* at *15. The Court of Appeal, however, reasoned that a claim for fraudulent business practices reflect the UCL's focus on Defendant's conduct, rather than Plaintiffs' damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices. *Id.* at *15-16. Thus, the Court of Appeal concluded that the question under the UCL was as to Defendant's conduct, not as to whether the computer functioned for the warranty period, and therefore Defendant's argument that the expiration of the warranty period precluded a claim for fraudulent concealment under the UCL was incorrect. *Id*. at *16. Further, the call center data and service data demonstrating an increase in inverter failure over time, coupled with Plaintiffs' engineering expert's analysis of the data, created a triable issue of fact as to whether Defendant knew about the defects and if so, when. *Id.* at *23. The Court of Appeal therefore held that Defendant was not entitled to judgment as a matter of law on the UCL claims and was not entitled to a no merits determination as to the CLRA claims. *Id.* at *24. Further, the Court of Appeal found that Defendant was entitled to judgment as a matter of law as to a named Plaintiffs' breach of warranty claim because they had not notified Defendant of the defect within the warranty period. *Id*. at *30-35. Moreover, the Court of Appeal held that the trial court's order denying nationwide class certification must be reversed. *Id.* at *40-44. Because the record supported a finding that California had sufficient contacts with the claims such that California had an interest in applying its laws to non-resident Plaintiffs, the Court of Appeal ruled that the trial court should have granted nationwide class certification, and the trial court had improperly used the possibility of differing warranty laws as reasons to deny class certification. *Id.* at *45. Finally, the Court of Appeal found that the trial court properly denied Plaintiffs' request to certify the CLRA claims, finding that at the time of certification request, the trial court had already ruled on the merits of action, which could create a "classic no-win option" for Defendant. *Id.* at *46-47. Accordingly, the Court of Appeal affirmed in part and reversed in part the trial court's order.

***Safeway, Inc., et al. v. Superior Court*, 2015 Cal. App. LEXIS 640 (Cal. App. 2d Dist. July 22, 2015).** Plaintiffs brought an action alleging that Defendants failed to provide and compensate them for meal and rest breaks, and failed to provide itemized pay statements in violation of the California Labor Code. Plaintiffs sought to certify classes for their meal and rest break claims. The trial court certified the meal break class, but refused to certify the rest break class. On appeal, the California Court of Appeals affirmed

the trial court's ruling. Plaintiffs sought class certification for the meal break class, which encompassed over 200,000 store-level hourly employees who worked for Defendants. Plaintiffs contended that Defendants' policy of not paying meal breaks to employees during specified breaks constituted both an unlawful and an unfair business practice under the California Unfair Competition Law ("UCL"). *Id*. at *12. In support of their motion, Plaintiffs submitted excerpts from the depositions of some managers, together with declarations and deposition testimony, and a declaration from Eric R. Lietzow, their accounting expert. *Id*. at *13. According to Plaintiffs, Defendants used time-keeping systems to monitor when employees began and ended work, as well when they took meal breaks. *Id*. Lietzow also stated that he had examined time punch data, and payroll records for the pertinent break from a random sample of Defendants' stores, and estimated that Defendants' records revealed 27,095,925 violations during the class period. *Id*. at *14. The Court of Appeals remarked that determining whether Plaintiffs' theory was suitable for class treatment necessitated an inquiry into the factual issues relevant to showing that the circumstances under which an employer's failure to pay meal break premium wages may constitute an unlawful or unfair business practice under the UCL. The Court of Appeals observed that, as explained in *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), an employer discharges its duty to provide an off-duty break if it relieves its employees of all duty, relinquishes control over their activities, and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. *Id*. at *22. Defendants maintained that Plaintiffs did not identify any unlawful or unfair practice, and invoked two restrictions on liability under the UCL traceable to *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999). In *Cel-Tech*, the California Supreme Court stated that no UCL claim may be predicated on a practice for which there was a safe harbor, *i.e.*, a specific legislation that clearly permits the practice. *Id*. at *26. The Court of Appeals remarked that Plaintiffs' evidence showed that Plaintiffs were often directed or pressured by supervisors not to take meal breaks, and that Defendants had no mechanism by which the premium pay related to meal break was calculated or determined when due. *Id*. at *30. The Court of Appeals concluded that Plaintiffs had demonstrated that the existence of the practice made the action suitable for class treatment. *Id*. at *31. Moreover, the Court of Appeals found that whether a significant number of employees accrued unpaid meal break premium wages was a question capable of common proof. *Id*. at *34. Accordingly, the Court of Appeals affirmed the trial court's order certifying the meal break class.

***Salazar, et al. v. Apple American Group, LLC,* 2015 Cal. App. Unpub. LEXIS 584 (Cal. App. 4th Dist. Jan. 26, 2015).** Plaintiff, on behalf of himself and others similarly-situated, brought a class action alleging that Defendant failed to pay wages and/or overtime pay in violation of the California Labor Code, and sought penalties under the Private Attorneys General Act ("PAGA"). The trial court denied Defendant's petition to compel arbitration on Plaintiff's representative PAGA claim. *Id*. at *7. On Defendant's appeal, the California Court of Appeal affirmed the trial court's order. Defendant argued that the trial court erred because the Federal Arbitration Act ("FAA") preempted California's public policy against the enforcement of class action waivers in arbitration agreements. *Id*. at *1. After briefing was completed in this appeal, the California Supreme Court rendered its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). *Id*. In *Iskanian*, the Supreme Court held that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy, that the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude the Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf, and that the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract. *Id*. at *1-2. The Court of Appeal subsequently directed the parties to file supplemental briefs addressing the effect of *Iskanian* on this appeal. *Id*. at *2. The Court of Appeal found that *Iskanian* was directly relevant to this case, and Defendant did not contend otherwise. *Id*. at *10. Instead, Defendant argued that *Iskanian* was wrongly decided and was in direct conflict with *Concepcion*, and that the order denying its petition to compel arbitration should be overturned, despite the ruling in *Iskanian*. *Id*. The Court of Appeal, however, held that under settled principles of *stare decisis*, it did not have the luxury to question whether *Iskanian* was correctly decided and that it was duty bound to apply it in this appeal. *Id*. at *2-3. Alternatively, Defendant requested the Court of Appeal to hold the appeal in abeyance while the U.S. Supreme Court considered the petition for writ of *certiorari* filed in *Iskanian*. *Id*. at *11. Since the U.S. Supreme Court subsequently had denied the petition for writ of

certiorari filed in *Iskanian*, the Court of Appeal declined to hold this appeal in abeyance. *Id*. at *12. Thus, because the enforcement of waivers of representative PAGA claims in employment contracts violates California public policy, and the Supreme Court has held that the FAA does not preempt that public policy, the Court of Appeal concluded that the trial court correctly denied Defendant's petition to compel Plaintiff to arbitrate his PAGA claim. *Id*. Accordingly, the Court of Appeal affirmed the trial court's order, and awarded Plaintiff his costs on appeal.

***Sanchez, et al. v. Valencia Holding Co., LLC,* 2015 Cal. LEXIS 5292 (Cal. Aug. 3, 2015).** Plaintiff brought a putative class action alleging that Defendant violated the California Consumer Legal Remedies Act ("CLRA") by making false representations about the condition of the Mercedes-Benz S500V that he purchased in 2008. *Id.* at *5. Defendant moved to compel arbitration on an individual basis pursuant to an arbitration clause in the sales contract signed by Plaintiff. The arbitration agreement included a class action waiver and provided that any arbitration decision could be appealed only if the award was exactly $0 or over $100,000. *Id.* at *7-8. The trial court denied the motion, finding that class arbitration could not be waived under the CLRA. *Id.* at *11. On appeal, the California Court of Appeal declined to decide whether the class waiver was enforceable in light of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), but nonetheless affirmed the trial court's order on the grounds that the arbitration agreement was procedurally and substantively unconscionable. *Id.* at *11-12. The California Supreme Court subsequently granted review and reversed. The Supreme Court held that the Court of Appeal erred as a matter of law in finding the agreement unconscionable. The Supreme Court discussed the general provisions of unconscionability and noted that the doctrine of unconscionability has both procedural and substantive elements. The former focuses on oppression or surprise due to unequal bargaining power, and the latter on overly harsh or one-sided results. *Id.* at *13. The Supreme Court emphasized that both procedural and substantive unconscionability must be present in order for a trial court to exercise its discretion to refuse to enforce a contract or arbitration clause under the doctrine of unconscionability. Although Defendant's contract had some degree of procedural unconscionability (as Defendant did not offer Plaintiff an opportunity to negotiate its terms), the Supreme Court held that a finding of procedural unconscionability does not mean that a contract should not be enforced, but rather that trial courts should scrutinize the substantive terms of the contract to ensure that they are not manifestly unfair or one-sided. *Id.* at *23. The Supreme Court, therefore, rejected Plaintiff's contention that adhesion contracts – which are presented on a "take it or leave it" basis – were *per se* procedurally unconscionable. Regarding the arbitration provision's substantive terms, the Supreme Court explained that the central idea in substantive unconscionability analysis "is…not [whether the parties made] a simple old-fashioned bad bargain, but [whether there are] terms that are unreasonably unfavorable to the more powerful party." *Id.* at *14. Thus, in assessing the arbitration provisions at issue, the Supreme Court found that none of its requirements was substantively unconscionable. Because the underlying contract was for the purchase of a car and not an employment contract, the Supreme Court found the $100,000 minimum threshold for appeals reasonable, especially because Plaintiff could also appeal if he lost and was awarded nothing. *Id.* at *26-27. The Supreme Court also found that the right to appeal an injunction award was not unconscionable given the "potentially far-reaching nature of an injunctive relief remedy." *Id.* at *27-28. The Supreme Court ruled and found that the requirement that the appealing party must advance the costs of the appeal was not unconscionable given that the case concerned a high-end luxury item, and no evidence suggested that Plaintiff could not afford the cost of appellate arbitration filing fees. *Id.* at *36-37. The Supreme Court similarly dismissed the claim that the reservation of self-help remedies was too unfair, noting that it was undisputed that the remedy of repossession of collateral remain an integral part of the business of selling automobiles on credit and fulfils a legitimate commercial need. *Id.* at *39-40. Finally, the Supreme Court confirmed that the Federal Arbitration Act preempted the CLRA's bar on class action waivers, and as such, the arbitration provision's class action waiver had no effect on the unconscionability analysis. *Id.* at *42-43. Accordingly, the Supreme Court reversed the Court of Appeal's judgment.

***Scranton, et al. v. E*TRADE Securities LLC,* Case No. 13-CV-245579 (Cal. Super. Ct. Mar. 18, 2015).** Plaintiff brought a putative consumer class action alleging that Defendant made misrepresentations regarding options. Defendant served as a broker for consumers seeking to trade options – contracts giving a buyer the right to buy or sell an asset, often a share of stock in a particular company – at a specific price

on or before a certain date. Plaintiff alleged that Defendant represented that it automatically would exercise consumers' options if those options would result in the consumer getting at least a $.01 profit. Plaintiff contended that those representations provided consumers with a false sense of security that their options automatically would be exercised, causing them to fail manually to exercise their options. Defendant filed a demurrer to Plaintiff's third amended class action complaint ("TAC") on count I (breach of fiduciary duty) and count II (breach of covenant of good faith and fair dealing). The Court sustained Defendant's demurrer without leave to amend. Earlier, in connection with Defendant's demurrer to the second amended complaint, the Court found that a disclaimer of liability in the customer agreement barred Plaintiff's breach of fiduciary duty claim absent facts showing that the disclaimer of liability provision was not enforceable. *Id*. at 2. In the TAC, Plaintiff alleged that the disclaimer of liability did not bar his claims because it must be construed strictly against Defendant. *Id*. The Court noted that Defendant's customer agreement stated that Defendant would have no liability for "any losses arising out of or relating to a cause over which Defendant or its affiliates do not have direct control, including . . . suspension of trading." *Id*. The Court found that the disclaimer in the customer agreement was not ambiguous. *Id*. As stated in its prior order, the Court also noted that the disclaimer was sufficiently clear, explicit, and comprehensible in each of its essential details. *Id*. Although Plaintiff argued that the disclaimer in the customer agreement should be restricted to an immediate cause of loss, and not to a "but-for" cause of loss, the Court found nothing in the customer agreement to support Plaintiff's interpretation. *Id*. at 3. The Court concluded that Plaintiff failed to allege facts showing that the disclaimer in the customer agreement was unenforceable. *Id*. Accordingly, the Court held that the disclaimer of liability barred Plaintiff's causes of action for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing, and sustained Defendant's demurrer without leave to amend.

***Siechert & Synn, et al. v. Apple Inc.,* 2015 Cal. App. Unpub. LEXIS 859 (Cal. App. 6th Dist. Feb. 6, 2015).** Plaintiffs, a group of retailers, brought a putative class action alleging that Defendant violated the California Unfair Competition Law, breached its contract, committed fraud, and caused misappropriation of trade secrets by opening its own retail stores and driving Plaintiffs out of business. Whereas Defendant previously sold its products to consumers mainly through independent resellers, in 1997 it began developing plans to open its own retail stores. Defendant allegedly preserved its relationships with its independent resellers until it opened its own chain in 2001. *Id.* at *5. Plaintiffs alleged that Defendant's decision to open its own retail stores was part of a fraudulent scheme and plan to drive its independent resellers out of business. Although Defendant sent out bulletins assuring store owners that Defendant's stores would be stocked the same as other resellers and would not have better pricing, Plaintiffs alleged that Defendant favored its own stores to Plaintiff's detriment by "deliberately" withholding new products from resellers and by "siphoning off" the resellers' customers. *Id.* at *7. Plaintiffs also alleged that Defendant gave "secret rebates" to favored resellers such as CompUSA and Fry's, but not to Plaintiffs. *Id.* at *8. In November 2009, Plaintiffs moved to certify a class of resellers of Defendant's products. After a lengthy hearing, the trial court denied the motion on the basis that Plaintiffs failed to show that common question of law or fact predominated over the individual questions. *Id.* at *19. In particular, the trial court found that a three-year statute of limitations would apply to the fraud claims initially filed in 2005, and Plaintiffs would have to show how their discovery was delayed. *Id.* at *20. The trial court also found that highly individualized issues regarding Defendant's representations, Plaintiffs' reliance upon those representations, and proximate causation, all of which defeated Plaintiffs' motion for class certification. *Id.* On Plaintiffs' appeal, the California Court of Appeal affirmed the trial court's decision. The Court of Appeal found that substantial evidence supported the trial court's finding that Plaintiffs' claims would require an inherently individualized inquiry. *Id.* at *27. The substantial evidence showed that each of the named Plaintiffs had a different story as to when and how they discovered the alleged fraud and why they could not have discovered it sooner. *Id.* The substantial evidence also showed that the alleged misrepresentation regarding Defendant's reassurances to resellers was not susceptible to class-wide proof. Not all Plaintiffs heard the alleged misrepresentations, and each class member would need to present individualized evidence about how he or she relied on the alleged misrepresentations. *Id.* at *36. Moreover, the evidence showed that some resellers who claimed to have heard and relied on Defendant's alleged misrepresentations faltered for reasons that had nothing to do with Defendant's alleged wrong-doing. *Id.* at *42. In addition, Defendant submitted evidence that many resellers enjoyed remarkable

success after Defendant's retail stores opened in 2001, and some attributed much of their success to the "halo effect" of Defendant's stores. *Id.* at *43. Further, Plaintiffs' claims of wrongfully withheld products varied substantially such that each member of the class would have to present highly individualized evidence regarding which products were withheld or delayed and why. *Id.* at *47. Finally, the evidence showed that individualized inquiries would be required to determine whether Defendant's alleged discounting to favored resellers adversely impacted Plaintiffs because Plaintiffs' claim depended on the extent to which Plaintiffs' stores competed with the favored resellers' stores for sales. *Id.* at *55. The Court of Appeal, therefore, concluded that the trial court properly denied Plaintiffs' motion for class certification based on Plaintiffs' failure to satisfy the predominance requirement.

***UFCW & Employers Benefit Trust, et al. v. Sutter Health,* 2015 Cal. App. LEXIS 957 (Cal. App. 1st Dist. Oct. 27, 2015).** Plaintiff, on behalf of a putative class of all California self-funded payors, brought a putative class action alleging that Defendant's various written and oral contracts with network vendors contained anti-competitive terms that insulated Defendant from competition and drove up the cost of healthcare in violation of California law. *Id.* at *2. Plaintiff paid healthcare providers directly from its own funds for the services provided to enrollees in its health plans and contracted with a network vendor, Blue Shield, to obtain access to Blue Shield's provider network as well as certain administrative services. *Id.* at *6. Plaintiff reimbursed Blue Shield for all covered healthcare charges paid on behalf of its members. *Id.* Blue Shield entered into another agreement (the "Provider Contract") with Defendant that provided reduced service rates to Blue Shield and third-parties that contract with Blue Shield to pay those rates. The Provider Contract contained an arbitration clause. *Id.* at *3-4. Pursuant to the contract between Plaintiff and Blue Shield, Plaintiff's beneficiaries began presenting Blue Shield cards to Defendant to obtain medical services at the agreed rate. *Id.* at *7. In April 2014, Plaintiff brought this action alleging that terms of the written or oral contracts Defendant entered with network vendors – such as Blue Shield – violated the Cartwright Act and the Unfair Competition Law ("UCL"), causing the class members to overpay for Defendant's services. *Id.* at *9. Specifically, Plaintiff alleged that Defendant demanded inclusion of anti-competitive terms, including prohibiting disclosure of hospital pricing information, prohibiting efforts to encourage patient to select the most cost-effective providers, and requiring network vendors to include all of Defendant's hospitals and facilities in their networks. *Id.* Defendant moved to compel arbitration of Plaintiff's claims relying on an arbitration clause in the Provider Contract signed by Defendant and Blue Shield. The trial court denied the motion, finding that Plaintiff was not bound to arbitrate his claims because Plaintiff was not a signatory to the Provider Contract. *Id.* at *10-11. The California Court of Appeal affirmed the trial court's order and held that the trial court did not err in determining the scope of arbitration agreement. *Id.* at *44. While it was undisputed that Plaintiff never signed or saw the Provider Contract, which contained the arbitration clause at issue, Defendant argued that Blue Shield served as Plaintiff's agent and agreed to arbitration on Plaintiff's behalf. *Id.* at *11-12. Defendant also argued that Plaintiff was seeking to retain the benefits it received under the Provider Contract while disavowing its obligations under that same contract. *Id.* at *36. The Court of Appeal, however, disagreed with Defendant's arguments. The Court of Appeal noted that Plaintiff challenged the legitimacy of the terms of all "arrangements" negotiated by Defendant with Blue Shield and other network vendors, and therefore was only seeking to enforce the UCL and the Cartwright Act and not to enforce or otherwise take advantage of any portion of the Provider Contract. *Id.* Although Plaintiff made repeated reference to the Provider Contract, the Court of Appeal noted that such reference to an agreement was not enough to require arbitration. *Id.* at *39. The Court of Appeal further found that Plaintiff did not accept the benefits of the Provider Contract because Plaintiff entered into a separate contract with Blue Shield under which it paid Blue Shield consideration in exchange for access to Blue Shield's discounted provider rates and encouraged its members to use providers within the preferred network. *Id.* at *40. The Court of Appeal, therefore, failed to see how Plaintiff's members' use of Blue Shield cards to obtain services from Defendant reasonably suggested that Plaintiff had authorized Blue Shield to bind it to all terms of the Provider Contract. *Id.* at *40-43. Accordingly, the Court of Appeal affirmed the trial court's order denying Defendant's motion to compel arbitration.

***Universal Protection Service, LP, et al. v. Superior Court,* 2015 Cal. App. LEXIS 708 (Cal. App. 3d Dist. Aug. 18, 2015).** Plaintiffs, a group of armed security guards, brought a putative class action alleging

that Defendant, Universal Protection Service, L.P., failed to reimburse them for the costs of guns, handcuffs, radios, and other equipment they used for their job. Plaintiffs also alleged that when they filed an administrative complaint under the Private Attorney General Act ("PAGA"), Defendant terminated four of the five named Plaintiffs, and failed to pay final wages. *Id.* at *2. Defendant moved to compel individual arbitration of the claims, arguing that the arbitration agreement entered into by Plaintiffs barred class actions. *Id.* at *4. Defendant also filed a cross-complaint seeking a declaration that the trial court, not the arbitrator, should decide whether the arbitration agreement barred class action relief. *Id.* The trial court denied the motion to compel individual arbitration, ruling that the agreement, by incorporating the American Arbitration Association's ("AAA") rules, granted the power to determine whether or not the arbitration could proceed as a class action to the arbitrator. *Id.* Defendant filed a petition for a writ of mandamus. The California Court of Appeal denied the petition. The Court of Appeal noted that the arbitration agreement incorporated by reference the rules of the AAA, and the AAA Supplementary rules for Class Arbitration apply "to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the [AAA] where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules." *Id.* at *9. The Rules further delegate to the arbitrator the task of deciding whether a class arbitration could proceed. *Id.* The Court of Appeal thus found that the parties' agreement to conduct their arbitration under the AAA rules constituted clear and unmistakable evidence of their shared intent that the arbitrator decide whether it permits arbitration of class claims. *Id.* at *15. The Court of Appeal rejected Defendant's argument that, because the agreement did not use the term "class action," it did not permit class arbitration, noting that when an employee signed the agreement drafted by Defendant, he or she – if interested – would have been directed to the AAA rules referenced by the agreement, including the rule that the arbitrator would decide the gateway issue of whether class arbitration was appropriate, and thus the fact that the agreement did not use the term class action was not dispositive on the issue. *Id.* at *6-10. The Court of Appeal therefore denied Defendant's writ and held that the trial court did not err in staying Plaintiffs' action pending arbitration proceedings, including submission to the arbitrator of the gateway issue of whether a class arbitration could proceed.

(v) Delaware

***Asbestos Workers Local 42 Pension Fund, et al. v. JPMorgan Chase & Co.,* 2015 Del. Ch. LEXIS 142 (Del. Ch. May 21, 2015).** Plaintiff, a stockholder of Defendant JPMorgan, brought an action asserting derivative claims arising out of the losses suffered by JPMorgan due to the "London Whale." *Id*. at *2. By the end of 2012, Bruno Iksil, nicknamed the London Whale, lost more than $6 billion while serving as head trader of JPMorgan's Synthetic Credit Portfolio Group. In connection with this loss and aftermath, Plaintiff alleged that JPMorgan, members of its board, and certain officers, breached the duty of loyalty by failing to monitor the company's risks in its investments. *Id.* at *6. Plaintiff asserted that it was permitted to sue derivatively on behalf of the corporation as the Board was not in a position to exercise its independent business judgment with respect to the ligation, and was thus a demand excused under Delaware Chancery Court Rule 23.1. *Id*. Defendant moved to dismiss, arguing that collateral estoppel precluded Plaintiff's action. The Court of Chancery granted Defendant's motion. After giving a detailed summary of the allegations contained in the complaint, the Court of Chancery concluded that Plaintiff had pleaded issues identical to the issues presented in two New York actions brought against certain directors and officers of the losses caused by the London Whale trading episode, and thus the case was subject to collateral estoppel. *Id*. at *3-4. The Court of Chancery noted that in 2012, Plaintiff brought a consolidated derivative action in the U.S. District Court for the Southern District of New York against the officers and directors of JPMorgan for failing to manage the company's risks in its investments. The Court in that case granted a motion to dismiss for failure to plead demand futility as required by Rule 23.1, which is identical to Chancery Court Rule 23.1. *Id.* at *36-37. Further, in 2012, Plaintiff brought a consolidated derivative action in New York against the directors and officers of JPMorgan alleging that they ignored red flags and concealed the increased risk in the company's investments. The judge also dismissed that case for failure to plead demand futility, but this time without prejudice to Plaintiffs' right to make a demand on the board and proceed with a wrongful refusal action. *Id.* at *37-39. Plaintiff here argued that collateral estoppel was not applicable as the "controlling facts" of this action were different and contained additional facts supporting the demand excusal argument. *Id.* at *49-50. The Court of Chancery rejected Plaintiff's argument and held that "the underlying conduct is what is at issue, not whether the complaint raises

additional facts, or a more compelling characterization of those facts, regarding the same conduct previously at issue." *Id.* at *53. Nonetheless, the Court of Chancery analyzed the additional facts and found them to be cumulative of those pleaded in the New York actions or not truly additional. *Id.* at *56-58. Accordingly, the Court granted Defendants' motion to dismiss.

***Corwin, et al. v. KKR Financial Holdings LLC,* 2015 Del. LEXIS 473 (Del. Oct. 2, 2015).** Plaintiffs, a group of stockholders of KKR Financial Holdings LLC ("Financial Holdings"), brought an action challenging a stock-for-stock merger between KKR & Co. L.P. ("KKR") and Financial Holdings, alleging that the fairness standard of review applied to the transaction. *Id.* at *2. Plaintiffs argued that KKR was a controlling stockholder of Financial Holdings because, even though KKR owned less than 1% of Financial Holdings, KKR managed Financial Holdings through an affiliate under a contractual management agreement that could be terminated by Financial Holdings only if it paid a termination fee. *Id.* at *3. The Delaware Chancery Court found that KKR was not the controlling stockholder because there were no well-pled facts that KKR could prevent the Financial Holdings Board from freely exercising its independent judgment in considering the proposed merger, and therefore dismissed the action under the business judgment rule. *Id.* at *7. The Court of Chancery noted the "unusual existential circumstances," but observed that Financial Holding had real assets its independent Board controlled and had the option of pursuing any path its directors chose. *Id.* at *4. On appeal, the Delaware Supreme Court affirmed the Chancery Court. The Supreme Court held that the Chancery Court properly applied the business judgment standard of review because the transaction had been approved by a "fully informed, uncoerced vote of the disinterested stockholders." *Id.* at *10. The Supreme Court further emphasized that the business judgment rule would not apply if material, troubling facts regarding director behavior existed and were not disclosed to stockholders prior to their vote. *Id.* Finally, the Supreme Court noted that, in cases in which disinterested stockholders have had an informed opportunity to decide on the merits of a transaction, the costs to stockholders, in the form of litigation and inhibitions on risk-taking, of judicial second-guessing would outweigh the benefits to stockholders. *Id.* at *22-23. Accordingly, the Supreme Court concluded that the business judgment rule standard of review was the presumptively appropriate standard for a post-closing damages action when a merger that was not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders.

***Fox, et al. v. CDX Holdings, Inc.,* 2015 Del. Ch. LEXIS 194 (Del. Ch. July 28, 2015).** Plaintiffs, a group of stock option holders, brought an action alleging that Defendant breached a stock incentive plan in relation to a merger. David Halbert founded the target company in the merger, Caris Life Sciences, Inc. ("Caris"), and owned 70.4% of Caris' equity. JH Whitney VI, L.P., a private equity fund, owned another 26.7% of Caris' equity. Caris operated three subsidiary businesses, including: (i) Caris Diagnostics, a profitable company; (ii) TargetNow, a revenue-positive but not yet profitable business; and (iii) Carisome, a business in the developmental stage. *Id.* at *1. Halbert believed that the Carisome business held enormous promise and sought ways to secure financing for Carisome and TargetNow. On the advice of its financial advisors Citigroup Global Markets ("Citi"), Caris settled on a deal structure in which it could spin off the TargetNow and Carisome businesses to its existing stockholder and then, with only the Caris Diagnostics remaining, merge with a third-party buyer. *Id.* Thus, in October 2011, Caris, as the parent of the Caris Diagnostics business alone, agreed to a merger with Miraca Holdings, Inc. for total consideration of $725 million. Through the merger, Caris changed its name to CDX Holdings, Inc. After the closing of the merger, management sent the option holders an e-mail identifying the fair market value per share as $5.07. *Id.* at *65-66. The e-mail also stated that the option holders would receive 92% of the total pay-out within ten days, but that 8% would be withheld and placed in escrow. The balance would then be paid out following the 18-month escrow period. *Id.* at *66. Plaintiffs claimed that Caris breached its stock incentive plan because its board of directors, as required by the plan, did not make the fair market value determination of the value of TargetNow and Carisome. *Id.* at *68. Plaintiffs also alleged that the board failed to adjust the options to account for the spin-off, and, even if the board had made the determination, the valuation was not made in good faith, and the process was arbitrary and capricious. *Id.* Plaintiffs also alleged that Caris breached its stock option plan by placing a portion of the option consideration into escrow and not paying out the full fair market value, minus the exercise price, on closing. *Id*. The Court of Chancery found for Plaintiffs and awarded damages of $16,260,332.77 plus pre-judgment and post-

judgment interest. *Id.* at *118. The Court of Chancery found that the company's stock incentive plan required an "Administrator" to determine the fair market value of the company's common stock, and the evidence indicated that the board never appointed an Administrator, and Caris never presented the figures that went into determining fair market value to the board. *Id.* at *71-72. The Court of Chancery, therefore, held that Caris failed to act under the stock incentive plan. The Court of Chancery also held that Caris failed to determine the fair market value and adjustment in good faith. Applying the good faith analysis, the Court of Chancery found that TargetNow and Carisome were not worth $47 million and $18 million respectively, as asserted by Caris, because the evidence showed that Citi had estimated TargetNow's value between $195 and $300 million and that Carisome was valued at least as high as TargetNow. *Id.* at *80-82. The Court of Chancery also held that Caris breached the incentive plan when it withheld a portion of the option holders' merger consideration in escrow. *Id.* at *108. The Court of Chancery held that Defendant owed Plaintiffs the full consideration. *Id.* at *100-112. Accordingly, the Court of Chancery entered judgment in favor of Plaintiffs and awarded damages of $16,260,332.77.

***In Re Dole Food Co., Inc. Stockholder Litigation*, 2015 Del. Ch. LEXIS 47 (Del. Ch. Feb. 27, 2015).** Plaintiffs, a group of shareholders, brought an action alleging that the directors of Dole Food Co. breached their fiduciary duties in connection with the proposed sale of the company. Defendants identified Stifel, Nicolaus & Company, Inc. ("Stifel") as their expert witness on the subject of the Dole's value at the time of the transaction, and Stifel produced Seth Ferguson, its managing director, as the person most knowledgeable about the expert reports it had created. *Id.* at *3. Plaintiffs objected, arguing that an expert witness must be a biological person and cannot be a corporation. The Court agreed. Delaware Rule of Evidence 602 requires that a witness testify from personal knowledge, and Rule 603 requires that a witness take an oath or make an affirmation. *Id.* at *5-6. Further, Rule 612 contemplates that a witness have a memory that can be refreshed, and Rule 615 assumes that a witness can hear the testimony of other witnesses, such that the witness might need to be sequestered. *Id.* at *6. The Court found that a corporation could do none of these things. The Court reasoned that being a purely metaphysical creature, having no mind with which to think, and no will with which to determine and no voice with which to speak, a corporation must depend upon the faculties of natural persons to determine for it its policies and direct the agencies through which they are to be effectuated. *Id.* at *6-7. Moreover, Rule 703 contemplates that an expert can perceive facts or data, and Rule 702 requires that the expert be qualified as such by knowledge, skill, experience, training or education. *Id.* at *7. The Court found that a corporation could not meet these requirements and, therefore, Stifel could not testify at trial. To avoid the prejudice that Defendants would suffer if forced to proceed without an expert, however, the Court allowed Defendants to substitute Ferguson. It ruled that, so long as Ferguson confirmed that he had adopted Stifel's expert reports, he could testify about their contents. Accordingly, the Court held that a corporation could not serve as an expert witness but allowed Defendants to substitute the corporation's managing director.

***In Re Jefferies Group, Inc. Shareholders Litigation*, 2015 Del. Ch. LEXIS 158 (Del. Ch. June 5, 2015).** In this consolidated class action, Plaintiffs challenged the proposed share transaction following the stock-for-stock merger of Jefferies Group, Inc. and Leucadia National Corp. Prior to consolidation, the first of seven actions was filed in New York state court. After initial litigation activity in New York, the case proceeded to Delaware. Under a consolidation order, the Court named Delaware counsel as co-lead counsel. *Id.* at *1. Thereafter, the parties structured a settlement to guarantee that the class would receive $70 million plus any award of attorneys' fees. *Id.* at *5. Delaware counsel moved for award of attorneys' fees and expenses, and New York Plaintiffs' counsel moved for a share of the fee award. The Delaware Chancery Court granted in part Delaware counsel's motion and denied the motion of New York Plaintiffs' counsel. Delaware counsel sought an attorneys' fees award of $27.5 million and expenses of $1,002,603.28, and contended that the requested fee amount equated to approximately 27.5% of the gross value of settlement. Although structuring a settlement based on a net recovery may have the salutary effect of subjecting more fee applications to an adversarial process, the Chancery Court remarked that it had traditionally granted fee awards in common fund settlements based on a percentage of the gross settlement value. *Id.* at *6. Regarding the appropriate fee amount, the Chancery Court noted that in *In Re Activision Blizzard, Inc. Shareholder Litigation*, 2015 Del. Ch. LEXIS 140 (Del. Ch. May 20, 2015), a case involving a $275 million derivative recovery that also settled about one month before trial, it had stated that

a typical fee award for a case settling at that stage of the proceeding ranged from 22.5% to 25% of the benefit conferred. *Id.* at *10. The Chancery Court opined that this range was reasonable as a general matter, and reasoned that there should be an appreciable difference between the fee award percentage for a pre-trial recovery and a recovery after trial, where fee awards usually max out at one-third of a fund, because of the significant additional risk and investment of resources involved in going to trial and the further exposure of appellate review. *Id.* at *10-11. Further, the Chancery Court noted that Delaware counsel handled this case on an entirely contingent basis, and expended meaningful efforts litigating this case on a non-expedited basis, and that the factual issues in the case were not overly complex and the core legal issues were fairly straightforward for professionals who handle cases of this nature. Accordingly, the Chancery Court granted an award of $21.5 million, inclusive of expenses, which equated to about 23.5% of the gross value. The New York Plaintiffs sought an award of 20% of the amount of any fees to be awarded to Delaware counsel. The Chancery Court remarked that to be entitled to a percentage of the fee, counsel for the New York Plaintiffs must substantiate their contribution to the result achieved. *Id.* at *15. Counsel for the New York Plaintiffs contended that the Delaware Plaintiffs' prosecution of their claims relied heavily upon the expedited New York discovery, which would not have otherwise been available in drafting the amended complaint. The expedited discovery obtained by the New York Plaintiffs consisted of certain core documents concerning the proposed transaction, including board and transaction committee presentation materials and minutes, and depositions of chair of Jefferies' transaction committee and the senior member of the team at Citigroup. The Chancery Court observed that the reason Delaware counsel was able to incorporate the contents of documents previously produced in the New York action into an amended pleading was because Defendants, who did not seek to stay discovery in the Delaware action pending the resolution of a motion to dismiss, produced them to Delaware counsel. *Id.* at *17. Accordingly, the Chancery Court denied the New York Plaintiffs' motion for a share of the fee award.

***In Re Riverbed Technology Inc., Stockholders Litigation,* 2015 Del. Ch. LEXIS 241 (Del. Ch. Sept. 17, 2015).** In this class action arising out of a merger transaction challenging the purchase price, the sale process, and the disclosures in the proxy statement, the Delaware Chancery Court approved a disclosure-only settlement finding it appropriate given the unique circumstances. The class action arose out of the acquisition of network equipment manufacturer Riverbed Technology, Inc. for $3.6 billion (at $21 per share). *Id.* at *3. Subsequent to the announcement of the transaction, Plaintiffs, a group of shareholders, filed the class action alleging that the sales process undervalued Riverbed and that the preliminary and definitive proxy documents failed to disclose all material information related to alleged financial advisor conflicts. *Id.* at *3-4. Later, the parties agreed to a settlement of Plaintiffs' claims in which Riverbed made additional disclosures in exchange for a broad release of all federal and state claims in connection with the transaction. The parties also agreed that Defendants would not oppose a fee request of $500,000 by Plaintiffs' counsel. The parties moved for settlement approval, and a Riverbed shareholder objected on the basis that the supplemental disclosures were essentially valueless, and that there might be valuable unknown claims extinguished by the broad release of claims. *Id.* at *19. After finding that the objector had standing to object, the Chancery Court approved the settlement. The Chancery Court focused on the "agency problem" that exists in class action settlements of this type, noting that the interest of the individual shareholder is often so small "that it serves as scant check on the perverse incentive" of Plaintiff's counsel, and while the adversarial system would usually help ameliorate this agency problem, in class litigation Defendants' primary goal is to consummate the transaction, which requires terminating the litigation. *Id.* at *10-11. The Chancery Court stated that, where the interests of Defendant and Plaintiff are aligned, it is incumbent upon the Court to determine whether the proposed settlement is actually fair to the class. *Id.* at *13. The Chancery Court then examined the facts presented and concluded that the supplemental disclosures showed that Riverbed's financial adviser for the transaction, Goldman Sachs, had engagements and relationships with the purchasers that created potential conflicts of interest, and thus, although the supplemental disclosures were "not of great importance," they had "tangible, although minor, value to the class." *Id.* at *17-19. According to the Chancery Court, this relatively insignificant benefit could only support the settlement under the unique facts of this litigation. *Id.* The Chancery Court found that where the parties negotiated a remedy in good faith with the reasonable expectation that the broad release negotiated in return would be approved by the Court, the settlement was fair to the class. The Chancery Court reasoned the parties had relied on its past practice of approving settlements in which the

remedy comprised additional disclosures, and stated that, if it were not for this reasonable reliance, the interest of the class might merit rejection of a settlement encompassing a release that went far beyond the claims asserted and the results achieved. *Id.* at *19-22. The Chancery Court therefore reluctantly approved the settlement but cautioned that litigants could no longer expert approval of similar settlements where the release extends far beyond the claims asserted and the results achieved. *Id.* The Chancery Court also rejected the request of Plaintiffs' counsel fees, finding that the benefits achieved – the supplemental disclosures – were "too modest" to justify an award of $500,000. *Id.* at *22. The Chancery Court noted that the disclosure in connection with potential conflicts of interests of Goldman Sachs merited a fee of $200,000 and the supplemental disclosures merited a fee of $100,000, totaling a fee of $300,000. *Id.* at *28. Accordingly, the Chancery Court approved the disclosure only settlement and awarded attorneys' fees and costs of $329,881.61 to Plaintiffs' counsel.

***In Re Riverbed Technology, Inc. Stockholders Litigation,* 2015 Del. Ch. LEXIS 296 (Del. Ch. Dec. 2, 2015).** Plaintiffs, a group of shareholders, brought a class action alleging that Defendant undervalued itself and failed to make adequate disclosures in the proxy materials relating to its acquisition. Subsequently, the parties agreed to a settlement of Plaintiffs' claims in which Defendant made disclosures in exchange for the broadest possible release of all federal and state claims in connections with the transaction. *Id.* at *5. The Delaware Court of Chancery approved the settlement, although reluctantly, on the basis of the parties' reasonable expectation of approval. An objector, an academic who bought shares specifically with the aim of presenting his objection, sought an award of attorneys' fees in connection with his opposition to the settlement, which was unsuccessful. *Id.* at *2-3. The Court awarded the objector $10,000 for his counsel's fee, and costs in the amount of $837. *Id.* at *9. The Court noted that the objector's presentation not only pointed out the general problem inherent in the settlement, but also advocated against the settlement based upon the specific terms proposed and the investigation undertaken; the Court explicitly found the objector's argument persuasive, as well as helpful in analyzing the propriety of the settlement. *Id.* at *6. In light of the nature of the proposed settlement, and the re-examination of the utility to the class of disclosure-only settlements in return for broad releases of liability, the Court found the objector's elucidation of issues helpful in reaching a decision. *Id.* The Court observed that the objector's counsel necessarily had reviewed the record closely, and advocated the objector's positions based on the proposed settlement and the case law. Hence, the Court concluded that some fee award was therefore appropriate. *Id.* at *7-8. Accordingly, the Court awarded the objector $10,000 toward his counsel's fee, and costs in the amount of $837.

***In Re Zalicus, Inc. Stockholders Litigation*, 2015 Del. Ch. LEXIS 15 (Del. Ch. Jan. 16, 2015).** Plaintiffs, a group of stockholders, brought an action alleging that the directors of Zalicus, Inc. breached their fiduciary duties in connection with their approval of a stock-for-stock merger with Epirus Biopharmaceuticals, Inc. The parties settled the litigation. Subsequently, the Court entered a stipulated order dismissing the action without prejudice as to all Plaintiffs and retaining jurisdiction solely for the purpose of determining Plaintiffs' forthcoming fee and expense application. *Id.* at *1-2. Thereafter, the parties agreed that Zalicus would pay a combined global fee amounting to $400,000 to Plaintiffs' counsel in this action and counsel for other Zalicus stockholders who commenced similar litigation in Massachusetts in full satisfaction of all claims for attorneys' fees and expenses (the "Fee Stipulation"). *Id.* at *2. Thereafter, parties asked the Court to enter a stipulated order closing the action for all purposes. The Court denied the motion because the parties had not provided adequate notice of the fee stipulation to the putative class. Plaintiffs contended that the Court could enter the closure order without notice to the class because the Court did not need to approve or take any action with respect to the fee stipulation. The Court disagreed. *Id.* at *3. The Court noted that in *In Re Advanced Mammography Systems, Inc. Shareholders Litigation*, 1996 Del. Ch. LEXIS 132 (Del. Ch. Oct. 30, 1996), it had held that parties were required to provide notice of a joint application to the putative class because of the risk of a buy-off presented by the proposed fee payment. *Id.* Although the Court had not certified a class in this action, the Court found that class certification was not dispositive of whether notice was required. In particular, the Court reasoned that it was hard pressed to understand the relevance of a certification order in this context because no class members had released any claims and the class members' claims were dismissed without prejudice. *Id.* at *5. The Court concluded that notice was appropriate because it provided the information necessary for an

interested person to object to the use of corporate funds, if the circumstances warranted. *Id.* Accordingly, the Court denied the parties' motion to close the case.

***RBC Capital Markets, LLC v. Jervis, et al.,* 2015 Del. LEXIS 629 (Del. Nov. 30, 2015).** In this class action alleging that Defendants aided and abetted breaches of fiduciary duty by former directors of Rural/Metro Corp ("Rural") in connection with the sale of Rural to an affiliate of Warburg Pincus, LLC, the Delaware Supreme Court affirmed all of the principal holdings of the Court of Chancery's series of decisions in *In Re Rural/Metro Corporation Shareholder Litigation.* On March 7, 2014, the Court of Chancery found that the directors of Rural/Metro Corp. breached their duty of care by failing to act within a range of reasonableness in overseeing the sale of Rural, and ruled that Defendants was liable to the class of Rural stockholders for aiding and abetting breaches of fiduciary duty. *Id*. at *3. On appeal, Defendants argued that the trial court erred by holding that the Board of Directors breached its duty of care under the enhanced scrutiny standard enunciated in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). *Id.* at *74. Defendants argued that intermediate scrutiny under *Revlon* exists to determine whether stockholders should receive pre-closing injunctive relief, but not to establish a breach of fiduciary duty that warrants post-closing damages, and that the Court of Chancery erred by finding a due care violation without finding gross negligence. *Id.* at *98. The Supreme Court disagreed, and affirmed the Court of Chancery's ruling that the directors breached their fiduciary duties under a *Revlon* standard of review by engaging in conduct that fell outside the range of reasonableness, and that this was a sufficient predicate for its finding of post-closing aiding and abetting liability against Defendants. *Id.* at *99-100. While the Supreme Court acknowledged that gross negligence was required to sustain monetary damages against disinterested directors, it also opined that a Board might nonetheless still be in breach of its fiduciary duties under *Revlon*'s reasonableness standard of review, and as such *Revlon* might continue to apply in the context of post-closing aiding and abetting claims. *Id.* The Court of Chancery had found that, under the specific circumstances of the case, the Board's initiation of a sale process in late 2010 fell outside the range of reasonableness, and thus was a breach of its fiduciary duties under *Revlon*. *Id.* at *78. Defendants argued that during such period Rural was merely exploring strategic alternatives and that the business judgment rule – not the rule in *Revlon* – applied. *Id*. The Supreme Court, however, disagreed and found that the record showed that Rural was for sale from the outset. The Supreme Court noted that there was no exploration of other strategic alternatives, the financial advisors understood that they were being hired for a sell-side engagement, the special committee had authorized the negotiation of the sale of Rural at an early stage in the process, and, although the Board was not initially aware of the special committee's authorization of the sale, the Board ultimately purported to ratify the special committee's actions. *Id.* at *79-85. The Supreme Court thus agreed with the Court of Chancery's principal conclusion that the Board's overall course of conduct failed scrutiny under *Revlon*. *Id.* at *86-89. Defendants argued that Rural's exculpatory provision barred the recovery of monetary damages from directors for a successful shareholder claim based upon establishing a violation of the duty of care. *Id.* at *142-144. The Supreme Court, however, ruled that the provision did not vitiate the Board's obligation to adhere to its fiduciary obligation to proceed with due care, and thus Defendants' knowing and intentional inducement of the fiduciary breach justified the award of damages. *Id.* at *146. The Supreme Court further opined that allowing the provision to safeguard third-parties would create a "perverse incentive system" that would allow advisers to mislead the Board and then hide behind their victim's liability shield. *Id.* at *147. Accordingly, the Supreme Court affirmed the Court of Chancery's final order and judgment finding Defendants liable.

(vi) Florida

***Asseff, et al. v. Citizens Property Insurance,* 2015 Fla. App. LEXIS 3362 (Fla. Dist. Ct. App. 1st Dist. Mar. 10, 2015).** Plaintiffs, a group of insurance policyholders, brought a putative class action alleging that Defendant violated the policyholder's contracts through a re-inspection program that deprived them of legitimate wind mitigation credits. Florida law requires insurers to provide premium discounts to policyholders who install or implement windstorm damage mitigation techniques, alterations, or solutions to their properties to prevent windstorm losses. *Id.* at *2. Plaintiffs submitted uniform mitigation verification inspection forms to Defendant after a professional inspector reviewed their property. Defendant allegedly accepted the forms without conducting any separate inspections of the properties and routinely provided

insureds premium credits based on the loss mitigation features and inspection results. *Id*. Before the five-year expiration date of the forms, Defendant implemented a re-inspection program, which led to widespread removal of loss mitigation benefits afforded under the policy in the form of credits. *Id.* at *2-3. Plaintiffs alleged that Defendant was obligated to honor the loss mitigation discounts and sought a declaration that the insurance policies incorporated the mitigation form and its terms, that Defendant must honor the mitigation form and inspection results on an insured's property for five years unless there has been a material change to the property, and that the trial court was the proper forum for issuing this relief notwithstanding that damages would be in the form of overpaid premiums. *Id.* at *3-4. Defendant moved to dismiss, arguing that Plaintiffs failed to exhaust the administrative remedies available under § 627.371 of the Florida Statutes. That Section provides that any person aggrieved by any rate charged or rating plan adopted by an insurer may make written request of the insurer or rating organization to review the manner in which the rate has been applied. *Id.* at *6-7. The trial court granted Defendant's motion. On appeal, the Florida District Court of Appeal affirmed. The District Court of Appeal agreed with the trial court that because Plaintiffs complained of the reduction or elimination of wind mitigation credits and the corresponding increase in premiums, they essentially claimed to have been aggrieved by the rate Defendant charged. *Id.* at *13. Although Plaintiffs claimed that they only challenged Defendant's re-inspection rights and not their rates, the District Court of Appeal noted that, by virtue of the fact that Plaintiffs alleged a loss of premium discounts and credits, they had been "aggrieved by any rate charged" pursuant to § 627.371(1). The District Court of Appeal therefore concluded that Plaintiffs should have pursued administrative relief under § 627.371(1), and the trial court did not err in dismissing the action for failure to exhaust administrative remedies.

***Bay Area Injury Rehab Specialists Holdings, Inc., et al. v. United Services Automobile Association,* 2015 Fla. App. LEXIS 8772 (Fla. Dist. Ct. App. 2d Dist. June 10, 2015).** Plaintiff, a health care provider, brought a class action alleging that Defendants routinely rejected valid claims for personal injury protection ("PIP") benefits based on an unlawful requirement that a separate "disclosure and acknowledgement form" be submitted every time an insured patient received health care services. *Id*. at *2. Plaintiff sought declaratory relief (Count I), injunctive relief to compel PIP payments (Count II), and damages (Count III). Plaintiff also sought to proceed for itself and as representative of opt-out class members from a prior class action settlement involving similar issues. Previously, Steven E. Goodwiller had filed a putative class action Defendants for unpaid PIP benefits in an action entitled *Steven E. Goodwiller, M.D., P.A. v. USAA*, No. 08-15594 (Fla. 17th Cir. 2009). The previous action did not assert claims for declaratory or injunctive relief, but sought monetary relief comparable to what Plaintiff sought in Count III of its complaint. Because of the similarity of issues, Plaintiff's lawsuit was stayed pending resolution of *Goodwiller*. Subsequently, the court in *Goodwiller* approved a class action settlement, but Plaintiff and 292 class members opted-out of that settlement. With *Goodwiller* resolved, Plaintiff's lawsuit proceeded. Defendants then filed motions directed to the sufficiency of Plaintiff's complaint. The trial court denied Plaintiff's motion for class certification and dismissed claims for declaratory and injunctive relief. The trial court ruled that Plaintiff could not represent a class of *Goodwiller* opt-outs seeking the same form of monetary relief adjudicated in the *Goodwiller* class settlement. In dismissing Counts I and II, the trial court held that class action status was inappropriate for the declaratory and injunctive relief claims, even if they had not been raised in *Goodwiller*. On appeal, the Florida District Court of Appeal affirmed the trial court's order, with one exception; it dismissed the appeal of the order dismissing the declaratory judgment count. The District Court of Appeal found instructive *In Re Bridgestone/Firestone, Inc., Tires Products, Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), where the Seventh Circuit held that a party who opts out of a class action retains the right to proceed individually, but not to launch a competing class action of opt-outs seeking the same relief resolved on a class basis in a prior lawsuit. *Id*. at *7-8. The District Court of Appeal found that the trial court acutely observed that serial class actions would promote a marketplace for competing class actions and erode the benefits of proceeding in a single class action. *Id*. at *9. The District Court of Appeal remarked that a need for a class action of opt-outs was not legally impossible, but required exceptional circumstances, which was absent here. *Id*. at *10. The District Court of Appeal held that the trial court did not abuse its discretion in concluding that serial class actions do not promote the purpose behind class actions. *Id*. Accordingly, Plaintiff could not proceed on a class action basis with any claims adjudicated in *Goodwiller*, especially on those monetary claims that were the subject of its claims in Count III. *Id*. at *11.

The District Court of Appeal also ruled that Plaintiff could pursue its monetary claims on an individual basis. *Id*. Further, the District Court of Appeal found that the trial court did not err in dismissing the declaratory judgment claim, but the portion of the non-final order that dismissed Count I was not appealable. *Id*. Accordingly, the District Court of Appeal dismissed that portion of the appeal involving Count I. *Id*. Finally, the District Court of Appeal found that the trial court did not err in characterizing the class claims in Count II as predominantly seeking monetary relief, thus precluding certification of an injunction class. *Id*. at *12. Moreover, dismissal of Count II was adequately supported by the trial court's conclusion that Plaintiff failed to state a cause of action for injunctive relief. *Id*. Accordingly, the District Court of Appeal affirmed in part and dismissed in part.

***Damianakis, et al. v. Philip Morris USA, Inc.,* 2015 Fla. App. LEXIS 197 (Fla. Dist. Ct. App. 2d Dist. Jan. 7, 2015).** Plaintiffs, Nikitas Damianakis and his wife, brought a personal injury action against Defendants, several tobacco companies and other entities, including Defendant Philip Morris, seeking damages for diseases and medical conditions brought on by Nikitas Damianakis' alleged addiction to nicotine. The action was a progeny of *R.J. Reynolds Co. v. Engle ("Engle I")*, 672 So.2d 39 (Fla. 3d Dist. Ct. App. 1996), a class action which was divided into three phases, and which awarded $12.7 million in compensatory damages, and $145 billion in punitive damages *Engle II* to a class of Florida citizens and residents who suffered or died from diseases and medical conditions caused by their addiction to cigarettes that contained nicotine. Although the *Engle* class had been eventually decertified in *Engle v. Liggett Group, Inc. ("Engle III")*, 945 So.2d 1246 (Fla. 2006), the Florida Supreme Court had provided Plaintiffs who qualified as class members as of November 21, 1996 to proceed individually for damages within one year with a *res judicata* effect on the phase I common core findings. Nikitas Damianakis, after being diagnosed with emphysema and chronic obstructive pulmonary disease ("COPD"), moved to Florida in April 1994, and brought his action on November 29, 2007. While the litigation was running its course, Nikitas Damianakis died. Defendants filed a motion for summary judgment, arguing that Nikitas Damianakis was not a member of the *Engle* class because his COPD and emphysema had been diagnosed before he moved to Florida. Defendants argued that because Nikitas Damianakis was diagnosed with COPD before he moved to Florida, he could not take advantage of the window provided for by the Florida Supreme Court in *Engle III*, and he could not file an independent lawsuit because the statute of limitations had expired. *Id.* at *21. The trial court granted Defendants' motion. The Florida District Court of Appeal, however, reversed the trial court's order. The District Court of Appeal held that as long as an individual was a citizen or resident of Florida as of the cut-off date of November 21, 1996, and his or her smoking-related illness "manifested" on or before that date, then he or she satisfied the residency and citizenship requirement of *Engle* class membership, and thus, it was an error to hold that Damianakis was not a class member on the ground that his smoking-related illness had been diagnosed before he moved to Florida. *Id.* at *39. The District Court of Appeal explained that the only requirements for membership in the *Engle* class were that: (i) the individual's smoking-related illness manifested before the cut-off date; (ii) he or she was a resident or citizen of Florida on or before the cut-off date; and (iii) the individual's smoking-related illness resulted from the individual's addiction to cigarettes containing nicotine. Hence, even though a person's smoking-related illness first manifested before that person became a Florida resident, he or she was not necessarily excluded from the class. *Id*. at *22-23. Defendants argued that the qualification for membership in the *Engle* class required Plaintiffs to show that the decedent was a resident of the state of Florida at the time of a "medical diagnosis" of a smoking-related disease or at the time evidence of the causal relationship of the cause of action had otherwise manifested itself. *Id.* at *23. The District Court of Appeal, however, found no statement in *Engle III* that supported such a requirement. Rather, the District Court of Appeal found that the Florida Supreme Court had repeated at least twice that the class included all persons who were Florida residents as of the class cut-off date of November 21, 1996, and the phrase "who have suffered, presently suffer, or have died" supported the view that the class should include only those people who were affected in the past or who were presently suffering at the time the class was re-certified by the trial court. *Id.* at 23-26. According to the District Court of Appeal, Damianakis, like many other members of the class, spent most of his adult, "smoking" life in another state or country, and the possibility that some of them, including Damianakis, might have had symptoms that "manifested" before they move to Florida, did not necessarily exclude them from the class. *Id.* at *38-39. The District Court of Appeal therefore concluded that Damianakis satisfied the residency and citizenship requirement of the

Engle class and he was entitled to take advantage of the one-year filing window created in *Engle III*, and accordingly, reversed the order granting summary judgment to Defendants.

***R.J. Reynolds Tobacco Co. v. Ballard, et al.,* 2015 Fla. App. LEXIS (Fla. Dist. Ct. App. 3d Dist. Mar. 18, 2015).** Plaintiffs, several living and pre-deceased smokers, brought actions alleging personal injury or wrongful death due to smoking Defendant's tobacco products. In *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006), the Florida Supreme Court decertified a class of smokers and their survivors but gave *res judicata* effect to certain liability determinations made by the jury so long as individual class members filed individual damages actions within one year. After a jury returned a verdict in favor of Plaintiffs, Defendant appealed. Defendant claimed that the trial court erred by failing to direct a verdict in its favor as to Plaintiffs' membership in the *Engle* class; by not granting a new trial based on improper comments made by Plaintiffs' counsel; and by admitting certain evidence of Defendant's misconduct. *Id*. at *1. The Florida District Court of Appeal affirmed the trial court's judgment. Defendant first argued that the evidence used to prove Plaintiff Ralph Ballard's addiction to cigarettes was insufficient because the only individualized testimony on addiction came from Ballard himself, who was not qualified to offer expert testimony in this matter. Defendant also argued that Plaintiff's expert merely offered generalized testimony because he was unfamiliar with Ballard and merely identified generic criteria relevant to the question of addiction. *Id*. at *9. The District Court of Appeal adopted the reasoning and holding in *R.J. Reynolds Tobacco Co. v. Brown*, 70 So. 3d 707 (Fla. Dist. Ct. App. 2011), wherein it rejected Defendant's argument that lay testimony was insufficient to prove the decedent's addiction or that addiction was the legal cause of his death. *Id*. at *10. Defendant further argued that it was entitled to a new trial because, in closing and rebuttal arguments, Plaintiffs' counsel impermissibly attacked Defendant for defending this case. The *Engle* rulings included common liability findings that the *Engle* Defendants concealed or omitted, and agreed to conceal or omit, material information not otherwise known or available concerning the health effects and/or addictive nature of smoking cigarettes with the intention that the public would detrimentally rely on the information. *Id*. Moreover, in *Phillip Morris USA, Inc. v. Douglas*, 110 So. 3d 419 (2013), the Florida Supreme Court precluded *Engle* Defendants from arguing in individual actions that they did not engage in conduct sufficient to subject them to liability. *Id*. at *16. In this case, although Defendant informed the jury during opening and closing arguments that it did not dispute any of the *Engle* findings, it shortly afterward denied the existence of any conspiracy to conceal. *Id*. Accordingly, the District Court of Appeal concluded that, because Defendant challenged the *Engle* findings, it was not reversible error for Plaintiffs' counsel to rebut such arguments in closing and rebuttal arguments. *Id*. at *17. Accordingly, the District Court of Appeal affirmed the trial court's judgment.

(vii) Illinois

***Ballard RN Center, Inc. et al. v. Kohll's Pharmacy And Homecare, Inc.,* 2015 Ill. LEXIS 1248 (Ill. Oct. 22, 2015).** Plaintiff brought a class action against Defendant alleging that it sent unsolicited fax advertisements to Plaintiff in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff alleged that it did not have a prior business relationship with Defendant and that it did not authorize Defendant to send fax advertisements to Plaintiff. *Id.* at *2. Plaintiff further alleged that Defendant's fax advertisement did not provide the requisite "opt out notice." *Id.* at *3. Along with filing the action, Plaintiff filed a motion for class certification proposing three separate classes, and asserting that it would file a supporting memorandum of law in due course. *Id.* at *5. Defendant subsequently filed a motion for summary judgment. Defendant argued that Plaintiff's TCPA claim was moot because Defendant had tendered an unconditional offer of payment to Plaintiff exceeding the total recoverable amount of possible TCPA damages, but Plaintiff rejected all of the tenders. *Id.* Defendant cited to *Barber v. American Airlines, Inc.,* 241 Ill. 2d 450 (2011), contending that a class action becomes moot when a Defendant offers such tenders before Plaintiff filed a motion for class certification. *Id.* at *6. Although Plaintiff had filed for class certification at the time of the filing of the action, Defendant argued that the motion did not contain enough detail or information on the proposed classes. The trial court denied Defendant's motion, reasoning that Defendant did not make its tender on the TCPA claim before Plaintiff filed its motion for class certification. *Id.* at *9. Disagreeing with Defendant's argument that Plaintiff's motion for class certification was merely a shell motion, the trial court concluded that *Barber* required only that a motion for class certification be filed, and not that it must meet any certain standards. *Id.* On Defendant's appeal, the Illinois Appellate Court

reversed the trial court's decision. While acknowledging that *Barber* did not expressly set forth requirements for a valid motion for class certification, the Appellate Court determined that *Barber* implicitly required that a motion contain sufficient factual allegations so that it implicates the interests of the other class members. *Id.* at *11. The Appellate Court therefore concluded that the motion for class certification had not yet been filed within the meaning of *Barber* to avoid a finding of mootness. On further appeal, the Illinois Supreme Court reversed. While agreeing in principle that a contentless shell motion, or otherwise frivolous pleading, would be insufficient to preclude a mootness finding under *Barber,* the Supreme Court held that Plaintiff's motion was sufficient because it contained a general outline of Plaintiff's class members and class action allegations, and it effectively communicated the fundamental nature of the putative class action. *Id.* at *19-20. The Supreme Court further found that even if the motion for class certification was not sufficient to support class certification, the focus of *Barber* was on the timing of Plaintiff's filing a motion, and thus, Plaintiff's motion was sufficient for purposes of *Barber. Id.* at *24. Accordingly, the Supreme Court concluded that Defendant's tender after Plaintiff filed its class certification could not render moot any part of Plaintiff's pending action.

***Hawkins, et al. v. Commonwealth Edison Co.*, 2015 Ill. App. LEXIS 96 (Ill. App. Ct. 1st Dist. Feb. 17, 2015).** Plaintiffs brought a class action alleging that Defendant's non-compliance with the Illinois Commerce Commission's order, which required Defendant to begin its smart meter deployment within a certain timeframe, was a violation of the Illinois Public Utilities Act (the "Act"). The Illinois Energy Infrastructure Modernization Act ("EIMA") sets forth investment plans for participating utilities requiring them to invest in electric system upgrades, modernization projects, and training facilities, and the modernization of their transmission and distribution infrastructures. *Id.* at *2. Defendant elected to participate and invest to modernize its transmission and distribution infrastructure, including the installation of smart meter technology. The Commission approved Defendant's plan with modifications, and ordered Defendant to begin its smart meter deployment within three months. The trial court dismissed the complaint for lack of subject-matter jurisdiction, and the Illinois Appellate Court affirmed the dismissal. The Appellate Court noted that the Commission is the body most capable of determining whether a utility's rates are reasonable and its services adequate, given its expertise in the complex data inherent in rate and service issues. *Id.* at *5. Further, *Sheffler v. Commonwealth Edison Co.*, 955 N.E. 2d 1110 (Ill. 2011), determined that the Act provides that a claim for reparations is within the jurisdiction of the Commission, while a claim for civil damages lies within the civil court's jurisdiction. *Id.* at *6. The Appellate Court noted that generally, a claim is for reparations when the essence of the claim is that a utility has charged too much for a service, while a claim is for civil damages when the essence of the complaint is that the utility has done something else to wrong Plaintiff. *Id.* at *7. *Sheffler* reasoned that in determining whether the Commission has jurisdiction, the proper focus should be on the nature of the relief sought rather than the basis for seeking relief. *Id*. at *8. Further, *Sheffler* held that rates and service are inextricably tied together and therefore, complaints concerning the adequacy of Defendant's services are reparations falling within the jurisdiction of the Commission. *Id.* at *9. Here, Plaintiffs filed a breach of contract complaint seeking damages for Defendant's violation of the Commission's order requiring it to deploy smart meters within a timeframe, and they alleged that Defendant's smart meter deployment would be delayed more than two years because of the violation. Plaintiffs sought damages of at least $182 million, which represented the reduced amount of net present benefit to customers caused by the delay. The Appellate Court noted that under the EIMA, the deployment of smart meters is an improvement of infrastructure, and utilities making such improvements may recover expenditures through the rate-making process. *Id.* at *10. Because the nature of relief sought by Plaintiffs went directly to Defendant's infrastructure and service, the Appellate Court found that Plaintiffs' complaint was within the exclusive jurisdiction of the Commission. Accordingly, the Appellate Court affirmed dismissal of the complaint.

***Mabry, et al. v. Village Of Glenwood,* 2015 Ill. App. LEXIS 691 (Ill. App. Ct. 1st Dist. Sept. 14, 2015).** Plaintiffs brought a putative class action alleging that they suffered property damages after a heavy rainstorm cause sewage and sewage water to back-up into their residences in 2006. *Id.* at *2. Plaintiffs alleged common law trespass and negligent operation of the sewer system. *Id.* at *3. Plaintiffs later withdrew their class action allegations, and added 32 individuals as intervening Plaintiffs into the action. *Id.* at *5. Defendant filed a motion to dismiss arguing that the intervening Plaintiffs' claims were time-barred,

and because the named Plaintiffs did not move to certify the class as soon as practicable after filing the proposed class action, the Illinois class action tolling rule did not preserve the claims of the intervening Plaintiffs. *Id.* at *5-6. The trial court granted Defendant's motion to dismiss. On appeal, the Illinois Appellate Court reversed and found that Plaintiffs' timely filing of the proposed class action served to toll the limitation period for the intervening Plaintiffs. The Appellate Court noted that Plaintiffs' cause of action accrued on April 16, 2006, when allegedly a heavy rainstorm cause sewage and sewer water to back-up into Plaintiffs' homes, causing property damage. Plaintiffs filed their original proposed class action complaint on April 16, 2007, exactly one year later, but before the expiration of the Tort Immunity's Act's limitations period. *Id.* at *18. The Appellate Court explained that, from that date, the statute of limitations was tolled as to all members of the putative class until the point at which class certification was denied or abandoned, and the limitations period started running again when Plaintiffs abandoned the class allegations on March 28, 2013. *Id*. Since Plaintiffs' original proposed class action was filed with one day remaining in the limitations period, the intervening Plaintiffs had one day within which to file their intervening claims, and Plaintiffs filed a second amended complaint adding the intervening Plaintiffs on the same day that Plaintiffs abandoned their class action allegations. *Id*. The Appellate Court thus found that the intervening Plaintiffs' claims against Defendant were timely filed pursuant to the class action tolling rule. *Id.* at *18-19. Defendant argued that, because Plaintiffs did not pursue class certification during the pendency of their proposed class action, they did not meet the requirement of moving for certification "as soon as practicable" and this equated to a failure to act with "due diligence" which nullified the application of the class action tolling rule. *Id.* at *19. The Appellate Court, however, found that Defendant's argument was not supported by case law, but also was inconsistent with the principles of underlying the class action tolling rule. *Id.* at *21. The Appellate Court pointed out that the specific purpose of the class action tolling rule is to preserve the claims of potential class Plaintiffs in the event that the class is not certified, and thus, it appeared reasonable that Plaintiffs did not move for certification during the discovery because the trial court never ordered Plaintiffs to move for class certification. *Id.* According to the Appellate Court, a reversal was consistent with the principles of class action tolling rule because imposing a somewhat arbitrary deadline as to when members of a purported class must either intervene or file their own protective claims, based on nothing more than the statute's ambiguous requirement that representative Plaintiffs in a proposed class action must move for certification "as soon as practicable," would encourage the duplicative filing and judicial inefficiency. *Id.* at *22-24. Accordingly, the Appellate Court reversed the trial court's order granting Defendant's motion to dismiss.

***Maglio v. Advocate Health And Hospitals Corp.*, 2015 Ill. App. Unpub. LEXIS 1190 (Ill. App. Ct. 2d Dist. June 2, 2015).** Defendant, a network of hospitals and doctors, experienced a data breach. On July 15, 2013, burglars stole four computers from Defendant's administrative building that contained the personal information of about four million of Defendant's patients. *Id* at *2. Defendant notified the patients of the theft on August 23, 2013. *Id*. Two sets of Plaintiffs filed class actions against Defendant, claiming that Defendant violated two state consumer data protection laws by failing to maintain adequate procedures to protect the personal information of Plaintiffs and putative class members and by failing to notify Plaintiffs and putative class about the breach in a timely matter. *Id*. at *4. Plaintiffs also sued Defendant on theories of negligence and invasion of privacy. *Id*. Defendant moved to dismiss both class actions, arguing that Plaintiffs lacked standing because they had not suffered any injury as a result of their data being stolen. *Id*. at *5. Both trial courts dismissed the class actions. *Id*. at *5, 7. The trial courts found that "[t]he increased risk that Plaintiffs will be identity theft victims at some indeterminate point in the future . . . did not constitute an injury sufficient to confer standing," and that Plaintiffs' "allegations concerning anxiety and emotional distress . . . were insufficient to establish standing, where they were not based on an imminent threat." *Id*. at *6. Plaintiffs appealed. The Illinois Appellate Court pointed out that, under Illinois law, a Plaintiff only has standing if he or she has suffered "some injury-in-fact to a legally cognizable interest." *Id*. at *9. "[T]he claimed injury may be actual or threatened and it must be: (i) *distinct and palpable*; (ii) fairly traceable to the defendant's actions; and (iii) substantially likely to be prevented or redressed by the grant of the requested relief." *Id*. at 10. The Appellate Court analyzed whether Plaintiffs had suffered a "distinct and palpable" injury under Illinois law. Based on *Chicago Teachers Union, Local 1 v. Board of Education*, 189 Ill. 2d 200 (2000) – a case in which the Illinois Supreme Court held that physical education teachers did not have standing to challenge a statute allowing school districts to waive

mandatory physical education requirements because the teachers were not "in immediate danger of sustaining a direct injury as a result of enforcement of the challenged statute that is *distinct and palpable*" – the Appellate Court concluded that Plaintiffs allegations of injury were speculative and that Plaintiffs thus did not have standing to bring suit. *Id*. at 10. The Appellate Court reasoned that this result was supported by federal case law on standing. It observed that, "[i]n federal courts, to show standing under Article III of the Constitution, a *Plaintiff* must establish the existence of an injury that is: (i) concrete, particularized, and *actual or imminent*; (ii) fairly traceable to the challenged action; and (iii) redressable by a favorable ruling." *Id*. at *11. To meet the first requirement, "an 'allegation of *future* injury may suffice if the threatened injury is '*certainly impending*,' or there is a '*substantial risk*' that the harm will occur." *Id*. "Allegations of *possible* future injury are not sufficient," nor is an "objectively-reasonable-likelihood" that the future injury will occur. *Id.* The Appellate Court opined an increased risk of harm is not sufficient to confer standing. Finally, the Appellate Court reasoned that alleged "appreciable emotional injury" did not confer standing on Plaintiffs. *Id*. at *14. Specifically, the Appellate Court found that, because the purported emotional injury did not flow from an "imminent, certainly impending, or substantial risk of harm," it could not, on its own, confer standing. *Id*.

***Pierscionek, et al. v. Illinois High School Association,* Case No. 14-CH-19131 (Ill. Cir. Ct. Oct. 27, 2015).** Plaintiff brought a putative class action alleging that Defendant failed to minimize the risk of concussions for student athletes. Plaintiff sought: (i) injunctive relief to correct the deficiencies with Defendant's policies and procedures; and (ii) to establish a medical monitoring program for high school athletes. *Id.* at 1. Defendant moved to dismiss Plaintiff's complaint, and the Court granted the motion. *Id.* Defendant argued that Plaintiff improperly asked the Court to impose policies, which were within the province of the Illinois legislature and various local school boards. *Id.* at 2. The Court agreed with Defendant that Plaintiffs asked to impose policy and, in effect, enact legislation when determining policy and enacting legislation already existed within the distinct province of the legislature. *Id.* The Court found that Plaintiff had specifically alleged in his complaint that the legislature had charged Defendant with addressing concussions in student athletes and as such, despite recognizing that the legislature dictated in this regard, Plaintiff asked for an injunction and medical monitoring. *Id.* The Court held that it was clear that Defendant had acted to protect student athletes, and the measures alleged to be necessary by Plaintiff were simply conclusions and not factual allegations capable of being proven. *Id.* at 3. The Court recognized that Defendant's arguments were sufficient for dismissal of the complaint, but it addressed other bases for dismissal for the edification of the parties and in the event of an appeal. *Id.* First, the Court held that Plaintiffs' "negligent rule-making" allegation was not a viable cause of action. *Id.* Plaintiffs' case theory – that Defendant was careless and negligent by breaching its duty of care by failing to enact specific procedures – was not a recognized cause of action for negligence by an individual against a governmental entity. *Id.* at 4. Second, the Court held that Plaintiff's action failed under the "contact sports exception," first recognized in *Karas v. Strevell*, 227 Ill. 440 (2008) *Id.* at 5. The Court found that the contact sports exception was applicable to Defendant as it was a governmental entity charged with safeguarding student athletes and had no direct relationship to the sport or Plaintiff. *Id.* at 6. Third, the Court held that Plaintiff failed to state a claim for injunctive relief. *Id.* at 7. The Court observed that by bringing a legal claim of negligence, Plaintiff was not entitled to injunctive relief as a remedy because one of the elements necessary for injunctive relief was the absence of an adequate remedy at law. *Id.* Fourth, the Court held that Illinois law did not recognize a medical-monitoring-only cause of action. *Id.* The Court observed that to recover damages for an increased risk of future harm in a tort action, Plaintiff must establish that Defendant's breach of duty caused a present injury which resulted in that increased risk. *Id.* at 8. However, the Court reasoned that Plaintiff's complaint sought on-going medical monitoring as opposed to screening for a medical condition, but the pleading failed to establish a causal link between Defendant and the damages Plaintiff sought. *Id.* Lastly, Defendant argued that Plaintiff expressly assumed the risk of injury when he signed an athletic permit. *Id.* at 9. Plaintiff argued that he was a minor at the time he signed the document relied upon by Defendant and therefore he did not know of the risks involved. *Id.* The Court rejected Plaintiff's argument and held that he had ratified the contract failing to disaffirm it within a reasonable time after attaining majority. *Id.* Accordingly, the Court granted Defendant's motion to dismiss.

***Price, et al. v. Philip Morris, Inc.,* 2015 Ill. LEXIS 117687 (Ill. Nov. 4, 2015).** Plaintiffs filed a class action against Defendant, a cigarette manufacturer, alleging that Defendant's use of the terms "lights" and "lowered tar and nicotine" on the packaging and in the marketing of various cigarettes violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") and the Uniform Deceptive Trade Practices Act. Defendant raised numerous defenses in response to the complaint, including that it was barred by § 10b(1) of the Consumer Fraud Act. *Id.* at *3. The trial court rejected this defense and certified a class consisting of all purchasers of "Lights" from 1971-2001. Following a bench trial, the trial court rendered judgment in favor of Plaintiffs and awarded $10.1 billion in damages. *Id.* at *3-4. After several reversals on various appeals, the Illinois Supreme Court granted Defendant's petition for leave to appeal, specifically to address whether the Illinois Appellate Court correctly reversed the judgment of the trial court denying Plaintiffs' petition brought pursuant to § 2-1401 of the Code of Civil Procedure. *Id.* at *6. The Illinois Supreme Court vacated the judgments of the Appellate Court and held that cause was dismissed without prejudice to Plaintiffs' right to file a motion to recall the mandate in the Supreme Court. *Id.* at *17. Defendant argued that both the trial court and the Appellate Court, on review of the trial court's judgment, erred in considering the merits of Plaintiffs' § 2-1401 petition. *Id.* at *7. The Supreme Court agreed, holding that § 2-1401 did not authorize the trial court to grant collateral relief from the judgment, and that such relief must be sought by filing a motion to recall the mandate at the appellate level. *Id.* Accordingly, the Illinois Supreme Court vacated the judgment and dismissed the cause of action without prejudice to Plaintiffs to file a motion to recall the mandate in the Illinois Supreme Court. *Id.* at *17.

***S37 Management, Inc., et al. v. Advance Refrigeration Co*., Case No. 06-CH-20999 (Ill. Cir. Ct. Jan. 8, 2015).** The Court denied Defendant's motion to certify a question for interlocutory appeal regarding the application of the crime-fraud exception to the attorney-client and work-product privilege as it applies to communications between a Defendant, its counsel, and putative class members during the opt-out period. The Court previously had granted Plaintiff's motion for class certification. The class notice described the nature of the claims, and directed putative class members to contact class counsel in writing regarding any question on the notice. Plaintiff subsequently filed a motion requesting a protective order and sanctions, asserting that Defendant had impermissibly engaged in a campaign to urge its customers to opt-out of the class during the opt-out period. The Court subsequently issued an order barring Defendant from communications with any class members. Plaintiff then filed an amended motion for a protective order and sanctions, providing additional evidence of Defendant's alleged improper communications during the opt-out period. Plaintiff also sought discovery from Defendant's counsel about their role in Defendant's communications. Specifically, Plaintiff moved to compel all documents "relating to communications between Defendant and defense counsel regarding Defendant's communications to members of the class regarding opting out of the class." *Id.* at 2. Defendant objected to Plaintiff's request based on the attorney-client and work-product privileges. In response, Plaintiff argued that the crime-fraud exception applied to its request, and therefore, the privilege did not bar the discovery request. Plaintiff attached evidence to the motion illustrating that there was reason to believe that defense counsel had assisted Defendant in unilaterally reaching out to class members and urging them to opt-out of the case. Plaintiff alleged that this was accomplished using misleading information about the litigation, which constituted illegal or fraudulent activity. The Court found that this evidence gave it a reasonable basis to suspect Defendant's counsel may have assisted or advised in the communication asserted to be an illegal or fraudulent opt-out campaign. On this basis, the Court granted Plaintiff's motion to compel discovery regarding defense counsel's communications with the class. Defendant then filed a motion under Rule 308(a) of the Illinois Supreme Court Rules to certify a question for interlocutory appeal. The question was, "[w]hether the crime-fraud exception to the attorney-client and work-product privilege applies to communications between a Defendant and its counsel that relate to Defendant's communications with putative class members during the opt-out period." *Id*. at 6-7. The Court denied Defendant's motion. The Court reasoned that as worded, the question would require appellate review to determine whether the crime-fraud exception could ever apply, as a matter of law, to attorney/Defendant communications that relate to a Defendant's communications with putative class members during the opt-out period. The Court reasoned that there was no substantial ground to dispute that the crime-fraud exception could apply to such communications, if a sufficient showing was made. Additionally, the Court found that the question did not accurately address the specific issue on which it had ruled. The ruling was explicitly premised on evidence which raised the

possibility that defense counsel conferred with Defendant about soliciting class members to fill out opt-out forms and affidavits during the opt-out period. Accordingly, the Court denied Defendant's motion to certify a question for interlocutory appeal and granted Plaintiff's motion to compel discovery.

***Spadoni, et al. v. United Airlines, Inc.*, 2015 Ill. App. LEXIS 150458 (Ill. App. Ct. 1st Dist. Dec. 31, 2015).** Plaintiff filed a class action against Defendant for breach of contract, alleging that Defendant, an airline that also transports cargo, removed passengers' checked baggage while permitting the cargo to remain on the aircraft, or loaded the cargo in lieu of the passenger baggage, in order to meet aircraft weight restrictions established by the Federal Aviation Administration. The trial court granted Defendant's motion to dismiss the complaint with prejudice, and Plaintiff appealed. The Illinois Appellate Court affirmed the trial court's order of dismissal. *Id.* at *2. Plaintiff, who had paid a non-refundable fee of $25 to check a bag on a domestic flight, argued that Defendant had a duty, based on the terms and conditions set forth in the Contract of Carriage, to transport each passenger's checked baggage on the same aircraft as the passenger "unless such carriage is deemed impractical." *Id.* While Plaintiff admitted that Defendant was vested with broad discretion in determining whether carriage of a passenger's checked baggage on the same aircraft as the passenger was practical, Plaintiff alleged that Defendant had a duty to exercise this discretion in accordance with an implied covenant of good faith and fair dealing. *Id.* at *4-5. Rejecting these arguments, the trial court dismissed the complaint pursuant to § 2-615 of the Illinois Code of Civil Procedure, holding that Plaintiff failed to allege – and, indeed, could not allege – that, absent application of the implied covenant of good faith and fair dealing, Defendant violated the express terms of the Contract of Carriage where those terms gave Defendant sole discretion over whether to transport passengers with their checked baggage on the same aircraft. *Id.* at *7. Plaintiff contended the trial court erred in ruling that her claim, based on Defendant's alleged breach of the implied covenant, was preempted by the Airline Deregulation Act of 1978. The Appellate Court rejected this argument, holding that under *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014), an implied covenant claim will always be preempted if the covenant imposed by state common law cannot be expressly disavowed; even if the implied covenant could be disavowed, the claim would still be preempted if application of the covenant was based on a state policy. *Id.* at *11. Accordingly, the Appellate Court held that the trial court did not err in dismissing the complaint, and affirmed its dismissal order. *Id.* at *13-14.

***Stefanski, et al. v. The City Of Chicago,* 2015 Ill. App. LEXIS 133 (Ill. App. Ct. 1st Dist. Feb. 27, 2015).** Plaintiff brought a class action seeking declaratory relief and damages for unjust enrichment on behalf of herself and a putative class of beneficiaries of Defendant's medical insurance plan who had: (i) received medical services paid by Defendant's self-funded insurance plan for personal injuries caused by third-party tortfeasers; (ii) employed the services of an attorney to collect damages from such tortfeasers; and (iii) received recoveries from such tortfeasers that were reduced due to Defendant's improper refusal to reduce its subrogation claim to account for its share of the attorney fees, in violation of a "common fund doctrine." *Id.* at *1. Defendant's Chicago Medical Care Plan (the "Plan") paid for medical services Plaintiff received in connection with an automobile collision caused by a third-party tortfeasor. Plaintiff obtained an $18,000 settlement from the tortfeasor, and paid one-third of the amount toward his attorneys' fees. Defendant then asserted a claim against Plaintiff's recovery pursuant to a subrogation and reimbursement provision contained in the Plan. Although Defendant initially claimed a $3,824 lien on Plaintiff's recovery, representing the full amount it paid for Plaintiff's medical services, it ultimately reduced its claim to $2,900, in order to settle the dispute over the common fund issue. *Id.* at *3. Plaintiff paid the amount "under protest," and later brought this action alleging that Defendant's refusal to reduce its subrogation and reimbursement claim to account for its share of Plaintiff's attorneys' fees violated the common fund doctrine and caused her damages. *Id.* at *4. Plaintiff also sought class certification. The trial court granted Plaintiff's motion for class certification. The Illinois Appellate Court reversed, finding that Plaintiff failed to state an actionable claim. The Appellate Court rejected Plaintiff's reliance upon the common fund doctrine, which is an equitable, quasi-contractual right to attorneys' fees recognized when no other relevant or express contract is in place. *Id.* at *9. The Appellate Court noted that the express language contained in the Plan documentation provided that Defendant would not be responsible for any attorneys' fees incurred by or on behalf of Plaintiff with respect to her lawsuit, and a remedy based on a quasi-contract is not available when an express contract exists concerning the same subject matter. *Id*. at *9-10. The Appellate

Court concluded that Defendant was entitled to assert a subrogation claim on Plaintiff's recovery based on the Plan, and Plaintiff could not rely upon the common fund doctrine to support her claims. *Id.* at *11. Not persuaded by the cases cited by Plaintiff, the Appellate Court noted that "none of [the] decisions involved the situation presented here, *i.e.*, an insured attempting to recover directly from their insurer in a separate lawsuit asserting a violation of the common fund doctrine in the context of a contractual subrogation claim." *Id.* at *20. The Appellate Court observed that none of the cases recognized a litigant's individual right to claim application of the common fund doctrine to reduce a contractual subrogation lien claimed by the litigant's insurer; instead, the case law recognized the right of such a litigant's attorney to rely upon the common fund doctrine in the context of such subrogation claims, and only when the exercise of such a right could accurately be described as an independent action by and on behalf of such an attorney. *Id.* The Appellate Court rejected Plaintiff's contention that by paying her attorney's full one-third fee, she has essentially been assigned her attorney's common fund claim. The Appellate Court found that a claim under the common fund doctrine is not a claim at law, but one in equity, and equity did not support Plaintiff's attempt to recover under that doctrine. *Id.* at *29. The Appellate Court therefore concluded that Plaintiff has not stated an actionable claim, and thus, class certification was improper. *Id.* at *29-30. Accordingly, the Appellate Court vacated the trial court's class certification order.

***Stonecrafters, Inc., et al. v. Wholesale Life Insurance Brokerage, Inc.*, 2015 Ill. App. Unpub. LEXIS 1390 (Ill. App. Ct. 2d Dist. June 23, 2009).** Plaintiff, a corporation, brought a putative class action alleging that Defendant sent unsolicited faxes in violation of the federal Telephone Consumer Protection Act ("TCPA") and the Illinois Consumer Fraud and Deceptive Business Practices Act. The parties settled the case and a $5,999,999.98 judgment was entered against Defendant for the benefit of the putative class. Plaintiff agreed not to collect damages from Defendant and sought recovery from Defendant's insurers, Milwaukee Insurance Company ("MIC") and Unitrin, Inc. Plaintiff brought supplementary third-party citations against MIC and Unitrin. The trial court granted Plaintiff's motion for summary judgment, finding that the settlement was reasonable and limited the accrual of interest on the settlement to the period from the date of the entry of summary judgment. *Id*. at *1. MIC appealed the judgment against it, and Plaintiff cross-appealed, which the Illinois Appellate Court reversed. The Appellate Court noted that the trial court concluded that the parties' settlement for $5.99 million was reasonable and based its finding on evidence from the Defendant's fax broadcast summary that there were 16,674 successful faxes sent and 4,188 failures. The trial court relied heavily on those numbers in calculating Defendant's total exposure under the TCPA and determined that Defendant's decision to settle for nearly $6 million conformed to the standard of a prudent business and that the amount was what a reasonably prudent person in the position of Defendant would have settled for on the merits of Plaintiff's claim. *Id*. at *19. The Appellate Court noted that the trial court did address the fact that Defendant had two insurance policies at the time the faxes were transmitted, and the total coverage under the policies was $6 million, and the settlement was coincidentally for an amount two cents short of the total coverage. *Id*. at *21-22. The trial court did not, however, address how any unclaimed money would be distributed through *cy pres*. *Id*. at *22. Accordingly, the Appellate Court reversed the trial court's order granting summary judgment in Plaintiff's favor and remanded the case to determine the reasonableness of the class action settlement.

(viii) Indiana

***LHO Indianapolis One Lessee, LLC v. Bowman, et al.*, 2015 Ind. App. LEXIS 561 (Ind. Ct. App. Aug. 11, 2015).** Plaintiff brought a putative class action alleging that she and 61 others suffered a personal injury and an sustained economic loss as a result of consuming tainted food at Defendant's Indianapolis Marriott Downtown. *Id.* at *3. Plaintiffs and others attended the Annual Alpha Kappa Alpha Sorority, Inc.'s Central Regional Conference held at the Marriott in Indianapolis, and became violently ill several hours after eating food prepared at the event. *Id.* at *2. In October 2014, the trial court certified a class finding that Plaintiff satisfied the requirement of Indiana Rule 23(B)(3). On appeal, Defendant disputed that Plaintiff met the requirements of Indiana Rule 23(B)(3). Defendant contended that even if a jury found that food served at the Marriott was contaminated or defective, each claimant would still need to prove that his or her injuries were proximately caused by consumption of that food. *Id.* at *24. The trial court had concluded that Plaintiff satisfied the predominance requirement as Plaintiff and the class members' claims all derived from a "common nucleus." *Id.* at *22-23. The Indiana Court of Appeals agreed with Defendant

and reversed the trial court's order certifying the class. The Court of Appeals reasoned that, to prevail on Plaintiff's claim, she would not only have to show that Defendant served tainted food, but also that the food was the cause-in-fact of each class member's symptoms and their injuries. *Id.* at *24-25. Because Plaintiff's list of attendees who fell ill during the conference had included those who had eaten either the lunch or the dinner, and some who had eaten both, and had not specified which dishes the guests chose, the Court of Appeals found that, while Defendant's generic liability could be easily established, the case would become inevitably dominated by the individual issues of the extent and nature of the injuries and the degrees of exposure not suitable for class treatment. *Id* .at *27-29. The Court of Appeals distinguished between Plaintiff's case and a previous case where it ruled that class action treatment was well suited to cases of food poisoning on a cruise ship or at a nursing home. The Court of Appeals explained that, in those cases, proximate cause was present in a controlled and limited environment and could be determined on a class-wide basis because the cause and consequences of the common disaster were identical for all the members; in contrast, in Plaintiff's case, there was no consistency among the individual class member's dining options and locations. *Id.* at *27. The Court of Appeals concluded that the questions of law and fact common to the class members did not predominate over the issues affecting the individual members. *Id.* at *29. Accordingly, the Court of Appeals reversed the trial court's order of class certification, and suggested Plaintiff modify her class definition and the trial court to certify a general liability-only class on remand.

(ix) Iowa

***Kragnes, et al. v. City Of Des Moines, Iowa*, 2015 Iowa App. LEXIS 15 (Iowa App. Jan. 14, 2015).** In this class action brought against the City of Des Moines alleging that it charged excessive franchise fees that amounted to illegal taxes, the Iowa Court of Appeal upheld the trial court's order to reduce the fees of Plaintiffs' counsel from the request of $15 million to $7 million. In 1960, the City had entered into franchise agreements with its electricity and natural gas providers agreeing that each provider would pay the City a percentage of its gross receipts for their sales to the City. These agreements were then made into ordinances. On May 6, 2004, the then Iowa Governor signed a law phasing out sales and use tax for the sale of gas and electricity for residential use. Facing budget shortfalls, the City updated franchise agreements with its electric and gas providers by increasing franchise fees. Plaintiff then brought a class action on behalf of herself and those similarly-situated arguing that the increased franchise fees were illegal taxes. Ultimately, the trial court – and additional appellate rulings – had determined that the increased fees were illegal taxes, and that the City had to refund approximately $40 million to its taxpayers. *Id.* at *2. The $40 million was placed into a fund so that it could be remitted to taxpayers after class counsel's fees were removed. Class counsel requested $15 million in fees, or approximately 37% of the fund. Analyzing the factors set forth in Iowa Rule of Civil Procedure 1.275(5) and Iowa Rule of Professional Conduct 32:1.5(a), the trial court had determined that the amount was "not fair to the class members" and that an award of $7 million in fees, or approximately 18% of the fund, was appropriate. *Id.* at *3. Class counsel appealed the award, claiming that it was unreasonably low. The Court of Appeal affirmed the trial court's award. The Court of Appeal first considered whether the trial court erred in considering criteria other than those laid out in the Iowa Rules of Civil Procedure and Rules of Professional Conduct in deciding to reduce class counsel's fee award. Particularly, the Court of Appeal considered whether the trial court's decision to consider the fact that the money used to pay the attorneys' fees and expenses would come from the very residents who had already been wronged in the illegal extraction of franchise fees was an abuse of discretion. *Id.* at *7. The Court of Appeal found that the trial court had properly considered the factor because the applicable rules did not preclude consideration of additional factors in fixing a fee award. *Id.* Class counsel argued that he was entitled to the 37% fee because that was the amount stated in contingency fee agreement with the class representative and published to the class. The Court of Appeal, however, rejected the argument, and pointed out that a trial court is not bound by the fee agreements between class counsel and the class representative. *Id.* at *10. The Court of Appeal noted that "the fact that class counsel and the named parties agreed that attorneys' fees would be calculated on a percentage basis cannot control what approach the [trial] court should use in exercising its inherent power to determine reasonable attorneys' fees to be paid from the common fund." *Id*. at *11. The Court of Appeal thus upheld the trial court's finding that the attorneys' fees award could be reduced in spite of the agreed upon and published fee arrangement. The Court of Appeal further held that an award of 18%

of the $40 million fund was not unreasonable. Given the uniqueness of the litigation, its complexity, magnitude, and the contingent nature of the case, and the results achieved and benefits conferred upon the class, the Court of Appeal concluded that an appropriate and fair attorneys' fee for class counsel would be 18% of the $40 million fund. *Id.* at *15-17. Accordingly, the Court of Appeal affirmed the trial court's award of reduced attorney fees of $7 million to class counsel.

***Mueller, et al. v. Wellmark, Inc.*, 2015 Iowa LEXIS 21 (Iowa Feb. 27, 2015).** Plaintiffs, a group of chiropractors, brought a class action against Defendant Wellmark Inc. and its affiliates, challenging Wellmark's reimbursement rates and practices for chiropractic services, and sought relief under variety of Iowa insurance statutes. *Id*. at *2. Wellmark, an Iowa-based health insurer that belonged to the national Blue Cross and Blue Shield ("BCBS") network, had contracted with healthcare providers in Iowa to provide services at certain reimbursement rates. *Id*. at *1. The trial court had dismissed Plaintiffs' insurance claims, finding no private cause of action was available under those statutes, and granted summary judgment on the antitrust claims based on the state action exemption in the Iowa Competition Law. *Id*. at *3. The Iowa Supreme Court had previously remanded the case on the basis that the state action exemption did not insulate Defendants' reimbursement rates from antitrust review. *Id*. at *4. On remand, Plaintiffs stipulated that their antitrust claims rested on the conspiracies between Wellmark and out of state affiliates of BCBS, and between Wellmark and self-funding employers that hired Wellmark to administer their plans, and were being asserted on a *per se* theory. *Id*. at *5. Defendants moved for summary judgment on Plaintiffs' *per se* theory, and the trial court granted the motion. On appeal, the Iowa Supreme Court affirmed. The Supreme Court agreed with the trial court that Wellmark's arrangements with self-insured employers and out-of-state BCBS affiliates were governed by the rule of reason for various reasons. First, the Supreme Court concluded that the arrangements in this case were not naked price fixing-arrangements but were more akin to joint ventures, as the self-insureds were not entering into bare agreements to refrain from competing on price with Wellmark, and were buying administration services from Wellmark. *Id*. at *14-15. Furthermore, the Supreme Court found that neither of those types of Wellmark arrangements truly represented a horizontal agreement between competitors. *Id*. at *18. The Supreme Court also determined that the reasoning in *North Jackson Pharmacy, Inc. v. Caremark Rx, Inc.*, 385 F. Supp. 2d 740 (N.D. Ill. 2005), was persuasive, which provided that by negotiating prescription drug reimbursement rates on behalf of 1,200 plan sponsors that Defendant represented, it acted on behalf of what was essentially a cooperative purchasing group; it rejected the *pre se* categorization, and held that the arrangement was not a naked restraint, but one which was ancillary to a broader venture with precompetitive potential. *Id*. at *20. The Supreme Court clarified that it was not foreclosing a rule of reason claim against Wellmark if it were shown that anti-competitive consequences of its practices exceeded their pro-competitive benefits; instead, it was merely upholding the trial court's ruling that Wellmark's arrangements with self-insureds and the out-of-state BCBS licensees were not subject to the *per se* rule. *Id*. at *27. Accordingly, the Supreme Court affirmed the trial court grant's of summary judgment.

(x) Louisiana

***Baker, et al. v. PHC-Minden, L.P.,* 2015 La. LEXIS 699 (La. May 5, 2015).** Plaintiffs, a group of insured patients, brought putative class actions across Louisiana against Defendants, challenging the legality of Defendants' policy of collecting or attempting to collect the undiscounted rate from the insured if a liability insurer might be liable, and implemented through the filing of medical liens against Plaintiffs' lawsuits and settlements pursuant to the health care provider lien statute. *Id.* at *1. The trial court granted Plaintiffs' motion for class certification. On appeal, the Louisiana Court of Appeal reversed. Subsequently, the Supreme Court of Louisiana granted *certiorari* to resolve the issue of whether a class action was the superior method for adjudicating actions brought pursuant to the Health Care Consumer Billing and Disclosure Protection Act ("Balance Billing Act"). After reviewing the record and the applicable law, the Supreme Court found that a class action was superior to any other available method for a fair and efficient adjudication of the common controversy over the disputed billing and lien practices. The Supreme Court pointed out that a "class action certification is purely procedural," and "[w]hat is of primary concern in the certification proceeding is simply whether the Plaintiffs have met the statutory requirements to become a class action, not the merits of the underlying litigation." *Id.* at *26-27. The Supreme Court noted that, in

reversing the class certification order, the Court of Appeal focused upon the merits of the common issue, rather focusing on the procedural device proposed to establish liability and causation. *Id.* at *27. The Supreme Court explained that the eventual question of the fact-finder was whether or not Defendants' actions violated the Balance Billing Act, and only after the determination of the issues of liability and causation would the trial court have to determine what damages could be awarded under the Balance Billing Act. *Id.* at *27-28. Thus, according to the Supreme Court, at the center of the case was Defendants' collection policy, and not the individual damages Plaintiffs suffered as a result of the policy. *Id.* at *34. Therefore, since Plaintiffs met all other requirements for class certification, the Supreme Court concluded that a class action was the superior method for adjudicating the legality of Defendants' collection policy under the Balance Billing Act. *Id.* at *35. Accordingly, the Supreme Court reversed the ruling of the Court of Appeal.

(xi) Missouri

***Elsea, et al. v. U.S. Engineering Co.*, 2015 Mo. App. LEXIS (Mo. Ct. App. Mar. 17, 2015).** Plaintiffs brought a putative class action on behalf of individuals exposed to asbestos and sought recovery of compensatory damages for the expense of prospective medical monitoring allegedly necessitated by a defined amount of minimum exposure. Plaintiffs alleged that Defendants contracted to perform a retrofit project at the Jackson County Courthouse. *Id*. at *5. According to Plaintiffs, Defendants disturbed the insulation around the fittings and pipes and caused asbestos dust to blow throughout the courthouse. *Id*. The trial court denied Plaintiffs' motion for class certification. The trial court reasoned that issues such as actual asbestos exposure – varying and depending upon date, location, and duration of each class member's presence in the courthouse – were individualized issues, making a class action for medical monitoring inordinately difficult and necessitating individual hearings to categorize class members and to address individual issues of exposure, dose, causation, and monitoring protocol. *Id*. at *8. Plaintiffs sought and received the trial court's permission to file an interlocutory appeal. On appeal, the Missouri Court of Appeals reversed. Plaintiffs principally asserted that the trial court failed to appreciate the uniqueness of a medical monitoring claim for damages as described in *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007). *Id*. at *10. In *Meyer*, the Missouri Supreme Court recognized that a Plaintiff can obtain damages for medical monitoring upon a showing that Plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure. *Id*. at *13. As to commonality, the Court of Appeals found that the common fact of exposure to a set of toxins from a single source was a common and overriding issue, and the significance and extent of toxic exposure was primarily an issue of common proof. Under Plaintiffs' theory of liability, the individual factors identified by the trial court were not particularly relevant because the need for monitoring was based on a common threshold of exposure. *Id*. at *19. Similarly, regarding predominance, the Court of Appeals similarly observed that the medical monitoring issue affecting the entire putative class was based upon the common and overriding fact of a threshold level of asbestos exposure caused by a single source, *i.e.,* Defendants' air-handler retrofit project. *Id.* at *27. Finally, as to superiority, the Court of Appeals noted that the class management concerns identified by the trial court ignored the distinction between a medical monitoring claim and a personal injury claim. Because testing, not treatment, lies at the core of a medical monitoring claim, Plaintiffs need not establish a present physical injury and the concerns identified by the trial court about individualized factors were not relevant. Accordingly, the Court of Appeals reversed the trial court's order denying class certification and remanded the case.

(xii) New Jersey

***Barbarino, et al. v. Paramus Ford, Inc.,* 2015 N.J. Super. Unpub. LEXIS 2197 (N.J. Super. App. Div. Sept. 11, 2015).** Plaintiffs, a group of customers, brought a class action alleging that Defendant entered into automobile lease agreements that violated the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act (the "TCCWNA"). Plaintiffs signed Motor Vehicle Retail Orders ("Orders") that required Plaintiffs to pay sales tax. Plaintiffs paid enumerated sales taxes as required by the Orders and then filed suit alleging violation of the TCCWNA. Defendant moved to dismiss, and the Court granted the motion. At the outset, the Court noted that Plaintiffs' claims concerned the sales and use taxes imposed on vehicle lease transactions. The Court found that the language in Plaintiffs' Orders did not violate the TCCWNA and,

therefore, Plaintiffs failed to state a claim. *Id*. at *7. The Court explained that, at the time Plaintiffs executed the Orders, Plaintiffs were obligated to pay the sales tax on the leased motor vehicles. *Id*. at *7-8. Plaintiffs did not allege that they suffered any injury as a result of this provision or that it was illegal for Defendant to obligate customers to pay sales, use, or occupational taxes. *Id*. at *8. Further, the Court noted that Plaintiffs did not assert that they paid taxes that they should not have paid pursuant to New Jersey law governing automobile sales and leases. *Id*. New Jersey's Sales and Use Tax Act imposed an obligation on customers to pay sales tax applicable to their vehicle lease transactions, and Plaintiffs did not identify the existence of any statute in any jurisdiction that altered this basic obligation. *Id*. Accordingly, the Court concluded that Plaintiffs failed to state a claim under the TCCWNA and granted Defendant's motion to dismiss.

***Daniels, et al. v. Hollister Co.*, 2015 N.J. Super. LEXIS 77 (N.J. Super. App. Div. May 13, 2015).** Plaintiff, a purchaser, brought a class action alleging that one of Defendant's stores refused to honor a gift card although the card contained no expiration date. Customers purchasing at least $75 of merchandise received a $25 gift card for use in Defendant's stores and on its website. *Id.* at *3. The trial court certified a class comprised of consumers who possessed Defendant's promotional gift cards in hard copy that contained no expiration date and which Defendant issued them as part of the 2009 promotion and voided on or after January 30, 2010; and consumers who discarded such cards because Defendant's store had informed them that the cards expired or had been voided. On Defendant's appeal, the New Jersey Appellate Division affirmed. The class consisted of numerous individuals who allegedly suffered small injuries, and Defendant voided over $3 million worth of $25 gift cards. *Id.* at *5. Defendant argued that Plaintiffs did not meet the ascertainability requirement and the class certification order violated due process because Defendant would have no ability to test class membership because absent class members would have no opportunity to opt-out, and because the preclusive effect of any judgment would be unknown and unenforceable. *Id.* at *7. The Appellate Division, however, remarked that Rule 4:32-1 does not require that a class be ascertainable as a condition for certification. *Id.* Further, the Appellate Division noted that federal case law precedents that found the ascertainability requirement silently residing within Rule 23 so held because they believed this judge-made doctrine eliminates administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on the easy identification of class members; protection of absent class members by facilitating the best notice practicable required by the federal rules; and protection of Defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable. *Id.* at *8. The Appellate Division, however, also observed that *Shelton v. Bledsoe*, 775 F.3d 554, 560 (3d Cir. 2015), held that the ascertainability doctrine is different from the requirement that a class be properly defined, as the Third Circuit recognized held that the question of ascertainability was analyzed separately from the question of whether the class was properly defined. *Id.* at *8-9. Additionally, the Appellate Division reasoned that the policy at the very core of the class action mechanism was the desire to overcome the problem that small recoveries do not provide the incentive for any individual to bring an individual action prosecuting his or her rights and the mechanism solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's labor. *Id.* at *11. The Appellate Division remarked that ascertainability, as defined by Defendant, was particularly misguided when applied to a case where any difficulties encountered in identifying class members are a consequence of a Defendant's own acts or omissions. *Id.* at *13-14. Here, if Defendant had obtained the identities of consumers when giving out the gift cards, it would not have been faced with the problems it now offered as grounds for blocking class certification. Finally, the Appellate Division noted that consumers could have purchased more than $75 of Defendant's merchandise because of the lure of a $25 gift card, and Defendant took away this bargain by unilateral cancellation of the gift card at a later date. The Appellate Division opined that the class action device was created to allow compensation for such small wrongs and also to deter future wrong-doing in the marketplace. Accordingly, the Appellate Division affirmed the grant of class certification.

(xiii) New York

***Abbo-Bradley, et al. v. City Of Niagara Falls,* 2015 N.Y. App. Div. LEXIS 7072 (N.Y. App. Div. Oct. 2, 2015).** In this class action filed by Plaintiffs, as parents and natural guardians of their children, the New York Appellate Division affirmed in the trial court's dismissal of the complaint. Plaintiffs brought an action

to recover damages for personal injuries and property damage allegedly caused by Defendants' failure to properly remediate toxic contamination at the Love Canal Site ("landfill remediation") and the sewers in the Love Canal corridor ("sewer project") and release of toxins. *Id*. at *3. Several Defendants moved to dismiss the complaint, and the trial court granted the motions as to claims seeking damages resulting from the landfill remediation and sewer project, but denied them as to release of toxins. *Id*. at *3-4. On the parties' cross-appeal, the Appellate Division allowed both the appeals and affirmed in part and reversed in part. The Appellate Division agreed with Defendants that the trial court erred in denying the motions because Plaintiffs' children lacked an ownership or possessory interest in the respective properties. *Id*. at *5. The Appellate Division therefore modified the order accordingly. The Appellate Division also agreed with Plaintiffs that the trial court erred in dismissing claims of negligence, abnormally dangerous activity, private nuisance, and trespass, insofar as they sought damages related to the landfill remediation and sewer project, on the ground that those claims were barred by judicial estoppel. *Id*. The Appellate Division therefore modified the orders as to those claims too.

***City Trading Fund, et al. v. Howard,* Case No. 651668/2014 (N.Y. Super. Ct. Jan. 9, 2015).** Plaintiffs, a group of investors, brought a putative class action alleging inadequacies in the disclosures provided by Defendant Martin Marietta Materials, Inc. ("MMM") to its shareholders in connection with its proposed acquisition of Defendant Texas Industries, Inc. ("TXI"). *Id.* at 2. On March 3, 2014, MMM filed a preliminary proxy with the U.S. Securities Exchange Commission that contained disclosures about the merger, and the definitive proxy, filed on May 30, 2014, included a copy of the notice sent to the shareholders of MMM and TXI notifying them that meetings to vote on the merger would be held on June 30, 2014. *Id.* at 5. Plaintiffs commenced this action the same day the definitive proxy was filed, and averred that the definitive proxy suffered from ten categories of inadequate disclosures, including that MMM's advisors did not show the work behind their analysis of their EBITDA projections. *Id.* at 5-9. Plaintiffs also sought details of the substance of the board's discussions leading up to the merger, and wanted specific information concerning MMM's three financial advisors, including the exact amount of fees JP Morgan charged one of TXI's institutional shareholders for providing banking services not related to the merger and the value of each financial advisor's postions in TXI securities. *Id*. Before the Court could rule on the issues, however, the parties entered into settlement, and moved for preliminary approval of the settlement. Under the terms of the settlement, Defendants agreed to make certain supplemental disclosures to the shareholders in exchange for a limited release pertaining to claims regarding inadequate disclosures. *Id.* at 16. The Court denied approval to the settlement, finding that Plaintiffs and their counsel, the Brualdi Law Firm PC, engaged in "pernicious" litigation simply to extract legal fees. *Id.* The Court examined each of the ten categories of allegedly inadequate disclosures set forth in the complaint, and found that none of them were material. The Court noted that Plaintiffs had not explained why or how the requested information would be used by a shareholder to decide the reasonableness of the merger, and the requested disclosures were even less material than the backup for the banks' analysis, as they pertained to pre-merger agreement discussions. *Id.* at 10-14. The Court further found that nothing in the supplemental disclosures explained to the shareholders why the information was material, or significantly altered the information made available earlier. *Id.* at 18-21. The Court ruled that the merger-related disclosures demanded by Plaintiffs to affect settlement were trivial and a proposed $500,000 legal fees for the Brualdi firm appeared to the true reason for the lawsuit. The Court found it significant that the two individual Plaintiffs, Lawrence Bass and Anthony Carulla, who owned only 10 shares of MMM prior to the merger agreement, had filed at least 13 lawsuits for the sole purpose of bringing stockholder lawsuits. *Id.* at 14-15. In sum, the Court did not believe that Plaintiffs filed this class action because they had genuine concern for the company's corporate governance. *Id.* at 35. Under the given circumstances, the Court opined that approving the settlement would both undermine the public interest and the interests of MMM's shareholders, and it would incentivize Plaintiffs to file frivolous disclosures lawsuits. *Id.* at 33. The Court therefore denied settlement approval and ordered Defendants to file a motion to dismiss or to answer the suit within 30 days.

***Grunewald, et al. v. The Metropolitan Museum Of Art,* 2015 N.Y. App. Div. LEXIS 987 (N.Y. App. Div. Feb. 5, 2015).** Plaintiffs, members of the public, brought two separate class actions to challenge a policy by Defendant the Metropolitan Museum of Art ("MMA"), in place since 1970, to have all visitors at all times

pay an entrance fee. Prior to 1970, MMA entry was free to all visitors, at least on certain days and times. *Id.* at *1. Plaintiffs alleged that they had to pay for tickets to enter the museum on days and at times that admission should have been free. Plaintiffs alleged that MMA's policy of charging an entry fee violated certain legislation and the lease by which MMA occupied its location in Central Park. Defendants moved to dismiss, asserting that Plaintiffs lacked standing to pursue their claims. The trial court granted Defendants' motions to dismiss. *Id.* On appeal, the New York Appellate Division affirmed. The Appellate Division found that Plaintiffs lacked standing to sue under the 1893 statute. The statute authorized the Department of Public Parks in the City of New York to apply for up to an additional $70,000 of funds to keep, preserve, and exhibit the collections in the MMA. *Id.* at *2. As an express condition of the authorization, the statute required MMA to be free of charge five days a week, including Sunday and two evenings per week. *Id.* The Appellate Division found, however, that the statute provided no express or implied private right of action. *Id.* Although the Parks Department's authority to apply for the additional appropriations for MMA was expressly conditioned upon free admission, Plaintiffs did not request revocation of the Parks Department's authorization to seek additional funds, but only to enforce the condition for that authority. The Appellate Division held that no private remedy to enforce only the conditional portion of the statute was fairly implied, nor would a private right of action to enforce only the condition be consistent with the mechanism of the statute. *Id.* at *3. Second, the Appellate Division held that Plaintiffs lacked standing to sue under the MMA's lease with the City as third-party beneficiaries because the benefit to them was incidental and not direct. It noted that, although government contracts often confer benefits to the public at large, that is not a sufficient basis in itself to infer the government's intention to make any particular member of the public a third-party beneficiary entitled to sue on such contract. *Id.* at *3-4. The Appellate Division found that, for the benefit to be direct, it must be primary and immediate in such a sense and to such a degree as to demonstrate the assumption of a duty to provide a direct remedy to the individual members of the public if the benefit is lost. *Id.* at *4. Here, neither the language of the lease nor any other circumstances indicated that the parties intended to give Plaintiffs individually enforceable rights. Accordingly, the Appellate Division affirmed the dismissal.

***In Re Matter Of Medical Action Industries, Inc. Shareholders Litigation*, 2015 N.Y. Misc. LEXIS 699 (N.Y. Super. Ct. Feb. 25, 2015).** Plaintiffs, a group of shareholders, brought an action alleging breaches of fiduciary duty as well as aiding and abetting thereof in connection with Owens & Minor, Inc.'s buyout of Medical Action Industries, Inc. After parties entered into a settlement stipulation, Plaintiffs' counsel moved for attorneys' fees in connection with the asserted substantial benefit they achieved for the Medical Action public shareholders because of their actions in causing valuable supplemental disclosures in connection with Defendant's issuance of a Form 8-K, following their application for injunctive relief but prior to the requisite shareholder vote on the merger. *Id.* at **2. The Court granted the motion. The Court noted that in New York, attorneys' fees are merely an incident of litigation and are not recoverable absent a specific contractual provision or statutory authority. *Id.* at **4. Here, the stipulation set forth a process whereby the parties decided to avoid the expense of continued litigation and at the same time permit Plaintiffs' counsel to make a request for attorneys' fees. Further, Defendant had reserved their right to challenge the reasonableness of the request and, in that context, whether or not Plaintiffs' counsel had achieved any benefit, substantial or otherwise, in being a causative factor in Medical Action's filing of the 8-K Form with the SEC. The next issue was whether the actions taken by Plaintiffs achieved a substantial benefit for the stockholders or the corporation. The Court observed that a shareholder whose acts result in a substantial benefit to the corporate entity is entitled to recovery of his costs and expenses, and that the term "substantial benefit" requires demonstration, and must actually accomplish a result that corrects a wrong that would interfere with the protection of essential rights of the shareholders. *Id.* at **7. The Court agreed with Defendant that there was no disclosure of assurances of future employment; rather, the supplemental disclosure set forth that each prospective bidder was asked to provide information regarding its intentions to retain the company's management and employees. *Id.* at **17-18. Further, while Defendant averred that disclosure of the relative antitrust risk of the three bidders was irrelevant as no monetary value was assigned to the same, the Court agreed with Plaintiffs that this was a marginally material disclosure as it set forth that the Board had in fact determined that it considered that Owens & Minors offer was indeed less risky and less likely to involve the need for divestiture and/or delay than the competing offers. *Id.* at **19. Further, the supplemental disclosure that the competing bidders were entitled to seek and that the

company was entitled to grant a waiver of the standstill agreement and, if granted, would allow the competitive bidders to make a superior offer coupled with the fact that neither had done so as of the date of the disclosure was significant. *Id.* at **20. The Court opined that such disclosure permitted the shareholders to consider in the relative mix of whether the offer to be voted on maximized the value of their shares, and that the initial disclosures were not clear on this particular point. Accordingly, the Court opined that while only some of the additional disclosures that the parties stipulated were due to the commencement of this litigation, they were somewhat material and conferred a benefit upon the stockholders by providing a heightened level of corporate disclosure. Further, the Court remarked that the material disclosed was settled both at an early stage of the litigation and before class certification. *Id*. at **24. Considering the contingent nature of the case and the time limitations imposed, and because Plaintiffs' counsel pursued this litigation in a diligent and competent manner, the Court awarded attorneys' fees and expenses in the amount of $250,000 to Plaintiffs' counsel.

***Jiannaras, et al. v. Alfant,* 2015 N.Y. App. Div. LEXIS 311 (N.Y. App. Div. Jan. 14, 2015).** Plaintiff, on behalf of himself and other shareholders of Defendant On2 Technologies, Inc., brought a class action alleging that On2's board of directors breached its fiduciary duties to the shareholders by failing to ensure that the shareholders receive maximum value for their shares when it merged with Google and Oxide, Inc. Pursuant to the merger, Google had agreed to acquire each share of On2 common stock in exchange for 60 cents worth of Google Class A common stock, and at that time, the proposed transaction was valued at approximately $106.5 million. Plaintiffs alleged that Defendants made materially misleading disclosures about the merger negotiations and merger terms in the initially preliminary proxy statement/prospectus. In 2009, other shareholders of On2 commenced similar actions in the Delaware Court of Chancery, and in 2010, the parties, including the Delaware Plaintiffs, proposed a settlement pursuant to which they agreed that the instant action could be maintained as a non-opt out class action. *Id.* at *2-3. The settlement also provided for dismissal of the actions in their entirety and a release of "any and all" merger-related claims. *Id.* at *3. Upon notice of the proposed settlement, 226 of the shareholders filed objections. The objectors contended that the proposed settlement contained "an astonishingly broad" release that would "unlawfully restrict" and "unduly burden" the rights of shareholders to pursue their own individual claims for damages. *Id.* After a fairness hearing, the trial court denied approval of the settlement, reasoning that it did not afford non-resident class members the opportunity to opt-out of the settlement in order to preserve their right to assert claims for damages. *Id.* The Delaware Appellate Court affirmed the trial court's order. The Appellate Court found that the trial court had providently exercised its discretion in declining to approve the subject proposed settlement that would have extinguished the right of out-of-state class members to litigate damage claims without giving them the opportunity to opt-out of the class. *Id*. at *8. The Appellate Court cited to and discussed *Matter of Colt Industries Shareholder Litigation*, 77 N.Y.2d 185 (1991), which considered whether a class action complaint demanding predominantly equitable relief required class members to be given an opportunity to opt-out. *Matter of Colt* had stated that, while the settlement at issue there afforded class members relief that was essentially equitable in nature, it "exacted as a price" for that relief a concession that the class members could not pursue damage claims based on the corporate merger that was the subject of that proceeding, and had thus held that the trial court erred in approving a settlement that purported to extinguish the rights of out-of-state class members to litigate damages claims, without giving them a chance to opt-out of the class. *Id*. at *6-7. *Matter of Colt* also had emphasized that the mere fact that the relief initially demanded was largely equitable should not permit a trial court to bind litigants to a settlement that eliminated constitutionally protected property interests without due process. *Id*. at *7. The Appellate Division found *Matter of Colt* analogous to the instant case and controlling. The settlement agreement at issue here impinged upon a distinct right, namely the right to pursue a claim for damages. The Appellate Division therefore affirmed the trial court's order rejecting the proposed settlement.

***Osarczuk, et al. v. Associated Universities, Inc.,* 2015 N.Y. App. Div. LEXIS 5511 (N.Y. App. Div. July 1, 2015).** Plaintiffs brought an action to recover damages for personal injuries and injury to property allegedly resulting from Brookhaven National Laboratory's ("BNL") emission of hazardous and toxic substances into the air, soil, and groundwater over decades. The trial court granted Plaintiffs' renewed motion for certification and certified two sub-classes. On Defendant's appeal, the New York Appellate

Division reversed a portion of the certification order and denied Plaintiffs' renewed motion for class action certification. Thereafter, Plaintiffs and 167 proposed class members (collectively "Appellants") moved for leave to allow those 167 proposed class members to intervene in the action as Plaintiffs, arguing that when a class action is decertified, putative members of the decertified class are given the opportunity to intervene into the case because of their allegations of common questions of law and fact. *Id.* at **4. Appellants alleged that the proposed interveners owned property in the vicinity of BNL, and presented common questions of law and fact with respect to loss of property values, and the cost of using municipal water instead of well water. *Id*. The trial court denied the motion, holding that the intervention of 167 Plaintiffs would further delay this matter, unduly complicate the litigation, and prejudice Defendant in having to defend against a plethora of new claims. On further appeal, the Appellate Division reversed. The Appellate Division noted that the causes of action of the proposed interveners were all based upon common theories of liability, and thus satisfied the requirement of CPLR § 1013 that their causes of action involved common questions of law or fact. Contrary to the trial court's conclusion, the Appellate Division remarked that BNL would not be faced with a plethora of new claims, and that BNL did not demonstrate that intervention would substantially prejudice any party or cause undue delay. The Appellate Division also determined that the claims of the proposed interveners were not time-barred as under CPLR § 214-c, the statute of limitations applicable to the toxic tort action, which is the three-year that runs from the date of discovery or the date when the injury should have been discovered through the exercise of due diligence. *Id.* at **6-7. Further, the Appellate Division observed that New York case law had adopted the federal class action rule, under which commencement of a class action suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the trial court has found the suit inappropriate for class action status. *Id.* at **7. Thus, the Appellate Division opined that the claims of the proposed interveners were not time-barred at the time the motion for leave to intervene was made. Accordingly, the Appellate Division reversed the trial court's order denying the motion to intervene.

***Robinson, et al. v. City Of New York*, Case No. 151679/2014 (N.Y. Super. Ct. April 20, 2015).** Plaintiffs brought a class action alleging that Defendants' property tax classification system favored residential owners over its primarily African-American and Hispanic renters, in violation of Title VII of the Civil Rights Act, the Fair Housing Act ("FHA"), and 42 U.S.C. § 1983. Defendants divided residential properties into two classes: class one consisted of one, two, and three family homes, and class two was all other residential properties. Defendants further sub-divided class two into condominiums and cooperatives, rental buildings with fewer than 11 units, and rental buildings with 11 or more units. *Id.* at 1-2. Plaintiffs sought to represent a class of Hispanic and African-American residents of New York rental properties consisting of eleven or more units. Plaintiffs alleged that although class one properties had nearly twice the market values of class two properties, in 2013 class one properties paid only 15.5% of Defendants' real property tax, while class two properties paid 37%. *Id*. at 2. Further, Plaintiffs alleged that the favorable tax treatment given to class one properties was off-set by imposing exceedingly harsh treatment to the residential properties in class two. In addition, Plaintiffs alleged that Hispanic and African-American renters absorbed a higher tax burden through their rent payments than Whites and Asians because they were more likely to live in rental buildings that received unfavorable tax treatment. Thus, Plaintiffs alleged approximately 30% of a tenant's rental payment was attributable to the landlord's property tax. *Id.* Defendants moved to dismiss Plaintiffs' complaint, which the Court granted. First, the Court found that Plaintiffs had no standing to bring the action because they had failed to show that they were suffering any actual harm; Plaintiffs could only speculate that a portion of their rent was for their landlords' taxes, but they alleged no facts showing that their rents would be lower under a different tax scheme. *Id.* Moreover, there was no allegation showing that the tax plan in effect had a disparate or disproportionate impact on Plaintiffs based on race or ethnicity. *Id.* Significantly, the Court pointed out that in arguing that 30% of their rent went to taxes, Plaintiffs demonstrated that they had no standing because there was no allegation that they had a contractual obligation to pay their respective landlord's tax bill, or that they paid the entire bill. *Id*. The Court remarked that even if Plaintiffs had standing to maintain the action, the complaint must be dismissed for failure to state a cause of action because the complaint did not allege that the owners denied housing to Plaintiffs or any member of the purported class, or the tax plan compelled them to live in a racially or ethnically segregated neighborhood. *Id.* at 3. Finally, the Court concluded that Plaintiffs' claim

failed to state a cause of action under the FHA because Defendants were not involved in the sale or rental of a dwelling or in the provision of services or facilities in connection with one. *Id.* Accordingly, the Court granted Defendants' motion to dismiss.

***Sachs, et al. v. Matano*, 2015 N.Y. Misc. LEXIS 3846 (N.Y. Super. Ct. Oct. 28, 2015).** Plaintiff, a patient, brought a medical malpractice action alleging that Dr. Richard Matano negligently treated his diabetic foot ulcer at St. Francis Hospital. Plaintiff established a website on GoDaddy.com entitled "Matano Kills?" whereby he sought other patients for a class action malpractice suit by comparing Matano to the notorious Nazi doctor, Joseph Mengele, and asserted that he was anti-sematic. *Id.* at *1. Plaintiff also claimed that Matano was stubborn, would act like a mule, and discriminate if a person was "not Italian with a Mercedes Benz." *Id*. Further, Plaintiff also posted pictures of Matano's family on the website. Defendant moved for a preliminary injunction compelling GoDaddy.com and Plaintiff to remove the website and to enjoin Plaintiff from posting any further defamatory content concerning Defendant. The Court granted the motion. The Court agreed with Defendant that the statements published by Plaintiff were defamatory and designed to injure Defendant's reputation and business. The Court noted that many statements that might otherwise be considered defamatory may be protected by a qualified privilege, and that a privileged statement is one, which, but for the occasion on which it is uttered, would be defamatory and actionable. *Id.* at *3. Further, the Court observed that a qualified privilege is conditioned on its proper exercise and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity. *Id.* Here, the website at issue was not one through which Plaintiff sought other individuals similarly-situated that could have been injured by an alleged malpractice in order to establish a class action. Rather, the website was couched in terms designed to irreparably damage the reputation and business of Defendant. The Court opined that the comparison of Matano to the Nazi doctor, Josef Mengele, and bald conclusory claims of anti-semitism and "Matano-Kills" was not a protected by a qualified privilege, but rather bald reckless assertions in disregard of the truth. *Id*. at *4. Because the tone of Plaintiff's statements and the statements themselves were designed to injure Defendant's reputation and business, the Court held that Plaintiff did not have a qualified privilege to make those statements.

***Spence, et al. v. Miller, As Director Of The NY State Office Of Information Technology Services,* Case No. 3901-15 (N.Y. Super. Ct. Aug. 13, 2015).** The Professional Employees Federation ("PEF") filed an improper practice charge with the Public Employment Relations Board ("PERB") challenging the Office of Information Technology Services' ("ITS") implementation of fingerprinting and background checks of existing ITS employees as a violation of the New York Civil Service Law. *Id.* at 2. The PERB issued a notice of sufficient showing, in which it agreed that an injunction was required to prevent irreparable harm. The PEF, therefore, petitioned for a preliminary injunction asserting that ITS engaged in an improper practice by failing to bargain in good faith over the fingerprinting and background issue. *Id.* at 2-3. The Court granted the preliminary injunction. The Court rejected ITS' argument that the statutes required employees with access to the computer servers maintained by ITS to undergo background checks. The Court found no public policy pronouncement, in the statute or otherwise, that required all ITS employees to be subjected to fingerprinting and background checks. *Id.* at 4. ITS argued that fingerprinting and background checks of all employees was mission-related and should be subjected to a balancing test in which the competing interest of the employer in managing its affairs was weighed against the bargaining unit members' right to negotiate the terms and conditions of employment. *Id.* The Court found that given the strong presumption in favor of collective bargaining and the fact that ITS operated for a number of years without fingerprinting all employees, there was at least reasonable cause to believe that ITS' failure to bargain over the issue was a violation of the Civil Service Law. *Id.* at 5. Because the employer would be able to obtain and use sensitive personal information regarding certain employees unless the practice was enjoined pending a final determination by PERB, the Court enjoined ITS from the implementation of fingerprinting and background checks of its employees, excluding new employees and those who consented. *Id.* at 6. Accordingly, the Court granted the preliminary injunction.

***Weinstein, et al. v. Jenny Craig Operations, Inc.*, 2015 N.Y. App. Div. LEXIS 7287 (N.Y. App. Div. Oct. 8, 2015).** Plaintiffs, a group of non-managerial employees at Defendant's weight loss centers, brought an action alleging that center directors changed their timecards to reflect a 30 minute lunch break during

their shift when they had worked through the break. The trial court denied Defendant's motion to exclude all employees who had signed arbitration agreements containing class action waivers after this litigation was commenced. *Id.* at *1. On appeal, the New York Appellate Division reversed the order in part. Defendant asserted that it initiated a change in its arbitration agreements to include class action waivers on the same day Plaintiffs filed this action because it was responding to the decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), which held that the FAA preempts all state laws that hold that class action waivers with employees are unconscionable. *Id.* at *2. Further, Defendant argued that it was unaware of the litigation, which was filed with the New York Secretary of State and was not served on Defendant until 17 days after commencement of the action. *Id.* Defendant implemented the new arbitration agreement on the very day Plaintiff commenced the litigation, and then it started execution of these agreements the next day. Defendant continued having putative class member employees sign the arbitration agreements, without informing them of the existence of this class action or of their right to join this class action. The Appellate Division opined that the trial court properly exercised its discretion by drawing the inference that Defendant had implemented the agreements in response to this action and to preclude putative class members. Therefore, the Appellate Division found that the trial court properly declined to enforce those agreements signed after commencement of this litigation. *Id.* The Appellate Division, however, remarked that the trial court improperly refused to enforce the arbitration agreements signed by those employees whom Defendant hired after Plaintiffs commenced this litigation. Because these employees were not part of the putative class, as they had not yet worked for Defendant, the Appellate Division concluded that preclusion of the enforcement of the arbitration agreements should not have applied to these employees. *Id.* at *3.

***Westfall, et al. v. Olean General Hospital*, 2015 N.Y. App. Div. LEXIS 7439 (N.Y. App. Div. Oct. 9, 2015).** Plaintiffs, a group of patients who received insulin injections while at Olean General Hospital, brought a class action for negligence, malpractice, and loss of consortium after Defendant informed them of the possibility that insulin pens were shared by more than one patient. *Id.* at *1. When Defendant notified Plaintiffs of the lapse, it also offered free and confidential testing for hepatitis B, hepatitis C and HIV. The trial court denied Plaintiffs' motion for class certification, and on Plaintiffs' appeal, the New York Appellate Division affirmed. The Appellate Division observed that a prerequisite for recovery is proof of actual exposure to the blood-borne disease. Here, however, no Plaintiff had tested positive for the blood-borne disease to which he or she allegedly was exposed as a result of Defendant's negligence. *Id.* at *2. Further, the Appellate Division noted that the issue of actual exposure would require individualized determinations with respect to each Plaintiff. It reasoned that even if the proposed class members could establish such actual exposure, the extent of the damages resulting therefrom was a question requiring individual investigation and separate proof as to each individual claim. Thus, because common issues did not predominate over individual issues, the Appellate Division affirmed the denial of class certification.

***Zeitlin, et al. v. New York Islanders Hockey Club, L.P.,* Case No. 2484/15 (N.Y. Super. Ct. July 1, 2015).** Plaintiffs brought a putative class action alleging that Defendant engaged in false and deceptive business practices by failing to disclose to Plaintiffs and other class members that hockey playoff ticket purchasers would be charged a playoff premium. Of the 449 fans who purchased the ticket package, 119 purchasers overpaid for the package based upon the value of the tickets they ultimately received. Defendant offered refunds, and all but eight of the 119 overpaying customers, excluding the two named Plaintiffs, had accepted the refund offer. *Id*. at 1. Defendants then served Plaintiffs an offer of compromise pursuant to § 3221 of the New York CPLR. Plaintiffs did not accept the offer within the 10-day statutory acceptance period. *Id*. Defendant moved to compel Plaintiffs to accept its compromise offer and for dismissal of the complaint pursuant to § 3221(a) of the CPLR. The Court granted the motion in part. The Court found that although § 3221 encourages settlement, it does not permit a judge to affirmatively compel a Plaintiff to accept a statutory offer of compromise. *Id*. at 2. To the contrary, § 3221 only authorizes a Court to impose costs of litigation on the non-accepting party in the absence of obtaining a more favorable judgment. Second, the Court found that an unaccepted offer did not moot Plaintiffs' action, since Defendant's contention that a separate dismissal remedy existed based on mootness concepts arguably conflicted with the remedy provisions of § 3221 (a statute that deals directly with settlement offers and which expressly limits the consequences of rejecting a compromise offer to the imposition of costs). *Id*.

The Court remarked that although New York case law precedents have applied the mootness doctrine in a variety of contexts, albeit with contexts factually dissimilar from that involved in this action, Defendant failed to cite to any New York state appellate authorities holding that a judge can dismiss an action because a Plaintiff has rejected a proposed § 3221 compromise offer. *Id*. Moreover, the Court noted that Plaintiffs raised statutory claims that could potentially authorize a damage award in excess of Defendant's offer. Thus, the Court found that at that early stage of the litigation, it could not definitively assess the merits of Plaintiffs claims. *Id*. The Court, however, held that since fewer than ten claimants remained in the proposed class, Plaintiffs could not meet the class action numerosity requirements. *Id*. at 3. Because the potential class members were less than 40, the threshold number for impracticability of joinder, the Court dismissed Plaintiffs' class claims.

(xiv) North Carolina

***In Re Pike Corp. Shareholder Litigation*, 2015 NCBC 90 (N.C. Super. Ct. Oct. 8, 2015).** Plaintiffs, a group of former shareholders of Defendant, brought a class action alleging that Defendant breached and aided and abetted breaches of fiduciary duties in connection with its merger agreement with Pioneer Parent, Inc. ("Pioneer Parent"), an affiliate of Court Square Capital Partners. Specifically, Plaintiffs alleged that members of Defendant's Board of Directors omitted substantial, material information from the preliminary proxy statement and made misleading disclosures, which led to an inadequate merger consideration. *Id.* at 3. The parties eventually reached an agreement in principle to resolve all claims and executed a stipulation and agreement of compromise. Consistent with the agreement, Defendant made supplemental disclosures by filing forms with the U.S. Securities & Exchange Commission, and the shareholders approved a merger by vote. *Id.* After considering evidence and factors regarding the fairness and adequacy of relief obtained on behalf of the settlement class, the form of the release and the preservation of any appraisal remedy, the Court concluded that the settlement was in the best interest of the class, and was fair, reasonable, and adequate. *Id.* at 4. Plaintiffs' counsel then requested an aggregate award of $550,000 in attorneys' fees, which included reimbursement for expenses. *Id.* Because Defendants agreed not to contest an award of up to $275,000, they claimed that the Court should not award any greater amount. *Id.* The Court, however, reviewed the fairness and reasonableness of Plaintiffs' requested fee and determined that the requested aggregate award of $550,000 was reasonable and not clearly excessive. The Court determined that the aggregate requested award equated to roughly $550 per hour for partner hours of lead counsel, $375 per hour for partner hours of other counsel, and $250 per hour for associate time, and these hourly fees were within the range that the Court had found to be reasonable for complex business litigation in North Carolina. *Id.* at 9. Further, the Court noted that Plaintiffs' counsel had devoted 1394.60 hours to prosecuting the claims, not including appearances at the fairness hearing, and adequately established that the hours were spent efficiently, at the direction of lead counsel, without unnecessary duplication of effort. *Id.* at 12. Defendant argued that the fee award should be discounted because the relief obtained for the class included only disclosures without monetary relief. The Court rejected Defendant's argument, pointing out that it was granting no incentive over normal rates to reflect extraordinary success or to account for the contingent nature of the engagement, and reasoning that the particular supplemental disclosures that the class obtained were sufficiently material and substantial to justify the recovery of fees calculated at normal hourly billing rates. *Id.* at 13. According to the Court, a significant fee award was justified in this action in light of the particular supplemental disclosures obtained, together with the fact that the release did not preclude the appraisal remedy that North Carolina favors when a shareholder challenges the prices of a transaction. *Id.* at 14. Accordingly, the Court granted final approval to the settlement and awarded attorneys' fees to Plaintiffs' counsel in the amount of $550,000.

***Raul, et al. v. Burke,* 2015 NCBC LEXIS 93 (N.C. Super. Ct. Oct. 8, 2015).** Plaintiff, a stock holder, filed a derivative and class action complaint against Defendant Swisher Hygiene Inc.'s ("Swisher") Board of Directors for breaches of fiduciary duty arising out of Defendants' decision to sell all of the asstes of Swisher's U.S. operations to Defendant Ecolab Inc. for $40 million, which Plaintiff claimed was at an unfair price. Plaintiff filed a motion for expedited proceedings, which the Court denied. At the outset, the Court noted that to evaluate the request for expedited proceedings, it must balance the potential need for supplemental shareholder disclosures versus the potential shareholder loss if the underlying transaction

was adversely affected. *Id.* at *7. The Court also observed that it must analyze whether the timeliness and manner by which Plaintiff had pursued the litigation was consistent with the exigencies offered in support of expedition. *Id.* Swisher issued a press release annoucning the intended transaction on August 13, 2015, and filed its Schedule 14A Definitive Proxy ("Proxy") on September 3, 2015, which reflected that Swisher would hold a shareholder vote to approve the transaction at its annual meeting on October 15, 2015. *Id*. at *4. Plaintiff did not file a motion for preliminary injunction. The complaint included allegations that were typical to those made during challenges to mergers and acquisitions, but also included specific allegations of failure to disclosure information that Plaintiff contended was both material and omitted from the Proxy. *Id*. at *5. Defendants countered that they could not be required to disclose what they did not or could not know relative to statements in the Proxy that Defendants were not capable of quantifying those liabilities and expenses or providing a reliable estimate of any distribution that might be made to shareholders. *Id*. at *6. Defendants further contended that Swisher's shareholders would suffer potential harm if the shareholder vote was not allowed to proceed as scheduled. *Id*. at *7. The Court opined that the Proxy made it clear that Swisher's directors were recommending the transaction because of its continuing recurring losses. *Id*. at *8. The Proxy advised shareholders clearly that they were being asked to approve a transaction that provided no assurance of a cash benefit to shareholders in return. *Id*. They were also clearly advised that Swisher may not be able to maintain any of its value if the transaction is not completed. *Id*. The Court remarked that with this awareness of the obvious uncertainty surrounding the results of the transaction, the shareholders were free to vote for or against it. *Id*. Accordingly, the Court concluded that it was not persuaded that imposing the burden of expedited proceedings or forcing a delay of the shareholder meeting to complete discovery and allow for a possible injunction hearing would be appropriate under the particular circumstances of this case. *Id*.

(xv) North Dakota

***Baker, et al. v. Autos, Inc.*, 2015 N.Dak. LEXIS (N.Dak. Mar. 24, 2015).** Plaintiff, borrower, brought a class action alleging that Defendants unlawfully failed to include a loan fee and document administration fee in their finance charges, and that when added the rate of interest exceeded the maximum rate allowed by North Dakota law. Plaintiff purchased an automobile from Defendants, and financed the purchase by trading in her old vehicle. *Id*. at *2. When Plaintiff failed to make monthly payments, her vehicle was repossessed, and she filed an action challenging the lending practices. *Id*. Defendants removed the action to federal court, and it was remanded to the state trial court. Plaintiff then moved for class certification, which the trial court denied. On appeal, the North Dakota Supreme Court reversed and remanded. The Supreme Court observed that although Plaintiffs' putative class of vehicle purchasers included numerous contracts containing various prices and conditions, the overarching and unifying attribute common to the contract concerned the "loan fee," the "document administration fee," the "late fee," and whether the amount or nature of each fee violated state usury law or the Retail Installment Sales Act ("RISA"). *Id*. at *16-17. The Supreme Court explained that each putative Plaintiff signed the same standard form contract, albeit with varying price terms for each respective vehicle. *Id*. at *17. Given the common characteristics in the "loan fee," the "document administration fee," the "late fee," and whether the amount or nature of each fee violated state usury or the RISA, the Supreme Court concluded that there was a common nucleus of operative legal issues common to Plaintiff and the putative class. *Id*. at *17-18. The Supreme Court remarked that although there was evidence indicating that not all purchasers were charged a "loan fee," the "document administration fee," or the "late fee," it did not defeat commonality. *Id.* The Supreme Court found that the proposed class were all charged loan fees, were subject to unlawful late fee provisions, and endured incomplete or inaccurate disclosures. *Id.* Accordingly, the Supreme Court held that the common issues predominated over individual ones, and reversed and remanded the case.

(xvi) Ohio

***Felix, et al. v. Ganley Chevrolet, Inc.,* 2015 Ohio LEXIS 2113 (Ohio Aug. 27, 2015).** Plaintiffs, a group of customers, brought a putative class action alleging that Defendant, a car dealership, violated the Ohio Consumer Sales Practices Act ("OCSPA") by requiring customers to agree to an unenforceable arbitration provision. Plaintiffs alleged that Defendant offered financing at 0% interest to encourage them to purchase a vehicle. The purchase contract stated that it was "not binding unless accepted by seller and credit is

approved, if applicable, by [a] financial institution," and included a clause requiring resolution of any dispute through binding arbitration. *Id.* at *2-3. A few days after their purchases, Defendant informed Plaintiffs that the financial institution would only approve a higher 1.9% interest rate for the loan. *Id.* at *3. When Plaintiffs reluctantly accepted that rate, Defendants, however, later informed them that they could get a 9% interest loan from a bank. *Id.* at *4. Plaintiffs rejected the offer, and filed this action alleging that Defendant's practices related to the arbitration clause violated the OCSPA and that Defendant committed unfair and deceptive consumer sales practices. *Id.* Proposing a class of all consumers of vehicles from any of Defendant's companies, within the two year period preceding commencement of action and who signed a purchase agreement containing the arbitration clause or anything substantially similar to it, Plaintiffs sought declaratory judgment that the clause was unconscionable. *Id.* at *6-8. The trial court certified the class, determining that Defendant's arbitration provision violated the OCSPA, and awarded $200 to each class member. *Id.* at *8. Upon Defendant's appeal, the Ohio Court of Appeals for the Eighth District upheld the class certification order, rejecting Defendant's argument that the class definition and timeframe were overbroad. *Id.* at *10. The Court of Appeals also concluded that the damages award was beyond its scope of review. *Id.* Defendant then appealed to the Ohio Supreme Court, arguing that the class should not have been certified because, by definition, it included individuals who had not sustained any actual damages as a result of the inclusion of the arbitration clause. The Supreme Court agreed and reversed. The Supreme Court noted that the OCSPA provides for statutory and treble damages only in individual actions but not in class actions, and that proof of actual damages is required before a trial court may properly certify a class action. *Id.* at *13-14. According to the Supreme Court, this requirement of the OCSPA was consistent with various other state consumer protection statutes, which require aggrieved consumers to plead and prove actual damages, and consistent with the requirement that trial courts give more careful consideration in the class certification process. *Id.* at *14-15. Although Plaintiffs at the class certification stage do not need to demonstrate through common evidence the precise amount of damages incurred by each class member, the Supreme Court held that they must adduce common evidence that shows that all class members suffered some injury. *Id.* at *17. Plaintiffs' class, as certified, failed this requirement because there was no showing that all class members suffered an injury-in-fact. The Supreme Court noted that the broadly defined class encompassed consumers who purchased a vehicle from Defendant through a purchase contract that contained the unconscionable arbitration provision, but there was no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages. *Id.* at *19. The Supreme Court therefore reversed the Court of Appeal's order and remanded the action to the trial court for proceedings consistent with the determination that actual damages must be shown in class action litigation based on the OCSPA.

(xvii) Oregon

***Pearson, et al. v. Philip Morris, Inc.,* 2015 Ore. LEXIS 752 (Ore. Oct. 22, 2015).** Plaintiffs, two individuals, brought an action alleging that Defendant deceived consumers through representations that "Marlboro Lights" cigarettes contained less tar and nicotine than regular Marlboros. *Id.* at *2. Plaintiffs alleged that Defendant purposefully chose an "elastic" tar and nicotine delivery design to give Marlboro Lights smokers the illusion of lowered tar and nicotine while allowing them to obtain the higher levels of nicotine that they potentially craved. *Id.* at *11. Plaintiff sought economic damages for themselves and an estimated class of 100,000 individuals who purchased Marlboro Lights in Oregon over a 30-year period in violation of the Oregon's Unfair Trade Practices Act ("UTPA"). *Id.* at *13. The trial court denied Plaintiffs' motion for certification, finding that individual issues predominated. *Id.* at *21. The trial court had determined that because Plaintiffs' class claim depended on proof that they suffered an ascertainable loss or money or property and that the loss was the result of the alleged unlawful trade practice – lower tar and nicotine representation – individualized inquiries would be required. *Id.* at 22. In addition, the trial court had also found that Plaintiffs failed to demonstrate that they could prove through common evidence that the alleged representation that Marlboro Lights were inherently lower in tar and nicotine was a substantial or motivating factor in every class member's purchasing decision, as Defendant produced extensive evidence that many individuals bought it for reasons other than their perceived health benefits. *Id.* at *25. On Plaintiffs' appeal, the Oregon Court of Appeal reversed, finding that the elements of an UTPA claim could be proved through common evidence. The Court of Appeal agreed that Plaintiffs would have to prove that

the class members relied on Defendant's lowered tar and nicotine representation in purchasing Marlboro Lights, and reasoned that an inference of class-wide reliance could be drawn from the uniform nature of Defendant's representations, Defendant's design and marketing of Marlboro Lights, and the fact that many persons who smoked light cigarettes believed that they were safer than regular cigarettes. *Id.* at *29. On further review, the Supreme Court of Oregon agreed with the trial court that Plaintiffs failed to show that the reliance required to prove their economic loss could be litigated through common evidence, rather than requiring individual inquiries of the class members. The Supreme Court found that the records contained ample evidence that, among the putative class of 100,000 who purchased Marlboro Lights in Oregon over a 30-year period, the purchasers had varying beliefs as to whether lower tar and nicotine cigarettes were "healthier" to smoke. *Id.* at *92. The records showed that the putative class members were motivated to buy Marlboro Lights for a variety of reasons, some irrational, and others unrelated to whether Lights were "inherently" lower in tar and nicotine than regular cigarettes, and thus, the representations of inherent lightness on which Plaintiffs relied depended significantly on interpretation and what purchasers understood the "lowered tar and nicotine" label to imply. *Id.* The Supreme Court concluded that the trial court correctly determined that Plaintiffs did not carry their burden to show that common issues predominated over individual ones on the element or reliance. *Id.* at *93. Accordingly, the Supreme Court reversed the Court of Appeal's decision on class certification and affirmed the trial court's order.

(xviii) Pennsylvania

***Dittman, et al. v. UPMC,* Case No. 14-GD-3285 (Pa. Common Pleas Ct. May 28, 2015).** Plaintiffs, a group of current and former employees, brought a class action alleging that Defendant failed in their duty to protect their private, highly sensitive, confidential and personal information such as names, birthdays, social security numbers, and confidential tax information. ("Confidential Personal Information"). *Id*. at 2. Plaintiffs contended that their Confidential Personal Information was stolen from Defendant's computer systems, and that a duty of care should be imposed on Defendant to protect the confidential information of its employees. *Id*. at 5. Plaintiffs relied on Pennsylvania Supreme Court's decision in *Seebold v. Prison Health Services, Inc.*, 57 A.3d 1232 (Pa. 2012), discussing the factors for consideration in determining whether to impose a duty of care, including: (i) the relationship between the parties; (ii) the social utility of the actor's conduct; (iii) the nature of the risk imposed and foreseeability of the harm incurred; (iv) the consequences of imposing a duty of harm incurred; and (v) the overall public interest in the proposed solution. *Id*. The Court sustained Defendant's objections, and dismissed the class action complaint. The Court observed that Plaintiffs' proposed solution was the creation of a private negligence cause of action to recover actual damages, including damages for increased risks, upon a showing that Plaintiffs' Confidential Personal Information was made available to third persons through a data breach. *Id*. at *6. The Court explained that the public interest was not furthered by this proposed solution, as data breaches were widespread, and they frequently occurred because of sophisticated criminal activity of third persons. *Id*. The Court remarked that creating a private cause of action could result in possible filings of hundreds and thousands of such lawsuits within Pennsylvania alone by people whose confidential information may be in the hands of third persons. *Id*. The Court further explained that under Plaintiffs' proposed cause of action, in Pennsylvania alone, perhaps hundreds of profit and non-profit entities would be required to expend substantial resources responding to the resulting lawsuits. *Id*. The Court remarked that these entities were victims of the same criminal activity as Plaintiffs, and without guidance from the Legislature, the judicial system should not create a body of law that does not allow entitles that were victims of criminal activity to get on with their business. *Id*. at 7. Accordingly, the Court granted Defendant's motion to dismiss the data breach claims. The Court also dismissed Plaintiffs' breach of contract claim, finding no factual allegations supporting a finding of an agreement between the parties which Defendant agreed to be liable for criminal acts of third-parties. *Id*. at 12. Accordingly, the Court dismissed the class action complaint.

(xix) Texas

***Entergy Corp. v. Jenkins, et al.*, 2015 Tex. App. LEXIS 7756 (Tex. App. 1st Dist. July 28, 2015).** Plaintiff, on behalf of the utility's customers, brought a putative class action alleging that Defendants, Entergy Corp. and its six electric utility operating companies, violated the terms of the Texas Theft Liability Act by selling both residential and commercial customers expensive power from its own generating plants

rather than cheaper power available from other retail suppliers. Defendants first removed the action alleging federal question jurisdiction, but the case was remanded because the action did not invoke federal law. *Id.* at *4. Defendants then filed a motion to dismiss, contending that Federal Energy Regulatory Commission ("FERC") and the Texas Public Utilities Commission ("PUC") preempted Plaintiffs' claims because the Entergy Systems Agreement ("ESA"), a federal tariff, provided for centralized control of power purchases, operations, and use of available resources throughout the participating Defendant companies. *Id.* at *2-3. Finding lack of subject-matter jurisdiction, the trial court granted Defendants' motion. *Id.* at *4. The Texas Court of Appeals reversed the trial court's order. *Id.* at *5. Plaintiffs then filed a motion to certify a class consisting of Texas retail customers, and Defendants filed a second motion to dismiss for lack of jurisdiction and three motions for summary judgment. *Id.* The trial court denied Defendants' motions and granted Plaintiffs' motion for class certification. Upon Defendants' interlocutory appeal, the Texas Court of Appeal reversed the trial court. Defendants contended that the trial court lacked subject-matter jurisdiction over Plaintiffs' claims. Reviewing *de novo* the issue of subject-matter jurisdiction, the Court of Appeal found that the FERC has the exclusive jurisdiction over Plaintiffs' claims. *Id.* at *11. The Court of Appeal noted that the FERC regulates wholesale power transactions, and Defendants subjected its fuel and purchased-power costs to the scrutiny by the FERC under the Federal Power Act ("FPA") and by the PUC. Because the FERC's exclusive jurisdiction of the wholesale sale or transmission of electricity in interstate commerce encompassed the determination of just and reasonable rates, including all classifications, practices, regulations, and contracts affecting rates, as well as the authority to hear complaints about the reasonableness of an existing rate, and because the FPA gives states, municipalities, and retail ratepayers the right to participate in the FERC proceedings and to file complaints, the Court of Appeal concluded that Plaintiffs' claims fell within the FERC's jurisdiction. *Id.* at *15-17. Although Plaintiffs did not allege breach of the FERC-approved ESA as a cause of action, the Court of Appeal noted that he had challenged Defendants' purchasing decisions – whether to use allegedly available third-party electricity or system-generated electricity – which Defendants undertook pursuant to the ESA. The Court of Appeal thus found that determining whether Defendants permissibly exercised their discretion in making their purchasing decisions necessarily required consideration of the ESA, a FERC-approved tariff. *Id.* at *24. The Court of Appeal therefore concluded that the dispute fell within the FERC's exclusive jurisdiction. The Court of Appeal held that the trial court lacked subject-matter jurisdiction, as Plaintiffs did not exhaust the administrative remedies by first bringing the dispute before the FERC. *Id.* at *32. The Court of Appeal further held that the trial court erroneously denied Defendants' motion to dismiss for lack of jurisdiction and that the trial court's class certification order was therefore void. *Id.* at *32-33. Accordingly, the Court of Appeal reversed the trial court's order denying Defendants' motion to dismiss.

***Fleming, et al. v. Kirklin Law Firm, P.C.,* 2015 Tex. App. LEXIS 11767 (Tex. App. Nov. 17, 2015).** In this class action related to the filing of suits by thousands of users of a weight-loss drug known as Fen-Phen against Wyeth and the subsequent settlement of the litigation, the Texas Court of Appeal affirmed the trial court's order that law firm Fleming & Associates LLP breached a contract for referral fees tied to the $339 million Fen-Phen settlement when it deducted litigation expenses from fees owned to another firm. Soon after the second phase of Fen-Phen litigation, the Fleming firm sought additional Fen-Phen clients through referrals from other attorneys, including the Kirklin law firm. *Id.* at *3. After signing a referral agreement, the Kirklin law firm referred about 500 Fen-Phen clients to the Fleming firm, and the Fleming firm prosecuted its Fen-Phen cases for five years until Wyeth agreed to pay an aggregate of $339 million to settle all of the Fleming firm's 8,000 cases. *Id.* at *5. The Fleming firm paid the Kirklin firm over $2 million as its net share of attorneys' fees, and the Kirklin firm alleged that the Fleming firm calculated the payments incorrectly. When efforts to resolve the dispute failed, the Kirklin firm filed an action alleging breach of contract and fraud against the Fleming firm. Finding that the Fleming firm failed to comply with the referral agreement, the jury awarded the Kirklin firm damages and attorneys' fees of $150,000. Later, the trial court modified final judgment and vacated the award of attorneys' fees, as precedent did not allow for attorneys' fees to be awarded against a limited liability partnership. *Id*. at *10. The parties cross-appealed, and the Kirklin firm asserted that the trial court erred in not holding Fleming individually liable and also that the Fleming firm had not kept up with Texas Revised Partnership Act ("TRPA") requirements to maintain its LLP status. *Id.* at *16. The Court of Appeal rejected the Kirklin firm's arguments, finding that the Fleming firm presented evidence conclusively demonstrating compliance with TRPA's financial

responsibility provision, and the Kirklin firm failed to establish that the Fleming firm did not meet the statutory requirements to qualify as a limited liability partnership. *Id.* at *19-24. The Court of Appeal held that the trial court did not err when it refused to hold Fleming individually liable based on the Fleming firm's non-compliance with the TRPA. The Court of Appeal also ruled that the trial court did not err in holding the referral agreement ambiguous and admitting parol evidence to prove the parties' intent. *Id.* at *13. In holding so, the Court of Appeal rejected the claim of the Fleming firm that the agreements created a joint venture, which would have entitled Fleming to shift some of the litigation expenses to Kirklin. *Id.* at *15. Because the referral agreements were susceptible of more than one reasonable interpretation and thus ambiguous, the Court of Appeal held that the trial court did not abuse its discretion when it admitted parol evidence to prove the parties' intent. *Id.* at *16. Accordingly, the Court of Appeal affirmed the trial court's judgment.

***In Re National Lloyds Insurance Co.*, 2015 Tex. App. LEXIS 5509 (Tex. App. May 29, 2015).** Plaintiffs, a group of property owners, brought a class action for property damage claims alleging that Defendant violated the Texas Insurance Code by refusing to pay their claims without conducting reasonable investigations and by failing to affirm or deny coverage of the claims or submit a reservation of rights within a reasonable period of time. *Id*. at *2. Plaintiffs served Defendants with requests for production, and Defendants objected on the basis that the burden of the proposed discovery outweighed its likely benefit; Defendants also asserted privilege as to others. *Id*. at *4-5. Plaintiffs served two separate motions to compel against Defendants, which the trial court granted. *Id*. at *7. Plaintiffs then filed a motion to enforce and requirement Defendants to supplement its discovery responses. *Id*. Plaintiffs' motion to enforce related to testimony of Defendants' corporate representative, Paul Boswell, where he testified that Defendants ran several different reports which were generated in real time, and which were sent to the employee generating the request in PDF format by e-mail. *Id*. at *8. These reports could be used to see if a claims examiner was being efficient or handling their claims timely. *Id*. Boswell testified that the reports were historical in nature and were not retained so there was no ability to print past reports. *Id*. Based on Boswell's testimony, Plaintiffs requested the trial court to enforce its prior orders requiring Defendants to produce relevant documentation in response to their requests for production. *Id*. at *9. The trial court granted that motion, and Defendants sought to appeal through a writ of mandamus. On appeal, the Texas Court of Appeals found that issuing mandamus was inappropriate. Defendants asserted that the trial court abused its discretion in ordering it to produce all management reports and accompanying e-mails used to manage its internal financial and personnel information when those reports were irrelevant to an insured's claim that their claims were underpaid. *Id*. at *18. Plaintiffs argued that Defendants waived their right to these objections and arguments because they failed to assert them in a timely manner. The Court of Appeals noted that a responding party must include any objections to written discovery within 30 days after the service of request for production. *Id*. at *20. Defendants contended that they never waived their claim to contest the requests, but continually protested the discovery at every stage. *Id*. at *21. The Court of Appeals opined that Defendants had the duty to make complete responses to the requests for production based upon all information reasonably available, subject to objections and asserted privileges. *Id*. at *22. Based on the evidence, the Court of Appeals concluded that the trial court acted within its discretion in concluding the existence of those documents, given Boswell's extensive testimony regarding their existence and usage. *Id*. at *22. In addition, the Court of Appeals found that the records did not show that Defendants had in fact raised the issue of the discovery requests being overbroad. *Id*. at *23. Accordingly, the Court of Appeals overruled Defendants' objections, and denied the writ of mandamus.

***In Re Valerus Compression Services, LP,* 2015 Tex. App. LEXIS 4647 (Tex. App. May 7, 2015).** In this consolidated petition for mandamus and interlocutory appeal, Defendants contended that the trial court abused its discretion by failing to rule on their motion to compel arbitration. On Defendants' appeal, the Texas Court of Appeals dismissed the interlocutory appeal and conditionally granted the writ of mandamus. Plaintiffs had sent a letter to Defendants stating that they believed that Defendants manipulated tax allocations, assigned unwarranted phantom income, and failed to make requisite tax distributions, and Plaintiffs requested certain records to investigate those claims. *Id*. at *1-2. Defendants responded to the letter by addressing the concerns, and provided some of the information requested. Plaintiffs then filed a Rule 202 petition, and sought to depose various representatives of Defendants to investigate potential

claims of breach of contract, breach of fiduciary duty, minority shareholder oppression, and civil conspiracy. *Id*. at *2. Defendants objected to the Rule 202 petition and filed a motion to compel arbitration pursuant to a dispute resolution clause in a partnership agreement among the parties. The trial court granted the Rule 202 petition, but did not expressly rule on the motion to compel arbitration. *Id*. at *3. Defendants then filed an interlocutory appeal as well as a writ for mandamus. The Court of Appeals remarked that it first had to determine which mechanism among the two was appropriate. *Id*. At the outset, the Court of Appeals noted that mandamus lies when there was no adequate remedy by appeal, and an appeal lies only from final order and those interlocutory orders that statutes make appealable. *Id*. Here, Defendants filed an interlocutory appeal pursuant to § 51.016 of the Texas Civil Practice and Remedies Code and the Federal Arbitration Act ("FAA"), along with the mandamus proceeding. The Court of Appeals noted that the parties' arbitration clause stated that it was subject to the FAA, which allows interlocutory appeals from an order denying an application to compel arbitration. *Id*. at *4-5. Because the trial court did not deny the motion to compel arbitration, the Court of Appeals ruled that the writ of mandamus of appropriate in this case, and accordingly, dismissed the interlocutory appeal. *Id*. at *6. Defendants next contended that the trial court abused its discretion by failing to stay the Rule 202 depositions and compel arbitration relying on *In Re Bill Heard Chevrolet*, 2005 Tex. App. Lexis 8838 (Tex. App. Oct. 27, 2005), where the trial court had deferred ruling on the issue of arbitrability until after the Rule 202 deposition had been taken. *Id*. at *7. In that case, the Court of Appeals held that the trial court had abused its discretion by ordering the Rule 202 deposition before ruling on the motion to compel arbitration, and had conditionally granted the writ of mandamus. *Id*. For similar reasons, the Court of Appeals granted Defendants' writ of mandamus and directed the trial court to rule on the issue of arbitrability first.

***Weinstein & Riley, P.S. v. Blankenship, et al.,* 2015 Tex. App. LEXIS 7497 (Tex. App. July 21, 2015).** Plaintiffs, a group of debtors, brought a class action alleging that they received demand letters from Defendant, a law firm, in violation of the federal Fair Debt Collection Practices Act and the Texas Debt Collection Act ("TDCA"), as well as for the unauthorized practice of law. The trial court granted Plaintiffs' motion for class certification, and on appeal, the Texas Court of Appeals reversed. Defendant argued that the trial court lacked subject-matter jurisdiction over Plaintiffs' claim for injunctive relief because there was no live controversy. The Court observed that in 2003, when Defendant was known as Weinstein, Treiger, & Riley, P.S., it obtained a third-party debt collector surety bond, and in 2005 it changed its name to Weinstein & Riley, P.S. *Id*. at *4. Defendant filed a name change rider with the Secretary of State on November 17, 2009. *Id*. Plaintiffs filed their action in July 2010 and instead of seeking any actual damages in connection with Defendant's delayed filing of the name-change rider including seeking damages under § 392.403(e) of the TDCA, they generally sought to prevent and restrain Defendant from engaging in debt collection in Texas. *Id*. at *4-5. Plaintiffs argued that they were entitled to injunctive relief based on: (i) § 392.101(a) of the TDCA, which requires third-party debt collectors to obtain a surety bond and file a copy of that bond with the Secretary of State; (ii) § 392.304(a)(1)(A) of the TDCA, which prohibits debt collectors from using a name other than true business or professional name; (iii) § 392.403(a)(1) of the TDCA, which allows a party to seek injunctive relief; and (iv) § 392.403(e) of the TDCA, which entitles a party who maintains a successful injunctive relief to not less than $100 for each violation of the TDCA. *Id*. The Court of Appeals found that as Plaintiffs did not seek statutory damages, they could not successfully maintain an action because there was no continuing injury that injunctive relief could redress. *Id.* Accordingly, the Court of Appeals reversed the class certification order and remanded the case to the trial court.

(xx) Washington

***Filo Foods, LLC, et al. v. The City Of SeaTac,* 2015 Wash. LEXIS 890 (Wash. Aug. 20, 2015).** Plaintiffs, a group of employers, brought an action against Defendants – the City of SeaTac and the City clerk – challenging a voter initiative that established a $15 per hour minimum wage and other benefits and rights for employees in the hospitality and transportation industries. In June 2013, a group supporting an increase in the minimum wage for hospitality and transportation workers at SeaTac Airport circulated a petition among the voters in the City of SeaTac to put "Proposition 1" on the ballot. *Id.* at *2. Proposition 1 was approved by voters and raised the minimum wage of hospitality and transportation workers to $15 per hour. Plaintiffs challenged the validity of Proposition 1 on the basis that: (i) it violated the single-subject

rule; (ii) violated the Port of Seattle's jurisdiction over Seattle-Tacoma International Airport; (iii) federal labor and aviation laws preempted Proposition 1; and (iv) it violated the dormant commerce clause. *Id.* at *3-4. Although, the trial court upheld Proposition 1 generally, it ruled that the ordinance could not be enforced at the airport because, under state law, the City could not exercise jurisdiction or control over the airport. *Id.* at *4. The trial court also found that federal labor laws, particularly, National Labor Relations Act ("NLRA"), preempted Proposition 1. *Id.* On appeal, the Washington Supreme Court reversed the trial court holding that Proposition 1 could be applied at the airport and concluded that NLRA did not preempt Proposition 1 in whole or in part. *Id.* at *6. The Supreme Court held that Proposition 1 could be applied at the airport and it was not in conflict with state law concerning the Port of Seattle's jurisdiction over the airport because the Port had not shown that Proposition 1 would interfere with airport operations. *Id.* at *11. The Supreme Court based its analysis on the statutory language, prior case law, and the functional differences between cities and special purpose districts. *Id.* The Supreme Court noted that unlike cities, which are granted the broadest powers of local self-government, a port district is a special purpose district, which "is limited in its powers to those necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation." *Id.* at *16. These aspects of the statutory scheme led the Supreme Court to conclude that legislature intended to vest authority for the operation of the airport exclusively with the Port of Seattle, but not to prohibit a local municipality like the City from regulating the general welfare in a manner unrelated to airport operations. *Id*. The Supreme Court held that, absent a factual showing that Proposition 1 would interfere with airport operations, it did not conflict with the Port of Seattle's jurisdiction or ability to operate the Seattle-Tacoma International Airport, and thus it could be validly enforced at the airport. *Id.* at *24. The Supreme Court also rejected the argument that NLRA preempted Proposition 1 because it did not impermissibly intrude upon the collective bargaining process. *Id.* at *28-29. The Supreme Court reasoned that the Proposition 1's worker-retention provision protected employees, fitting comfortably within the category of minimum labor standards held to be valid. *Id.* at *36-38. The Supreme Court also rejected the argument that the Airline Deregulation Act preempted Proposition 1, finding that Proposition 1 was a "generally applicable" law rather than one directly targeted at the airline industry. *Id.* at *43. The Supreme Court further held that the Proposition 1 did not violate the single-subject rule or the dormant commerce clause because the Proposition 1 generally concerned labor standards for certain employers, and it did not facially discriminate against interstate commerce. Accordingly, the Supreme Court upheld Proposition 1 in its entirety.

(xxi) West Virgina

***Rich, et al. v. Simoni*, 2015 W. Va. LEXIS 257 (W. Va. April 10, 2015).** Plaintiff, an attorney, brought an action in the federal court seeking declaratory judgment on the issue of whether Defendant was entitled to compensation for his services, and sought a ruling as to whether sharing of legal fees relative to various class actions would violate Rule 5.4 of the West Virginia Rules of Professional Conduct. Defendant was a professor at West Virginia University ("WVU") and also held a juris doctorate degree but was never admitted to practice law in any jurisdiction. *Id*. at *3. Defendant contended that through his collaboration with Plaintiff, they learned of potential environmental and toxic tort mass cases, including two class actions known as the Fairmont litigation and the Spelter litigation. Plaintiff and his associate counsel earned a total fee of $14.6 million in the Fairmont litigation and $22.8 million in the Spelter litigation. *Id*. at *5. This litigation arose from an agreement between the Parties to compensate Defendant for his efforts in connection with various class action suits, including the Fairmont Spelter litigations. *Id*. According to Defendant, the initial understanding was that he would share the benefits on a 50/50 basis; however, Defendant purportedly informed Plaintiff that his share would be reduced from 50% to 20%. *Id*. at *6. When the parties cross-moved for summary judgment, the trial court certified the following question to the West Virginia Supreme Court of Appeals: "Are the West Virginia Rules of Professional Conduct statements of public policy with the force of law to that given to statutes enacted by the West Virginia?" *Id*. at *12. The Supreme Court of Appeals modified the question and answered affirmatively. Defendant acknowledged that a licensed lawyer is ethically prohibited from sharing legal fees with a non-lawyer under Rule 5.4 of the West Virginia Rules of Professional Conduct. *Id*. at *13. Defendant argued that Rules of Professional Conduct were nothing more than rules of reason, and could not stand as a bar to the enforcement of a fee-sharing agreement that was predicated on the reasonable value of services provided. *Id*. at *13-14. Plaintiff stated that he had no issue in paying Defendant, provided that such payment could be

accomplished within the boundaries of both ethical and legal constraints. *Id*. at *15. Accordingly, the Supreme Court of Appeals amended the certified question to "[w]hether a fee-sharing agreement between a lawyer and a non-lawyer is unenforceable as contrary to the public policy of this state." *Id*. at *13. The Supreme Court of Appeals noted that in *Gaddy Engineering Co. v. Bowles Rice McDavid*, 231 W. Va. 577 (2013), it had determined that the rules of professional conduct contained explicit declarations of the state's public policy. *Id*. at *16. In *Martello v. Santana*, 713 F.3d 309 (6th Cir. 2013), in affirming the trial court's ruling that a fee-sharing agreement between an attorney and a physician was unenforceable as violating public policy, the Sixth Circuit wholly rejected the argument that the public policy can be created by the Kentucky Legislature. *Id*. The Sixth Circuit reasoned that the Kentucky Rules of Professional Conduct were public policy set by the Kentucky Supreme Court. *Id*. In view of the highly persuasive authority throughout the country on this issue, the Supreme Court of Appeals determined that it had no difficulty in recognizing that the Rules of Professional Conduct may constitute statements of public policy, which in turn may carry the equivalent force and effect as statutes enacted by the State's Legislature. *Id*. at *23. The Supreme Court of Appeals explained that this determination would need to be made on a rule by rule basis, given that some of the rules are stated in mandatory terms while others are expressed in hortatory terms only. *Id*. at *24. Accordingly, the Supreme Court of Appeals modified the certified question, and answered that it in the affirmative.

VIII. Rulings On The Class Action Fairness Act

President Bush signed the Class Action Fairness Act ("CAFA") into law on February 18, 2005. The law facilitates removal of class actions from state court to federal court. In addition, it regulates the selection of class counsel, tightens control of attorneys' fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. In large part, the CAFA has significantly altered forum-selection and claim-selection strategies of plaintiffs' lawyers in litigating class actions.

The CAFA continues to play a large role in many class actions filed against employers. The CAFA responded to the abuses of state court judges in certifying class action lawsuits involving plaintiffs who filed their claims in states with a reputation for a lack of fairness toward out-of-state defendants. The CAFA modifies the rules for federal court jurisdiction over class actions based on the diversity of citizenship test. Before the CAFA, *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants, a situation that typically would not be met in class actions seeking nationwide classes. In addition, there was a minimum monetary threshold of $75,000 to be met by every plaintiff in the case.

With the advent of the CAFA, the rules for diversity jurisdiction have eased, though for class actions only, so that diversity of the parties can be achieved if *any* class member is a citizen of a different state from *any* defendant and if the aggregated, not individual, amount-in-controversy for all class members is at least $5 million, and the class involves more than 100 people. As a result, the CAFA relaxes the historic strict standard for diversity jurisdiction to allow defendants to remove what were formerly "non-diverse" state law-based class actions.

The CAFA also has prompted plaintiffs' class action lawyers to file "single-state" class actions in state court to avoid removal under the CAFA. For example, it is increasingly more common for plaintiffs to sue on behalf of "all employees in California" in an effort to plead around the CAFA's provisions triggering federal jurisdiction. Likewise, plaintiffs' class action lawyers are also filing multiple single-state class actions in a staggered fashion to avoid the CAFA.

The CAFA's impact in 2015 was significant. More class actions are being filed in federal courts, and more intrastate class actions are being heard in federal courts through the removal mechanisms under the CAFA. Because the law's provisions are designed to prevent plaintiffs' counsel from keeping class actions in state court that are more appropriately litigated in federal court, the CAFA forecloses the pleading tactic of requesting damages of less than $75,000 per class member (the jurisdictional limit for a federal court to hear a claim involving plaintiffs and defendants of different states) to stymie a defendant from removing the lawsuit to federal court. Over the last year, employers repeatedly invoked the statute to remove class actions filed in state court to federal court. In turn, federal courts addressed several novel issues arising under the CAFA.

The CAFA has had profound effects on considerations underlying case strategy and the structuring of class actions. In this context, the CAFA's impact on workplace class actions is both varied and evolving. Class actions and collective actions under Title VII, the ADEA, the FLSA, and ERISA typically are brought in federal court. The CAFA may have limited impact on strategic decisions in those cases relative to choice of venue in a federal court or state court. Class actions in state law-based wage & hour litigation are another matter. The plaintiffs' bar and defense bar alike continue to confront novel CAFA issues in these types of cases, for the fight over venue is often a key driver of exposure and risk. On the one hand, employers sued in state law wage & hour class actions are increasingly confronted by plaintiffs' lawyers seeking to avoid removal to federal court by various stratagems, including prayers for relief of less than $5 million, the filing of multiple "baby" class claims on behalf of less than 100 plaintiffs, and limiting the scope of the class to residents of one state. On the other hand, defense counsel seeking (often successfully) to dismiss state law claims pursued by plaintiffs with FLSA claims in "hybrid" wage & hour class actions in federal court also argue that judges should not exercise supplemental jurisdiction over the state law claims; in turn, federal courts are increasingly confronted with questions of whether original jurisdiction exists under

the CAFA over such hybrid state law claims, and employers also may face a two-front litigation war – one in federal court and the other in state court – depending on resolution of those CAFA issues. These litigation issues are likely to shape class action practice and defense strategy for the foreseeable future.

More than any other jurisdiction, the Ninth Circuit has confronted – and ruled on – more issues under the CAFA than any other federal circuit. This is primarily the result of the high volume of class action litigation in California state courts, and the corresponding removal of those lawsuits to federal courts in California. In this respect, the Ninth Circuit's CAFA jurisprudence has had a significant impact on other circuits, as issues already decided in the Ninth Circuit are confronted by courts in other areas of the country.

In 2015, federal courts decided many CAFA-related cases. This Chapter does not canvas them all, but instead focuses on major appellate cases and a number of noteworthy district court rulings – in both employment and non-employment cases – that interpreted the CAFA.

(i) First Circuit

***Addison Automatics, Inc., et al. v. The Netherlands Insurance Co.*, 2015 U.S. Dist. LEXIS 13211 (D. Mass. Feb. 4, 2015).** Plaintiff brought an action in state court seeking a declaratory judgment that Defendant Netherlands Insurance Co. ("Netherlands") had a duty to defend and indemnify Defendant Precision Electronic Glass Co. ("Precision") in an action pending in the U.S. District Court for the Northern District of Illinois. Defendants removed the action under the CAFA. Plaintiff moved to remand the action on the ground that Defendants did not timely remove and as Plaintiff did not bring a class action. The Court granted the motion. *Id*. at *1-2. In 2010, Plaintiff brought an action against Precision for alleged violations of the Telephone Consumer Protection Act ("TCPA") and obtained a $15 million settlement. *Id*. at *2-3. Plaintiff brought this action on November 7, 2011, in state court and on December 23, 2011, Defendants filed a motion to dismiss, which the state court denied. *Id*. at *4. On December 7, 2012, Defendants filed a motion for judgment on pleadings, which the state court also denied in January 2013. *Id*. On April 30, 2014, Defendants filed another motion to dismiss, which was denied on August 26, 2014. *Id*. On September 25, 2014, Defendants removed the action. *Id*. at *6. Defendants contended that the filing of the complaint did not start the removal clock. The Court disagreed. It found that Plaintiff specifically requested relief individually and as a class representative and, although Plaintiff did not specifically mention Rule 23 or file a class complaint, the initial filing provided Defendants with information from which they could ascertain the basis for removal. *Id*. at *8-9. The Court observed that the only element for removal missing from the initial complaint was the amount-in-controversy because, in the case cover sheet lodge with the clerk's office, Plaintiff stated the amount exceeded "$60,000.00." *Id*. at *10. The Court found that, even if the clock for removal did not start with the initial pleading, the clock started in January 2013 when the underlying judgment was included in briefing filed before the trial court. The underlying judgment made clear that the amount-in-controversy was more than $15 million and confirmed that the members of the class that were owed that amount. *Id*. at *10. The Court noted that as Defendants' motion to dismiss had been denied, Defendants removed the action, contending that the August 2014 order was the first paper that identified the case as a class action that could be removed. *Id*. at *12. The Court, however, noted that Plaintiff still continued to insist that it was not asserting class claims, so, in that respect, nothing had changed. *Id*. The Court, therefore, remanded the action, finding that Defendants failed to remove the action within 30 days. *Id*. at *13.

***Clee, et al. v. MVM, Inc.,* 2015 U.S. Dist. LEXIS 29387 (D. Mass. Mar. 10, 2015).** Plaintiffs brought a class action in state court alleging that Defendant, a federal contractor of security services, failed to pay its security guards for the 10 to 15 minutes it required guards to be at work before and after each shift in violation of the Massachusetts Wage Act. Plaintiffs also asserted a claim for unjust enrichment because Defendant required its guards to relinquish a portion of their wages. *Id*. at *3. Because a collective bargaining agreement ("CBA") governed the parties' employment relationship, Defendant removed the case based on complete preemption under § 301 of the Labor-Management Relations Act, as well as under the Federal Officer Removal Statute. While Defendant moved to dismiss on the grounds of complete preemption, Plaintiffs moved to remand. The Court denied Plaintiffs' motion to remand and granted

Defendant's motion to dismiss. The Court found that removal was proper because § 301 completely preempted Plaintiffs' claims as an interpretation of the CBA was required to resolve them. Specifically, the Court found that Plaintiffs' claims were intertwined with the CBA because Plaintiffs' claim for wages for uncompensated work depended on the interpretation of at least three provisions of the CBA. *Id*. at *18. First, the Court noted that the CBA provided that a regular workweek of 36 hours of work, including lunch periods, would constitute a normal full-time workweek for full-time employees, and shifts were eight or 12 hours. The Court stated that it was necessary to determine whether that time included time to prepare for work and prepare to leave work, and thus it was necessary to determine the definition of "work" in the CBA. *Id*. Second, the CBA required employees to report in and out before and after a shift. Defendant argued that Plaintiffs' allegations regarding pre-shift and post-shift requirements were contrary to that language. *Id*. at *18-19. The Court reasoned that it was necessary to construe the term "report" as it was used in the CBA. *Id*. at *19. Third, the CBA provided that the Government could supersede any understanding of the parties regarding assignments, hours, shifts, credentials, qualifications, and any other operational issue, and there would be no recourse against Defendant regarding such actions or their compliance with such directives. While Plaintiffs contended that the provision meant that only the provisions of the CBA, and not the requirements of the Wage Act, could be superseded by Government action, the Court opined that it was necessary to construe the parties' intentions as expressed in the CBA to decide the merit of this contention. *Id*. Moreover, the Court observed that the Government's requirements with respect to matters such as uniforms and firearms might justify Defendant's requirement that its employees spend time on certain actions before and after their shifts. *Id*. The Court therefore held that it was necessary to determine whether the Government supremacy provision of the CBA foreclosed Plaintiffs' actions against Defendant. *Id*. at *19-20. Thus, the Court concluded that Plaintiffs' motion to remand was not meritorious. Because § 301 preempted Plaintiffs' claims, the Court dismissed the complaint and observed that the parties could utilize the grievance procedure established in the CBA. *Id*. at *22-26.

(ii) Second Circuit

***In Touch Concepts, Inc. v. Cellco Partnership*, 2015 U.S. App. LEXIS 9293 (2d Cir. June 4, 2015).** Plaintiff, a former retail sales agent, brought a putative class action in New York state court alleging that Defendants terminated the agents' sales-agent relationship and he asserted multiple state and common law violations. After Defendants removed the case under the CAFA, Plaintiff filed amended complaint and dropped all class action allegations. *Id*. at *4. Despite the lack of any federal claims, the lack of complete diversity, and the lack of any class allegations, the District Court maintained subject-matter jurisdiction, and ultimately dismissed several claims on the merits. *Id* at *2. Plaintiff voluntarily dismissed the remaining claims and appealed, but the Second Circuit found that the District Court properly maintained subject-matter jurisdiction. *Id*. at *5. At the outset, the Second Circuit noted that when a Plaintiff files a case in federal court and voluntarily amends the complaint, the amended complaint determines jurisdiction. *Id*. The Second Circuit remarked that if this case was filed originally in federal court, the District Court would have to dismiss it as soon as Plaintiff amended the complaint dropping all class action allegations, which destroyed the only basis for federal jurisdiction. *Id*. at *6. In removal cases, however, the Second Circuit reasoned that a post-removal amended complaint that reduces the amount-in-controversy below the statutory threshold does not impair diversity jurisdiction. *Id*. Since Plaintiff's post-removal amendment did not defeat federal jurisdiction premised on a federal question or on diversity, the Second Circuit concluded that the District Court properly maintained subject-matter jurisdiction over the first amended complaint. *Id*. at *7. The Second Circuit thereby affirmed the dismissal of complaint in its entirety.

***Weisblum, et al. v. Prophase Labs, Inc.,* 2015 U.S. Dist. LEXIS 20634 (S.D.N.Y. Feb. 20, 2015).** Plaintiffs brought a class action alleging that Defendants made false representations that their cold remedy product, Cold-EEZE, reduced the duration and severity of the common cold. *Id.* at *2. Defendants moved to dismiss Plaintiffs' claims under the Magnuson-Moss Warranty Act ("MMWA"). The Court declined to dismiss the MMWA claims. Defendants argued that Plaintiffs' MMWA claims must be dismissed because the complaint neither named 100 Plaintiffs nor stated that any individual Plaintiff was seeking more than $25, as required under 15 U.S.C. § 2310(d)(3). *Id.* at *17. Plaintiffs instead relied on the CAFA for the Court's jurisdiction. At issue was whether the CAFA presented an alternative basis for jurisdiction over Plaintiffs' MMWA claims. The Court noted that the CAFA's grant of jurisdiction over qualifying class actions

is quite broad. Specifically, the CAFA provides original jurisdiction over any civil action that both satisfies the amount-in-controversy requirement and is a class action, as long as certain specified other criteria are met; in turn, a "class action" is expansively defined as any civil action filed under Rule 23 or similar state statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action. *Id.* at *19. Thus, the Court found that the plain text of the CAFA authorized actions like Plaintiffs' lawsuit, and that there was no basis to read an MMWA exception into the CAFA that Congress itself chose not to include. *Id.* at *20. The Court reasoned that treating the CAFA as an alternative basis for jurisdiction is consistent with the goal of expanding federal jurisdiction over class actions. *Id*. at *21. The Court concluded that because Plaintiffs met the jurisdictional prerequisites of the CAFA, it could exercise subject-matter jurisdiction over the claim under the MMWA without regard for whether the jurisdictional prerequisites of that statute were also met. *Id.* Accordingly, the Court denied Defendants' motion to dismiss Plaintiffs' claims under the MMWA.

(iii) Third Circuit

***Echavarria, et al. v. William Sonoma, Inc.,* 2015 U.S. Dist. LEXIS 14231 (D.N.J. Feb. 6, 2015).** Plaintiffs brought a class action in the state court alleging that Defendants misclassified their truck drivers and helpers as independent contractors and denied them overtime pay under the New Jersey Wage & Hour Law. Defendants removed the action asserting jurisdiction under the CAFA. Plaintiffs moved for remand on the basis that Defendants failed to establish the CAFA's $5 million amount-in-controversy requirements. The Court granted the motion. Defendants arrived at an amount-in-controversy of $7,328,271 by taking the total amount they paid to Cruz Delivery, the delivery company owned by Plaintiff Jose Cruz, and calculating a per hour rate from that figure. *Id.* at *4-5. Defendants claimed that they used this technique because they only had information regarding how much they paid to Cruz Delivery, not the hourly rate other members of the class received. *Id.* at *5. Plaintiffs contended that this calculation overstated the amount-in-controversy because Defendants included amounts paid to Cruz Delivery for the costs of diesel, tolls, insurance, and the expense of paying any other drivers and helpers. Plaintiffs also asserted that the average pay for a class member was $130 per day, and that the average class member worked 10 hours per day, so that the average rate was $10 per hour. *Id.* Using Defendants' same equation, this rate provided an amount-in-controversy of $650,000. Plaintiffs' complaint explicitly sought only overtime wages owed to the class members in the capacity of truck drivers and helpers. The Court observed that the U.S. Bureau of Labor Statistics reported that, as of May 2013, the mean hourly wage for light truck or delivery services drivers was $16.10, which was much closer to Plaintiffs' $10 per hour figure than Defendants' $77.01 per hour figure. *Id.* at *6. Further, the Court remarked that Defendants provided no persuasive reason to use the entire amount paid to Cruz Delivery to calculate an overtime rate for the class members when this amount contained certain non-payroll costs, such as fuel, insurance, and tolls. The Court remarked that even if those cost components were in controversy, they would not be used to calculate an overtime rate. *Id.* at *7. Thus, because the amount-in-controversy was below the threshold requirement of $5 million, the Court remanded the action.

***Grace, et al. v. TGI Fridays, Inc.,* 2015 U.S. Dist. LEXIS 97408 (D.N.J. July 27, 2015).** Plaintiffs brought a class action in the state court alleging that TGI Fridays, Inc. ("TGIF") had a practice of knowingly or intentionally failing to disclose the price of beverages, thereby inducing consumers to pay higher than reasonable prices for those beverages. Defendants removed this action pursuant to the CAFA. Plaintiffs moved for remand, which the Court denied. Plaintiffs argued that Defendant failed to establish that the amount-in-controversy exceeded the $5 million jurisdictional threshold. At the outset, the Court observed that a Defendant's notice of removal need include only a plausible allegation that the amount-in-controversy exceeds the jurisdictional threshold, and that no evidentiary support is required. *Id.* at *8-9. Here, the notice of removal stated that: (i) there were 34 TGIF locations in New Jersey; (ii) the class consisted of all customers who purchased items that did not have a disclosed price; (iii) all customers who purchased a beverage without a posted price could be entitled to a minimum $100 civil penalty under the New Jersey Truth in Consumer Contract Warranty and Notice Act ("TCCWNA") for each purchase made after July 14, 2014; (iv) all customers could be entitled to actual damages, treble damages, attorneys' fees, and a refund under the New Jersey Consumer Fraud Act ("CFA"); and (v) all customers could be entitled to punitive damages under the breach of contract claim. *Id.* at *9-10. Defendants asserted that it would take

only 50,000 customer transactions subject to the $100 TCCWNA fine to reach the $5 million threshold. Accordingly, the Court concluded that the notice of removal contained a short and plain statement that the amount-in-controversy requirement was satisfied. The Court next applied the preponderance of the evidence test to determine whether the matter-in-controversy exceeded the $5 million jurisdictional threshold by aggregating the claims of individual class members. *Id.* at *20-21. Because Plaintiffs' complaint had no expiration date, sought damages for all items sold to customers without clearly disclosed prices since July 14, 2014, and the parties did not indicate that TGIF had ceased the alleged offending practice, the Court opined that the claims in the complaint covered damages over the course of at least one year. Further, the Court noted that even a conservative estimate of the items sold at the TGIF locations yielded a significant number of transactions. The CFA permits customers to recover a full refund for all offending transactions, and the Court remarked that assuming that the illustrative $10.39 transaction price cited by Plaintiffs in his complaint was above average, and chose instead a $7.00 average mixed drink price for offending transactions, the refund provision alone brought the damages to over $800,000. *Id.* at *23. Further, pursuant to the TCCWNA, Plaintiffs sought actual damages, a refund for all transactions, attorneys' fees, and a civil penalty of not less than $100 for each Plaintiff. The Court noted that the refund and actual damages totaled approximately $1,030,000 when combined, and even if there were only 100 class members, the civil penalty could be at least $10,000. *Id.* at *24. Thus, Defendants could be liable for at least $1,040,000 under the TCCWNA. Further, because punitive damages were estimated at five times the compensatory damages, the Court opined that the punitive damages for the breach of contract claim alone would equal $1,150,000, leading to a liability of as much as $1,380,000 for breach of contract. The Court noted that attorneys' fees could amount to $1,173,000, and the overall damages amount could be as much as $5,083,000. Accordingly, the Court denied Plaintiffs' motion to remand.

***Johnson, et al. v. Organo Gold International,* 2015 U.S. Dist. LEXIS 156912 (D. Del. Nov. 20, 2015).** Plaintiff, a consumer, brought a class action in the state court alleging that he suffered serious complications after undergoing gastric bypass surgery due to his consumption of Organo coffee containing Ganoderma Lucidum. Plaintiff claimed that Defendants failed to warn him of the dangerous side effects of Ganoderma Lucidum, and further failed to label the amount of Ganoderma Lucidum in its product. *Id*. at *2. Defendants removed the action based on diversity of citizenship under the CAFA. *Id.* Plaintiff moved to remand, and the Court denied the motion. *Id.* at *3. The Court found that complete diversity of citizenship existed because Plaintiff was a resident of Florida and Defendants were Nevada business entities. *Id.* at *5. The Court found that although Plaintiff prayed for an indeterminate amount of compensatory and punitive damages and attorneys' fees, he alleged that he suffered serious medical injuries, requiring him to be resuscitated with multiple blood and platelet transfusions and subsequently undergo an emergency surgery. *Id.* The Court further found that Plaintiff did not dispute that the value of his own personal injury claim exceeded $75,000 and thus, with respect to Plaintiff's individual personal injury claim, the Court held that it had original jurisdiction. *Id.* Plaintiff argued that his own personal injury could not be used to impart subject-matter jurisdiction over the absent class members, whose injuries were unknown. *Id.* at *6. Defendants cited *ExxonMobil Corp. v. Allapattah Services., Inc.*, 545 U.S. 546 (2005), and argued that 28 U.S.C. § 1367 authorized supplemental jurisdiction over class actions where some, but not all, Plaintiffs allege a sufficient amount-in-controversy. *Id.* The Court observed that claims are part of the same case or controversy when they derive from a common nucleus of operative facts. *Id.* at *7. Although Plaintiff conceded that his personal injury claim shared common operative facts with the claims of the absent class members, he maintained that they did not form the nucleus of the case. *Id.* The Court, however, found that Plaintiff's personal injury claims as well as the claims of the absent class members were based on a common nucleus of operative facts, *i.e.*, Defendants' failure to adequately label its product and warn class members about the risks of consuming Ganoderma Lucidum. *Id.* at *8. Further, the Court reasoned that nothing in Plaintiff's complaint distinguished Plaintiff's injuries from those of the absent class members, and paragraph 18 of the complaint expressly provided that "[t]he harm that Defendants have caused or could cause is substantially uniform with respect to class members." *Id.* Consequently, the Court agreed with Defendants that the factual basis for all of the claims was that Defendants' products did not warn about the purported health risks of Ganoderma Lucidum or disclose how much Ganoderma Lucidum was in each product, and thus the claims shared a common nucleus of operative fact. *Id.* at *11. Further, the Court ruled that since original jurisdiction based on diversity existed over all of the claims in the case, it had been

properly removed, and therefore the Court need not decide whether jurisdiction existed based on the CAFA. *Id.* Accordingly, the Court denied Plaintiff's motion to remand.

(iv) Fourth Circuit

***Estate Of Hanna, et al. v. Agape Senior, LLC*, 2015 U.S. Dist. LEXIS 5901 (D.S.C. Jan. 20, 2015).** Plaintiffs brought a state court class action on behalf of all patients of Agape Senior, LLC, and its entities who received care from Ernest Addo, an unlicensed physician who had assumed the identity of a duly licensed physician. Plaintiffs alleged negligent referral against Jackson & Coker Locum Tenens, LLC, and negligent hiring, retention, supervision and entrustment; unjust enrichment; and strict tort liability against Agape. *Id.* at *2. Defendants removed the action, asserting jurisdiction under the CAFA. Thereafter, Plaintiffs moved for remand, arguing that the local controversy exception applied, and the Court granted the motion. At issue was whether Plaintiffs sought "significant relief" from Agape – the local Defendants – and whether Agape's conduct formed a "significant basis" for the claims made, so that the local controversy exception could apply. *Id.* at *8. The Court noted that a class seeks "significant relief" against a Defendant when the relief sought against the Defendant forms a significant portion of the entire relief sought. *Id.* at *9-10. Here, Plaintiffs exclusively sought from Agape disgorgement of all improper collections from Plaintiffs' class or their families and a declaratory judgment regarding strict liability for unreasonably dangerous activities. Plaintiffs alleged that Agape received payments from the patients that were unjustified because Agape did not actually provide any physician services. Further, out of the nine separate causes of action, Plaintiffs asserted only one against Jackson, while they asserted numerous causes of action against Agape, including unjust enrichment. Further, to the extent "significant relief" also included an assessment of how many class members were harmed, Plaintiffs alleged that all class members were allegedly harmed by Agape's actions. *Id.* at *13. Because the relief sought from Agape was significant in comparison to that sought from Jackson, the Court found that the Plaintiffs satisfied the significant relief prong of the inquiry. Further, the Court observed that in relating the local Defendant's alleged conduct to all the claims asserted, the "significant basis" provision effectively calls for comparing the local Defendant's alleged conduct to the alleged conduct of all Defendants. *Id.* at *15. The Court noted that the local Defendant's alleged conduct must be an important ground for the asserted claims in view of the alleged conduct of all Defendants. *Id.* While Plaintiffs alleged that Jackson negligently referred Addo to Agape, the claims asserted against Agape were more expansive and related to direct contact Agape made with Plaintiffs. Plaintiffs contended that Agape actually allowed Addo to treat patients, which resulted in harm to those individuals. Thus, the Court determined that even without the cause of action asserted against Jackson, substantial claims against Agape would still remain, and that Plaintiffs sued Agape based on its own alleged negligent conduct. *Id.* at *17. Finally, because all of the Agape Defendants constituted Agape entities, their subsidiary, sister concerns, affiliated corporations, and their officials, the Court found that all of the local Defendants were related to one another, and comprised the vast majority of all Defendants. Accordingly, the Court applied the local controversy exception and granted Plaintiffs' motion to remand.

(v) Fifth Circuit

***Hood, et al. v. Gilster-Mary Lee Corp.,* 2015 U.S. App. LEXIS 7241 (8th Cir. May 1, 2015).** Plaintiffs, a group of former and current employees, brought a class action in state court alleging lung impairment from exposure to butter-flavoring products, including diacetyl, used in Defendant's microwave popcorn packaging plant in Jasper, Missouri. The proposed class included those who worked for over one year at Defendant's plant before January 1, 2008, the date when Defendant stopped using diacetyl. After Defendant removed the case under the CAFA, the District Court remanded the action to state court based on the CAFA's local-controversy exception. On appeal, the Eighth Circuit reversed the remand order. During the course of discovery on state citizenship issues, employees initially provided only last known addresses, some 27 years old, and did not identify state citizenship. *Id*. at *2. After Plaintiffs identified 40 current employees and 246 former employees, they wrote the potential class members seeking affidavits of citizenship, but most did not respond. Based on the affidavits of few potential class members, the District Court had found that about 150, or 41%, of the potential class members were clearly Missouri citizens. *Id*. at *3. Based on the last known address of former employees obtained from staffing companies and from other modes, the District Court concluded that over two-thirds of the potential class members were

Missouri citizens. *Id*. at *4. At the outset, the Eighth Circuit reasoned that it was not proper to draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses. *Id*. The Eighth Circuit found that the District Court extrapolated the citizenship of the Missouri citizens who responded to the citizenship for those potential class members who did not respond. *Id*. at *6. The Eighth Circuit remarked that those still at the last known address were more likely to respond, and those not at the last known address were less likely to respond (and more likely not to be Missouri citizens, or even had a valid address). *Id*. Thus, the Eighth Circuit held that the last known address evidence in the case would not bridge the gap between 41% and 67%. *Id*. Because Plaintiffs did not meet their burden of proof that the CAFA exception under 28 U.S.C. § 1332(d)(4) applied, the Eighth Circuit concluded that the District Court erred when it resolved doubts in favor of the party seeking the remand. *Id*. Accordingly, the Eighth Circuit reversed the District Court's remand order.

(vi) Sixth Circuit

***Aldrich, et al. v. University Of Phoenix, Inc.,* 2015 U.S. Dist. LEXIS 137916 (W.D. Ky. Oct. 9, 2015).** Plaintiffs brought a class action against Defendant, the nation's largest for-profit university, on behalf of all current and former employees of Defendant who performed a substantial part of their job duties within Kentucky, alleging wage & hour violations under various sections of § 337 of the Kentucky Revised Statutes. Defendant removed the action on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a). Plaintiffs moved to remand, arguing that the Court lacked subject-matter jurisdiction and that the case did not meet the jurisdictional requirements under the CAFA , which requires that the amount-in-controversy exceed $5,000,000 and the class have more than 100 members. *Id.* at *2. The Court denied Plaintiffs' motion to remand. *Id.* at *1. Plaintiffs argued that the only jurisdictional basis for a class action was pursuant to the CAFA, as traditional diversity jurisdiction was now unavailable for class actions. *Id.* at *5-6. The Court rejected this argument, noting that it is widely accepted that both jurisdiction under the CAFA and traditional diversity jurisdiction are available to class action litigants. *Id.* at *6. Quoting *Newberg on Class Actions* § 6:14 (5th ed. 2011), the Court noted that the "CAFA does not displace conventional diversity class action rules; it augments them. Therefore, federal subject-matter jurisdiction over a class action may be premised on either the conventional diversity rules (including utilization of supplemental jurisdiction) or on the CAFA." *Id.* The Court further found that amount-in-controversy requirement of $75,000 per class member was satisfied since one of the named Plaintiffs alleged damages of at least $92,713 due to loss of salary. *Id.* at *9-10. Further, supplemental jurisdiction was properly invoked since at least one class member was diverse from Defendant. *Id.* at *17-18. Accordingly, the Court denied Plaintiffs' motion to remand. *Id.* at *19.

(vii) Seventh Circuit

***Drake, et al. v. Aerotek, Inc.,* 2015 U.S. Dist. LEXIS 129923 (W.D. Wis. Sept. 28, 2015).** Plaintiff brought a class action under Wisconsin state law on behalf of himself and similarly-situated individuals to recover overtime pay for his work as a recruiter trainee and a recruiter for Defendant. Plaintiff originally asserted subject-matter jurisdiction under the CAFA. *Id.* at *3. Because Plaintiff's later filed second amended complaint and motion to certify two state-wide classes presented questions concerning subject-matter jurisdiction, the Court entered an order requiring Plaintiff to show cause why the case should not be dismissed for lack of subject-matter jurisdiction. *Id.* at *1. The Court thereafter held that it had jurisdiction over Plaintiff's claims under the CAFA, and denied Plaintiff's motion to voluntarily dismiss his claims without prejudice. *Id.* at *2. In response to the Court's show cause order, Plaintiff stated that he could not meet the CAFA's $5 million amount-in-controversy requirement because even using Defendant's numbers for class size and eight hours of overtime per workweek owed to each individual class member, damages (with the one-and-a-half times damages multiplier allowed under Wisconsin law) totaled approximately $2.5 million. *Id.* at *6. Plaintiff also contended he could not individually meet the $75,000 amount-in-controversy threshold under the general diversity statute. *Id.* The Court noted that although Plaintiff did not cite any legal authority for doing so, he appeared to base his jurisdictional analysis on the newly revised class allegations in his motion for class certification that included claims brought on behalf of 147 trainees and 173 recruiters. *Id.* at *6-7. Defendant argued that even considering the more narrow class definitions proposed in Plaintiff's motion for class certification, the Court had jurisdiction under the CAFA. *Id.* at *7.

The Court agreed with Defendant, noting that dismissal was not justified because it was not "legally certain" that Plaintiff could not meet the amount-in-controversy requirement of the CAFA, even considering the more narrow class definitions. *Id.* Accordingly, the Court held that it retained subject-matter jurisdiction over Plaintiff's state law claims under the CAFA, and denied Plaintiff's motion for voluntary dismissal without prejudice for lack of subject-matter jurisdiction. *Id.* at *13-14.

(viii) Eighth Circuit

***Hood, et al. v. Gilster-Mary Lee Corp.*, 785 F.3d 263 (8th Cir. 2015).** Plaintiffs, a group of former and current employees of Defendant, filed a class action against Defendant and six other Defendants alleging lung impairment or potential lung impairment from exposure to butter-flavoring products, including diacetyl, used in Defendant's microwave popcorn packaging plant in Jasper, Missouri. The parties did not dispute jurisdiction under the CAFA. *Id.* at 264. Upon the dismissal of the six other Defendants, the District Court ordered a remand to state court based on the CAFA's local-controversy exception. *Id.* On appeal, the Eighth Circuit reversed and remanded. *Id.* The CAFA's local controversy exception requires a District Court to decline jurisdiction when greater than two-thirds of the members of all proposed Plaintiff classes in the aggregate are citizens of the state in which the action was originally filed. *Id.* at 246-65. The two-thirds figure is determined as of the date of the filing of the complaint or amended complaint. *Id.* at 265. The District Court permitted discovery on state citizenship; while Plaintiffs wrote to the potential class members seeking affidavits of citizenship, most did not respond. *Id.* Citing other case law authority, the District Court relied on last known addresses to conclude that over two-thirds of the potential class members were Missouri citizens. *Id.* While the District Court used the terms "sampling" and "representative sample" to justify its determination of citizenship, the record did not include any sample, sampling methodology, or other indication of a disciplined approach. *Id.* at 266. The Eighth Circuit noted that the District Court extrapolated the citizenship of the Missouri citizens who responded to the citizenship for those potential class members who did not respond; it found such reasoning to be in error. *Id.* Thus, because Plaintiffs did not meet their burden of proof that the CAFA exception under 28 U.S.C. § 1332(d)(4) applied, the Eighth Circuit held that the District Court erred by resolving doubt in favor of the party seeking remand. *Id.* Accordingly, the Eighth Circuit reversed and remanded the District Court's order of a remand to state court. *Id.*

(ix) Ninth Circuit

***Adams, et al. v. Toys "R" US – Delaware, Inc.,* 2015 U.S. Dist. LEXIS 11338 (N.D. Cal. Jan. 29, 2015).** Plaintiff, a former assistant store manager, brought a state court class action alleging that Defendant failed to reimburse its employees for mileage expenses in violation of California labor laws. Plaintiff contended that as a member of management, Plaintiff used her personal vehicle to perform interstore inventory transfers ("ISITs"), on behalf of Defendant without reimbursement for the expense of mileage and wear and tear on the vehicle. *Id*. at *2. Plaintiff sought to represent a class of at least 2,000 class members. *Id*. at *3. Defendant removed the case under the CAFA. Plaintiff moved to remand, which the Court denied. In her motion, Plaintiff noted that she had not alleged a specific amount-in-controversy because Defendant alone had access to the information necessary to make a damages calculation. Plaintiff maintained that Defendant knew which employees performed ISITs with their personal vehicles, the distance traveled, and which ISITs were not reimbursed, yet failed to perform this calculation in the notice of removal. *Id*. at *8. Plaintiff argued that even if each putative class member drove five miles per week, every week during the class period, the amount of mileage expenses would only be $1.16 million. *Id*. Defendant noted that Plaintiff alleged that the amount-in-controversy for her individual claim was less than $30,000 but greater than the unlimited jurisdictional amount of $25,000, and she further alleged that there were at least 2,000 class members whose claims were typical of her claims. *Id*. at *9. Defendant therefore argued that it was reasonable to assume that the damages sought exceeded $5 million. The Court found that it was more likely than not that Plaintiff had put over $5 million in controversy. *Id*. at *9-10. The Court remarked that in *Harris v. Bankers Life and Casualty Co.*, 425 F.3d. 689 (9th Cir. 2005), the Ninth Circuit held that the basis of a notice of removal under § 1446(b) was determined through examination of four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry. *Id*. at *10. Thus, the Court concluded that Defendant was under no duty to investigate the facts or to make calculations as

suggested by Plaintiff. The Court found that although Plaintiff challenged Defendant's calculation of the amount-in-controversy of $60,000,000 as a mere assertion, she failed to show that Defendant's calculation was false. *Id*. at *10. The Court reasoned that for the purposes of a motion to remand, it only needed to determine whether the amount-in-controversy suggested by the allegations in the complaint exceeded $5 million. The Court held that the allegations in the complaint did suggest that the amount-in-controversy exceeded the jurisdictional minimum, and denied Plaintiff's motion to remand.

***Allen, et al. v. The Boeing Co.,* 2015 U.S. App. LEXIS 6868 (9th Cir. April 27, 2015).** Plaintiffs brought a state court action in Washington alleging that for more than 40 years Defendant released toxic chemicals into the groundwater causing damages to Plaintiffs' properties. Plaintiffs asserted state law claims of negligence, nuisance, and trespass. Defendant removed the action based on diversity jurisdiction and the CAFA. Defendant contended that Plaintiffs' action was a "mass action" under the CAFA, § 1332(d)(11)(B), which defines mass action as "any civil action… in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the Plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those Plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under section (a)." *Id.* at *5. The District Court remanded the case, holding that Plaintiffs' claims fell within the local event exception to the CAFA in § 1332(d)(11)(B)(ii)(I), which provides that the term mass action "shall not include any civil action in which all of the claims arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." *Id.* On Defendant's appeal, the Ninth Circuit vacated the order, finding that Plaintiffs' action did not come within the local single event exception to the CAFA. The Ninth Circuit noted its prior analysis of the local event exception in *Nevada v. Bank of America Corp.,* 672 F.3d 661 (9th Cir. 2013), where it held that the "event or occurrence" exclusion applies "only where all claims arise from a single event or occurrence." *Id.* at *5-6. The District Court had relied on *Abraham v. St. Croix Renaissance Group LLLP,* 719 F.3d 270 (3d Cir. 2013), which stated that "the words event and occurrence do not commonly or necessarily refer in every instance to what transpired at an isolated moment in time," and that "treating a continuing set of circumstances collectively as an 'event or occurrence' for purposes of the mass action exclusion is consistent with the ordinary usage of these words, which do not necessarily have a temporal limitation." *Id.* at *8-9. The Ninth Circuit disagreed with the Third Circuit's construction, and found that such a broad definition would cause the local single event exception to be redundant with the local controversy exception to the CAFA. *Id.* at *10. The Ninth Circuit explained that there would be no need to consider the local controversy exception's criteria, such as whether at least two-thirds of the members of a class were citizens of the State or at least one significant Defendant was a citizen of the State, if the local single event exception applied to all "circumstances that share some commonality and persist over a period of time." *Id*. at *12-13. The Ninth Circuit further relied on legislative history to support its conclusion that "event or occurrence" referred to a singular happening. The Ninth Circuit quoted the language of the Senate Committee report that "[t]he purpose of this exception was to allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local…" The Ninth Circuit pointed out that by referring to "chemical spill," the legislative history drew the line between a one-time chemical spill and a continuing course of pollution or conduct that occurs over a period of years. *Id.* at *15-16. The Ninth Circuit thus read the exception as referring to a single happening, stating that it reflected the most common understanding of the terms, consistent with the purposes of the CAFA. *Id.* at *17-18. The Ninth Circuit therefore held that the District Court had federal jurisdiction over the matter. The Ninth Court also noted that, even if it read the local event exception as covering allegations of a continuing nature, Plaintiffs' action still would not qualify because Plaintiffs challenged several distinct actions on the part of two Defendant. *Id.* at *20. The Ninth Circuit therefore remanded the action to the District Court for further proceedings.

***Anderson, et al. v. Seaworld Parks And Entertainment, Inc.,* 2015 U.S. Dist. LEXIS 128786 (N.D. Cal. Sept. 24, 2015).** Plaintiffs, a group of consumers, brought a state court class action alleging that Defendant, a theme park, misled consumers about its alleged mistreatment of whales. *Id.* at *2. Specifically, Plaintiffs claimed that Defendant deceived consumers into paying higher prices than consumers would pay for admission to the theme parks if they knew about Defendant's mistreatment of killer whales. Defendant successfully removed the action based on the theory that the case involved at

least $5 million and had a class of at least 100 people, giving it jurisdiction under the CAFA. *Id.* at *3. Plaintiffs argued that the calculations underlying the notice of removal were improper and that they fell below the $5 million threshold required by the CAFA, as Plaintiffs intentionally did not seek any class damages. *Id.* Plaintiffs sought remand, which the Court denied. The Court found that the basis of Plaintiffs' motion for remand was wrong as a matter of law. *Id.* at *31-32. The Court noted that the value of the injunction-only case might be measured by the value of the injunction, and because such a valuation exceeded $5 million, it created jurisdiction under the CAFA. *Id.* at *11. The Court found that even absent any showing of monetary value of an injunction to Plaintiffs, the facts readily suggested by a preponderance of the evidence that Defendant would place an enormous negative value on the injunctive relief, if awarded. *Id.* at *15. Considering the damage done by the accusations currently being lobbied against Defendant, including its reputation, its ability to secure third-party vendors to market ticket sales, and its ability to retain sponsors, the Court found that the cost would be far greater than the simple cost of changing words on a webpage. *Id.* at *16-17. The Court therefore concluded that the amount-in-controversy was sufficiently high based on the value of the injunction to Defendant to merit federal jurisdiction. *Id.* at *18. Because Plaintiffs had also filed other cases pending elsewhere in the country alleging similar claims against Defendant, and the Judicial Panel for Multi-District Litigation denied consolidation of the actions, the parties argued at length whether preclusion would apply to prevent the filing of individual damages claims were this injunctive-only suit permitted to continue in state court. *Id.* The Court held that, where a case requesting only injunctive relief relied on the same facts as another, already-pending case that requested damages, and the injunctive case was comprised of a sub-set of members to the earlier case requesting damages, the Court's concern might be reasonably heightened that the effects of issue preclusion from hearing the injunctive case might effectuate claim preclusion. *Id.* at *25. The Court, however, determined that such an analysis conflicted with intent of the CAFA.

***Bailey, et al. v. Redfin Corp.,* 2015 U.S. Dist. LEXIS 7446 (C.D. Cal. Jan. 21, 2015).** Plaintiffs, a group of real estate field agents, brought state court action on behalf of themselves and all other aggrieved employees under the Private Attorney General Act ("PAGA") and the California Labor Code alleging that Defendant willfully misclassified Plaintiffs as independent contractors, and thereby denied them minimum wages, overtime compensation, and wages for missed meal and rest periods. Defendant removed the action under the CAFA's diversity jurisdiction provision, alleging that there was a diversity of citizenship among the parties and that the amount-in-controversy exceeded $5 million. Plaintiffs moved to remand, arguing that their claims did not trigger jurisdiction under the CAFA. The Court granted Plaintiffs' motion and remanded the action. The Court noted that Plaintiffs alleged numerous claims pursuant to the Labor Code, the Business and Professional Code. and a single PAGA claim. *Id*. at *6-7. The Court found that Plaintiffs' complaint contained neither class allegations, nor did it assert any claims on behalf of a class; instead, Plaintiffs sought civil penalties in their alleged PAGA claim. *Id*. at *7. The Court relied on the Ninth Circuit's ruling in *Baumann v. Chase Investment Services Corp.,* 747 F.3d 1117, 1122 (9th Cir. 2014), for the proposition that PAGA actions are not sufficiently similar to Rule 23 class actions to trigger jurisdiction under the CAFA. *Id*. The Court reasoned that a PAGA action is essentially a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class-wide relief. *Id*. at *8. Thus, the Court found that Plaintiffs' PAGA claims were not subject to removal under the CAFA. *Id*. at *8. In addition, Plaintiffs alleged that even if Defendant argued that the case was removable under the non-CAFA diversity provisions of 28 U.S.C. § 1332, removal was improper because it was untimely as Defendant exceeded the one-year limit on removal. Plaintiffs also argued that Defendant misrepresented the amount-in-controversy in its notice of removal, and that Defendants could not aggregate PAGA penalties for purposes of establishing diversity jurisdiction. *Id*. at *11. The Court agreed and accordingly remanded the case.

***Benko, et al. v. Quality Loan Service Corp.,* 2015 U.S. App. LEXIS 10253 (9th Cir. June 18, 2015).** Plaintiffs brought a putative class action in state court alleging that Defendants engaged in illegal debt collection practices in the course of carrying out non-judicial foreclosures. Plaintiffs took loans against Nevada real properties. When Plaintiffs defaulted on the loans, Defendants, as trustees on the foreclosed deeds, engaged in claim collection under § 649 of the Nevada Revised Statutes ("NRS"). Plaintiffs argued that Nevada law required the trustees be licensed, and Defendants' failure to register as "collection

agencies" constituted deceptive trade practice. *Id.* at *5. Defendants removed the action to the District Court under the CAFA. Plaintiffs then attempted to amend their complaint by adding information concerning the claims asserted against Meridian Foreclosure Services ("Meridian"), a Nevada corporation. *Id.* at *6. Although the District Court found jurisdiction, it dismissed Plaintiffs' claim for failure to state a claim. *Id.* The District Court also denied Plaintiffs' leave to amend, holding that the amendments were futile. On appeal, the Ninth Circuit vacated the District Court's judgment and remanded with instructions to remand the case to state court for further proceedings. The Ninth Circuit noted that because Meridian was a significant Defendant for purposes of the CAFA's local controversy exception, it lacked jurisdiction over this action. The Ninth Circuit cited *Coleman v. Estes Express Line, Inc.,* 631 F.3d 1010 (9th Cir. 2011), and held that it must analyze only the allegations in the complaint to determine whether Plaintiffs sought significant relief from an in-state Defendant and whether the in-state Defendant's alleged conduct formed a significant basis for the claims asserted. *Id.* at *11. The Ninth Circuit therefore compared the allegations against Meridian to the allegations made against other Defendants, and found that Plaintiffs had shown that a significant number or percentage of putative class members might have claims against Meridian. *Id.* at *14. In terms of the overall class, Plaintiffs alleged that Meridian conducted illegal debt collection agency activities with respect to thousands of files each year, and that Meridian's activities constituted between 15% to 20% of the total debt collection activities of all Defendants. *Id*. Further, Plaintiffs claimed general damages of $10,000 from Meridian, and punitive damages as a result of deceptive trade practices and fraud. Plaintiffs estimated that the total damages recovery from Meridian would be between $5 million and $8 million. *Id.* at *14-15. The Ninth Circuit therefore concluded that Meridian's conduct constituted a significant basis for Plaintiffs' claims, Plaintiffs sought significant relief from Meridian, and thus Plaintiffs met their burden of showing that the action qualified for the local controversy exception. *Id.* at *16. The Ninth Circuit further ruled that the District Court abused its discretion in denying Plaintiffs' leave to amend. According to the Ninth Circuit, Plaintiffs did not attempt to amend their complaint to eliminate a federal question so as to avoid federal jurisdiction; rather, they attempted to elaborate on estimates of the percentage of total claims asserted against Meridian, an in-state Defendant, and the dollar value of those claims. *Id*. at *10. The Ninth Circuit thus held that, by amending the complaint, Plaintiffs provided the information required to determine whether the action was within the District Court's jurisdiction under the CAFA. *Id*. at *11. Accordingly, the Ninth Circuit reversed the District Court's order, and instructed it to remand the action to the state court for further proceedings.

***Bridewell-Sledge, et al. v. Blue Cross Of California,* 2015 U.S. Dist. LEXIS 4500 (C.D. Cal. Jan. 14, 2015).** Plaintiff brought a putative class action in San Francisco Superior Court alleging claims for employment discrimination and unfair business practices against Defendants. Defendants transferred the action to the Los Angeles Superior Court, which later consolidated the lawsuit with a related class action entitled *Jermaine Crowder v. Blue Cross*. Defendants then removed this action, and separately removed the *Crowder* action, invoking jurisdiction under the CAFA, and the actions were consolidated again. Plaintiffs' filed a motion to remand. Plaintiffs' asserted that the action had been filed "exactly 13 minutes and 50 seconds" before the *Crowder* action, and thus, applying local controversy exception, the action should be remanded. *Id*. at *6. Agreeing with Plaintiffs, the Court remanded the case to Los Angeles Superior Court. The Court found that the local controversy exception mandated that it decline to exercise jurisdiction. Defendants had conceded that more than two-thirds of Plaintiffs were citizens of California, at least one Defendant from whom significant relief was sought and whose alleged conduct formed a significant basis for the claims was a California citizen, and the principal injuries about which Plaintiffs complained were suffered in California. *Id*. at *14. The issue, therefore, was whether "during the 3-year period preceding the filing of [this] class action, no other class action has been filed asserting the same or similar factual allegations against any of the Defendants on behalf of the same or other persons." *Id*. at *14-15. While Defendants did not contend that Plaintiffs' action was filed before the *Crowder* action or that there were similar actions filed within the preceding three-year period, they asserted that the action should not be remanded because to do so would circumvent the purpose of the local controversy exception. *Id*. at *21-22. Specifically, Defendants contended that the legislative history of the CAFA show that Congress enacted the local controversy exception to ensure that class actions "with a truly local focus" would not be removed. *Id.* at *22. Defendants cited the U.S. Senate report as support for their assertion that this action did not involve a controversy that uniquely affected a particular locality to the exclusion of all others. *Id.* at

*24. The Court found Defendants' arguments unpersuasive. There was no dispute that all members of the putative class were employed by Defendants solely in California. Thus, according to the Court, the controversy did uniquely affect a particular locality, *i.e.*, California, to the exclusion of all others. *Id.* Further, there was no dispute that two-third of the class were citizens of California, the principal injuries were suffered in California, and Defendants, except for one, were all California citizens. The Court, therefore, found that Plaintiffs satisfied the local controversy exception requirements. The Court rejected Defendants' argument that because the Court retained jurisdiction over *Crowder,* it could exercise supplemental jurisdiction over this action. The Court found that the fact that this action and *Crowder* action were consolidated following their removal does not allow a party to remove an otherwise unremovable action for consolidation with a related federal claim, and to conclude otherwise would run contrary to the long-standing rule that "[o]nly state court actions that originally could have been filed in federal court may be removed to federal court by the Defendant." *Id.* at *32. Because the local controversy exception mandates that a Court decline jurisdiction if the requisite showing was made, the Court concluded that it lacked subject-matter jurisdiction to hear the action. Accordingly, the Court remanded the action to Los Angeles Superior Court.

***Bridewell-Sledge, et al. v. Blue Cross Of California,* 2015 U.S. App. LEXIS 14624 (9th Cir. Aug. 20, 2015).** Plaintiffs brought two separate class actions in San Francisco Superior Court alleging that Defendants failed to properly pay African-American and female employees at a wage rate equate to white and/or male employees working in the same establishment and performing equal work. Plaintiffs alleged gender employment discrimination in violation of California's Fair Employment and Housing Act and violation of California's Equal Pay Act and Unfair Competition Law. *Id.* at *5. Following transfer of both actions to the Los Angeles Superior Court, Plaintiffs moved to consolidate the actions. The state court granted the motion and ordered that the actions be consolidated "for all purposes." *Id.* at *7. After Plaintiffs amended the complaints to add additional Defendants, including one non-California citizen, Defendants removed the actions under the CAFA by filing two notices of removal. The District Court consolidated the cases for all purposes, including trial, and later ordered Defendants to show cause as to why the cases should not be remanded to state court for lack of subject-matter jurisdiction based on the CAFA's local controversy exception, especially based on the fourth prong (*i.e.*, no similar class action has been filed against any Defendants in the preceding three years). *Id.* at *8. Then, after learning which complaint had been filed first, the District Court remanded the earlier-filed class action to state court, concluding that the CAFA's local controversy exception applied only to that case. *Id.* at *9-10. The District Court retained jurisdiction over the other action, finding that the local controversy exception did not apply. *Id*. On appeal, Plaintiffs argued that, because the two actions had been consolidated into a single action, no "other class action" had been filed within the three-year period before the consolidated action. *Id.* at *16. The Ninth Circuit agreed, finding that California law required the two cases to be treated as a single consolidated class action that was united originally, rather than as two separate class actions filed at different times. *Id.* at *18. The Ninth Circuit noted that state court-ordered consolidation might affect jurisdiction and removability because it could destroy the identity of each suit and merge them into one. *Id.* at *16. Here, the state court consolidated the two actions "for all purposes," and according to the Ninth Circuit, under California law, actions consolidated for all purposes are merged into a single proceeding with one case number, resulting in only one verdict and judgment, and therefore are to be treated as if they had been united originally. *Id.* at *17. The Ninth Circuit rejected Defendants' argument that the actions should be treated separately because they were separate actions at the time they were filed, since that it contravened California law regarding consolidation. Although the Ninth Circuit agreed that the relevant date under the fourth prong of the CAFA's local controversy exception was the date when the actions were originally filed, it explained that when two actions were consolidated "for all purposes" under California law, the cases were to be treated as if one single complaint had been filed. *Id.* at *20. Moreover, because most Plaintiffs and at least one significant Defendant were citizens of California, and the action involved injuries suffered in California, the Ninth Circuit held that the state had a strong interest in deciding the dispute, and allowing the state court to continue to adjudicate the consolidated class action was entirely in accordance with the purpose of the local controversy exception, as well as the CAFA's primary policy objectives. *Id.* at *22-25. Accordingly, the Ninth Circuit ruled that the District Court erred in exercising jurisdiction over one class

action and remanding the other, and ordered it to treat the cases as a single consolidated action and remand it in its entirety to state court.

***Briggs, et al. v. Marck Sharp & Dohme,* 2015 U.S. App. LEXIS 13731 (9th Cir. Aug. 6, 2015).** Plaintiffs brought five separate tort cases in California state court alleging that Defendants, pharmaceutical manufacturers, failed to warn users of diabetes drugs about its harmful side effects, including causing cancers. *Id.* at *4. While each of the five cases had fewer than 100 Plaintiffs, a second set of cases involving the same drug was already pending in the Superior Court for the County of Los Angeles as a Judicial Council Coordinated Proceeding ("JCCP"). *Id.* at *4-5. When Defendants removed three cases based on an assertion of diversity jurisdiction, Plaintiffs' counsel represented to the District Court that the cases, if remanded, would be assigned to JCCP "for all purposes." *Id.* at *8-9. Plaintiffs' counsel made a similar representation to the District Court when Defendant removed another of the cases, also based on diversity jurisdiction, stating that the remand would "result in these cases joining JCCP." *Id.* at *10-11. Following remand, Defendant again moved for removal, asserting mass action jurisdiction under the CAFA. *Id.* at *11. This time, the District Court denied Plaintiffs' motion to remand on the basis that assertions by Plaintiffs' counsel made the actions a mass action within the federal jurisdiction under the CAFA. *Id.* at *12. The District Court further denied Plaintiffs' motion to reconsider the removal order. Plaintiffs appealed. The Ninth Circuit reversed the District Court and ordered remand to state court. First, the Ninth Circuit agreed with Plaintiffs on a threshold jurisdictional question, holding that a petition for leave to appeal filed within 10 days of the denial of a motion for reconsideration was timely. *Id.* at *14. Turning to the merits, the Ninth Circuit held that the remand should have been granted because none of the five suits was a mass action under the CAFA as there had been no "proposal" by Plaintiffs that the claims of more than 100 persons be tried jointly. *Id.* at *18-19. The Ninth Circuit explained that a "proposal" for joint trial under the CAFA must be made to a trial court with the authority to effect the relief requested, and therefore, statements made in the District Court could not constitute such a proposal. *Id.* at *19-20. According to the Ninth Circuit and its understanding of the meaning of "proposal," nothing that Plaintiffs represented to the District Court about what might happen to their cases, if they were remanded to state court, qualified as a proposal for a joint trial. *Id.* at *20. The Ninth Circuit explained that Plaintiffs' counsel had, at most, cited the prospect of consolidation, and even if counsel expressed an intent to join the JCCP, such statements could not have been proposals given that the District Court lacked any authority to join Plaintiffs' cases to a proceeding in state court. *Id.* at *21. The Ninth Circuit also held that a set of Plaintiffs' declaration that they "do not seek join trial of any cases or Plaintiffs, but rather, all claims shall be tried individuals," did not trigger the CAFA as they did not explain that they sought to join the JCCP in order to avoid inconsistent judgments. *Id.* at *26. Finally, the Ninth Circuit ruled that a proposal for bellwether trials in a state mass tort proceeding did not constitute a proposal for joint trials within the meaning of the CAFA. *Id.* at *27. The Ninth Circuit therefore ordered the District Court to remand the five cases to state court.

***Dittmar, et al. v. Costco Wholesale Corp.,* 2015 U.S. Dist. LEXIS 154809 (S.D. Cal. Nov. 13, 2015).** Plaintiffs, a group of employees, brought a putative class action in state court alleging that Defendant failed to pay them overtime wages, denied them meal breaks, and failed to provide accurate wage statements in violation of California labor laws. *Id.* at *2. Defendant removed the case under the CAFA. *Id.* Plaintiffs moved to remand, and the Court denied the motion. *Id.* To quantify the amount-in-controversy, Defendant submitted that during the class period, it employed over 500 non-exempt pharmacists and 800 managers, who received hourly pay in lieu of overtime pay. *Id*. at *3. During this period, 181 pharmacists and 35 managers left their employment. *Id*. Defendant contended that non-exempt pharmacists made at least $58.75 per hour, and pharmacy managers made at least $63.22 per hour for overtime purposes, and salaried non-exempt department managers made $22.67 per hour for overtime purposes. *Id*. at *4. Defendant contended that on average at least 30,000 employees worked each week. Payroll records revealed that there were an average of 1,279 employees per pay period whose time records were inconsistent with taking a 30-minute meal break. *Id*. The Court noted that Plaintiffs alleged that Defendant willfully failed to timely pay all wages owed on separation of employees from the company. *Id*. at *6. Because Plaintiffs alleged that Defendant's violations were regular and pursuant to a uniform policy, it was reasonable to assume that each former employee was underpaid at least one time during their employment. *Id*. at *7. As the records suggested that Defendant did not pay the class for 30-days after

separation, the Court calculated the waiting time claims at $2.4 million. *Id*. at *8. As to overtime claims, Defendant argued that Plaintiffs' allegations established that each class member worked without overtime pay at least one 12 hour day and at least one 8 hour day on the seventh day of a workweek. *Id*. at *9. The Court agreed and estimated Plaintiffs' unpaid overtime claim at $822,504. *Id.* at *9. The Court further pegged Plaintiffs' meal break claims at $168,014.40, and rest break claims at $91,382 in controversy. *Id.* In addition, the Court reasoned that Plaintiffs' failure to provide wage statements claims placed $684,000 in controversy. *Id.* at *13. Finally, Defendant calculated attorneys' fees equal to 25% of the total amount-in-controversy and stated that attorneys' fees placed over $1 million in controversy. *Id.* at *14. Consequently, the Court found that Defendant had demonstrated by a preponderance of evidence that the aggregate amount-in-controversy exceeded $5 million. *Id.* Accordingly, the Court denied Plaintiffs' motion to remand.

***Eminence Investors, LLP, et al. v. Bank Of New York Mellon*, 2015 U.S. App. LEXIS 5300 (9th Cir. April 2, 2015).** Plaintiffs brought an action in the state court seeking to recover for Defendant's alleged breaches of duties that it owed as the indenture trustee of bonds issues to fund the development of real property. Almost two years later, Plaintiffs amended the complaint by adding class allegations on behalf of more than 100 class members and requesting compensatory damages expected to exceed $10 million for each of the alleged four causes of action. Within 30 days after filing the complaint, Defendant removed the action. *Id*. at *3. Plaintiffs moved to remand, arguing that removal was untimely and that the CAFA securities exception applied. The District Court ultimately agreed with Plaintiffs regarding the untimeliness of the removal notice under 28 U.S.C. § 1446(b), and remanded the case without reaching the securities exception. On appeal, the Ninth Circuit affirmed. At the outset, the Ninth Circuit noted that cases falling under the CAFA's securities exemption, *i.e.*, claims relating to the rights, duties, and obligations relating to or created to any security under the Securities Act, were expressly exempted from removal. *Id*. at *4. The Ninth Circuit observed that Plaintiffs' first three causes of action were for breach of fiduciary duty, based respectively on non-disclosure, loyalty and due care. *Id*. at *5. The fourth cause of action was for gross negligence. Therefore, the Ninth Circuit concluded that all causes of action related to the rights, duties, and obligations related to or created by or pursuant to the bonds, and thus the securities exception must apply. *Id*. at *8. Defendant relied on *Estate of Pew v. Cardarelli*, 527 F.3d. 25 (2d Cir. 2008), where purchasers of certain money market certificates brought suit against the issuers of the certificates and their auditors under a state consumer fraud statute. The Second Circuit held that because Plaintiffs sought to enforce their rights as purchasers of the securities rather than as holders of the securities under a state fraud statute that focused on the transaction in which they acquired the notes, the CAFA exception did not apply. *Id*. at *10. Defendant cited *Cardarelli* for the proposition that in order to apply the securities exception, the case must be grounded in the terms of the security itself. The Ninth Circuit, however, noted that *Cardarelli* clarified that the key distinction was whether Plaintiffs were seeking to enforce their rights as holders of the certificates or purchasers of the certificates. *Id*. at *11. Here, the Ninth Circuit found that Plaintiffs asserted their rights as a holder of the bonds rather than as a purchaser of the bonds. *Id*. Defendant also pointed to *BlackRock Financial Management, Inc. v. Segregated Account of Ambac Assurance Corp.*, 673 F.3d. 169 (2d Cir. 2012), where the Second Circuit agreed with the District Court that the securities exception did not apply if the trustee's conduct in approving the settlement also must be evaluated under some source of law other than laws such as New York's common law of trusts. *Id*. at *14. Defendant cited to *BlackRock* for the principle that the securities exception should not be applied to causes of action seeking solely to enforce the terms of the indenture. The Ninth Circuit, however, observed that Defendant did not discuss *BlackRock*'s preceding phrase stating that the securities exception applies to cases based on the duties imposed on persons who administered securities. *Id*. at *15. The Ninth Circuit held that an indenture trustee is the one responsible for administering bonds, so under the reasoning of this passage in *BlackRock*, the securities exception should apply because all of Plaintiffs' causes of action were based on the Defendant's alleged duties in administering the bonds. Accordingly, the Ninth Circuit concluded that causes of action in this case were covered by the CAFA securities exception.

***Garnett, et al. v. ADT, LLC*, 2014 U.S. Dist. LEXIS 16204 (E.D. Cal. Feb. 10, 2015).** Plaintiff brought a state court class action for wage & hour violations, asserting claims for failure to reimburse her and others for work-related expenses and for failure to provide wage statements required by California law. Defendant removed the action under the CAFA. Plaintiff moved to remand, which the Court denied. Defendant

removed the action solely on the statutory penalties available for failing to furnish wage statements under § 226 of the California Labor Code, contending that the amount-in-controversy was approximately $6.7 million. *Id*. at *2. Defendant submitted a declaration of the HR Workforce Analyst Lori Pencis in support of its amount-in-controversy calculation. At the outset, the Court noted that § 226(e) provides for an employee to recover greater of all actual damages or $50 for initial pay period, and $100 per employee for each violation, up to a limit of $4,000. *Id*. at *4. Section 226(e) entitles an employee for costs and reasonable attorneys' fees as well. *Id*. at *4-5. Defendant interpreted subsequent event to mean a pay period that occurred chronologically after the first pay period in which an employer failed to comply with § 226(a). Defendant calculated the amount-in-controversy using three different penalty rates, including: (i) a set of 1,040 employee wage statements at a maximum penalty of $4,000; (ii) an additional 1,751 initial wage statements of those were not included in 1,040 putative class members; and (iii) an additional 25,465 subsequent wage statements for the individuals included in category (2). *Id*. at *5. Plaintiff disagreed, and contended that "subsequent" has a special meaning in the Labor Code that triggered heightened statutory penalties only after an employer has learned that its conduct violated the Labor Code. *Id*. at *5-6. Plaintiff estimated the amount-in-controversy to be at $4 million. Plaintiff relied on *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (1st Dist. 2008), which rejected a purely temporal understanding of the term subsequent and interpreted its use in §§ 210 and 222.5 of the Labor Code to require that the employer has been notified that it violated the provision before higher penalties were triggered. *Id*. at *6. The Court disagreed with this interpretation, finding that the §§ 210, 222.5, and 2699 used the term subsequent in a different way than § 226(e). *Id*. at *7. The Court explained that the term subsequent in those sections modified the word "violation," so that a Defendant faced enhanced penalties for each subsequent violation. *Id*. In contrast, the Court found that § 226(e) used the term "subsequent" to modify the noun "pay period," so that enhanced penalties apply "per employee for each violation in a subsequent pay period." *Id*. at *7-8. Accordingly, the Court concluded that under § 226(e), Defendant faced a $50 penalty for an initial pay period, and a $100 penalty per employee for each subsequent violation. The Court, therefore, accepted Defendant's estimate of the amount-in-controversy of $6.7 million, and ruled that the $5 million jurisdictional minimum of the CAFA was satisfied. *Id*. at *9.

***Harris, et al. v. CVS Pharmacy, Inc.*, 2015 U.S. Dist. LEXIS 104101 (C.D. Cal. Aug. 6, 2015).** Plaintiff brought a putative class action alleging that Defendant violated various California and Rhode Island consumer protection statutes and breached express and implied warranties in connection with the marketing and sale of the CVS-branded Ultra CoQ10 softgel dietary supplements. Defendant filed a motion to dismiss, arguing that the Court lacked subject-matter jurisdiction, which the Court granted. Plaintiff sought to invoke jurisdiction under the CAFA. Plaintiff's complaint alleged that the Court had original diversity jurisdiction under the CAFA because the amount-in-controversy exceeded $5 million. *Id.* at *7. Defendant disputed Plaintiff's amount-in-controversy and provided evidence that when Plaintiff filed suit, its total sales for CVS UltraCoQ10 was $1,192,234 from its stores nationwide. *Id.* Plaintiff did not dispute that he was unable to satisfy the CAFA's jurisdictional threshold using his full refund model of restitution or compensatory damages; instead, he argued that the amount-in-controversy was premised on his claims under the Rhode Island Deceptive Trade Practices Act ("RIDTPA"), which provides for statutory damages, punitive damages, and attorneys' fees. *Id.* at *8. The Court reasoned that as the party advocating for the application of Rhode Island law, Plaintiff must make at least a *prima facie* showing that the RIDTPA applied to him such that he would have standing to bring that claim. *Id.* at *10. The Court remarked that was a particularly difficult burden for Plaintiff to bear because he (as the only named Plaintiff in this uncertified class action) alleged that he was a resident of California who purchased Defendant's CoQ10 supplement in California. *Id.* at *10-11. The Court found Plaintiff did not show any plausible basis for invoking Rhode Island law, which clearly states that, absent some indication to the contrary, extraterritorial force cannot be given to a Rhode Island statute. Id. at *12. Moreover, Plaintiff failed to identify any basis to conclude that the law of Rhode Island would apply to him under standard choice-of-law principles; the fact that Defendant was incorporated in Rhode Island was not sufficient to overcome California's interest in applying its consumer protection laws to Plaintiff's transaction, which occurred entirely within California. *Id.* at *13. The Court also rejected Plaintiff's argument that he had satisfied the threshold amount-in-controversy requirement because he had claimed for punitive damages and attorneys' fees under the RIDTPA. *Id.* at *18. The Court pointed out that because Plaintiff had no standing to invoke

Rhode Island law, he could not rely on those provisions. *Id.* Finally the Court rejected Plaintiff's claim that the value of injunctive relief should be considered in calculating the amount-in-controversy, because Plaintiff failed to offer any substantial, plausible evidence indicating the value of the injunctive relief he sought, let alone that the value of that injunctive relief exceeded the CAFA's jurisdictional threshold. *Id.* at *18-19. Separately, the Court held that it did not have subject-matter jurisdiction under the Magnuson-Moss Warranty Act ("MMWA"), which provides federal subject-matter jurisdiction over state law express and implied warranty claims. *Id.* at *22. The Court noted Plaintiff brought this case as a class action, and he was the only named Plaintiff; in addition, Plaintiff failed to respond to that argument in its opposition, effectively conceding that his claim under the MMWA hinged on jurisdiction under the CAFA. *Id.* at *23. Thus, the Court found that absent jurisdiction under the CAFA, Plaintiff could not pursue a claim under the MMWA. *Id.* Accordingly, the Court granted Defendant's motion to dismiss the action without prejudice. *Id.* at *25.

***Ibarra, et al. v. Manheim Investments, Inc.*, 2015 U.S. App. LEXIS 334 (9th Cir. Jan. 8, 2015).** Plaintiff, a former employee, brought a state court action alleging a failure to pay minimum and overtime wages, and failure to provide meal and rest periods. Plaintiff alleged that the aggregate claims of the individual class members did not exceed the $5 million threshold for jurisdiction under the CAFA. Defendant removed the action. The District Court, relying on *Lowdermilk v. U.S. Bank National Association*, 479 F.3d 994 (9th Cir. 2007), held that Defendant did not prove to a legal certainty that the amount-in-controversy exceeded $5 million and thus, remanded the action. *Id.* at *6. Subsequently, *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013), held that a Plaintiff's pre-certification stipulation that Plaintiff and the class will not seek damages over $5 million does not preclude a Defendant's ability to remove the case under the CAFA. *Id.* Thus, Defendant again removed the action; however, the District Court remanded the case, holding that *Standard Fire* was not irreconcilable with *Lowdermilk. Id.* While Defendant's appeal was pending, the Ninth Circuit decided *Rodriguez v. AT&T Mobility Services, LLC*, 728 F.3d 975, 977 (9th Cir. 2013), which held that *Lowdermilk* had been overruled by *Standard Fire* and that the proper burden of proof imposed upon a Defendant to establish the amount-in-controversy is the preponderance of the evidence standard. *Id.* at *6. The Ninth Circuit thus remanded the action to the District Court. On Plaintiff's renewed motion for remand, the District Court opined that Defendant did not prove that the amount-in-controversy exceeded $5 million, because Defendant did not provide a basis for its assumption that Plaintiffs were never provided breaks, and again remanded the action. *Id.* at *7. On further appeal, the Ninth Circuit vacated that order. The Ninth Circuit observed that where, as here, Defendant's assertion of the amount-in-controversy is contested by Plaintiffs, evidence establishing the amount is required, and both sides must submit proof by a preponderance of the evidence whether the amount-in-controversy requirement has been satisfied. *Id.* at *8. Further, the Ninth Circuit noted that in light of *Standard Fire*, this rule is not altered even if Plaintiffs affirmatively contend in their complaint that damages do not exceed $5 million, and that a Defendant cannot establish removal jurisdiction by mere speculation and conjecture, or with unreasonable assumptions. *Id.* at *9. To prove the amount-in-controversy, Defendant relied on a declaration of its senior director of employee services and administration, which had a table listing all of its non-exempt employees and their corresponding number of shifts worked in excess of 5 hours and 3.5 hours during the relevant class period. Defendant's method of calculation assumed that each class member was denied one meal break in each of their 5-hour shifts and one rest break in each of their 3.5-hour shifts. Further, Defendant based its violation-rate assumption on the allegations in the complaint that Defendant had a pattern or practice of failing to pay its non-exempt employees for working off-the-clock, and that it hid behind written policies that purported to forbid these unlawful labor practices while at the same time maintaining an institutionalized unwritten policy that mandated these unlawful practices. *Id.* at *13. The Ninth Circuit, however, stated that a pattern or practice of doing something does not necessarily mean always doing something. *Id.* Here, the complaint alleged a pattern or practice of labor law violations, but did not allege that this pattern or practice was universally followed every time the wage & hour violation could arise. While Defendant relied on an assumption about the rate of its alleged labor law violations that was not grounded in real evidence, Plaintiff contested the assumption, but did not assert an alternative violation rate grounded in real evidence. Thus, the Ninth Circuit remanded the action to the District Court to enable the parties to submit proof related to the disputed amount-in-controversy, and directed the District

Court to determine if a preponderance of the evidence showed that the amount-in-controversy exceeded $5 million.

***Jordan, et al. v. Tor Nationstar Mortgage, LLC,* 2015 U.S. App. LEXIS 5221 (9th Cir. April 1, 2015).** Plaintiff brought a putative class action against Defendant in Washington state court in 2012, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff did not specify an amount-in-controversy in the complaint, but requested damages in an amount to be proven at trial, including treble damages. *Id.* at *5. On June 3, 2014, Plaintiff submitted responses to Defendant's interrogatories stating that "the total amount of monetary damages is expected to exceed $25,000,000." *Id.* Defendant then filed a notice of removal pursuant to the CAFA. Plaintiff moved to remand the case, arguing that Defendant's notice of removal was untimely because Defendant filed it more than two years after Plaintiff's initial complaint triggered federal jurisdiction under the FDCPA. *Id.* at *6. Defendant countered by claiming that the interrogatory answer provided the first occasion to ascertain an amount-in-controversy exceeding $5 million, an essential element of jurisdiction under the CAFA. *Id.* Not persuaded by Defendant's argument, the District Court remanded the case. The District Court adhered to the traditional strict construction afforded to removal statutes generally, and ruled that "the general principles of removal jurisdiction apply in CAFA cases" and "the relevant removal date is the date on which the case itself becomes removable." *Id.* at *7. Upon Defendant's appeal, the Ninth Circuit reversed the District Court's decision. Relying on the recent U.S. Supreme Court decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014), the Ninth Circuit adopted a much broader interpretation of the term "removal" under the CAFA. In doing so, the Ninth Circuit reiterated the logic of its opinion in *Durham v. Lockheed Martin Corp.,* 445 F.3d 1247 (9th Cir. 2006), a federal officer removal case, in which the Ninth Circuit recognized that a "second and separate ground for removal, even if the initial complaint provided some other ground for removal" re-opened the 30 days removal window. *Id*. at *10. The Ninth Circuit noted that *Durham* identified "two plausible ways to construe" the term "removable:" one "binary – either there is a basis for the removal or there is not," and the other looks at each ground for removal separately. *Id*. Under this reading, "a case does not become removable until the particular basis on which the removal is sought becomes apparent for the record." *Id.* Based on the Supreme Court's command to liberally construe the "federal officer" removal statute, *Durham* applied the second broad construction to the removal. Citing *Dart Cherokee*, the Ninth Circuit pointed out that the policies underlying removal under the CAFA were similarly broad, and evince a strong preference that interstate class actions be heard in the federal judicial system if properly removed. *Id.* at *12-13. The Ninth Circuit therefore extended the rationale of *Durham* for a broad interpretation of federal officer removal to a removal under the CAFA, and explained that, even though *Dart Cherokee* focused on how specifically the amount-in-controversy requirement must be asserted in a Defendant's removal notice under the CAFA, the Supreme Court left no doubt that "no anti-removal presumption attends cases involving [the] CAFA." *Id.* at *14. The Ninth Circuit therefore concluded that Defendant's removal under the CAFA was timely, and accordingly reversed the District Court's remand order.

***LaCross, et al. v. Knight Transportation, Inc.*, 2015 U.S. App. LEXIS 335 (9th Cir. Jan. 8, 2015).** Plaintiffs, a group of truck drivers, brought a state court action alleging that Defendant misclassified them as independent contractors. Defendant removed the action to the District Court, and estimated that the amount-in-controversy for reimbursing the drivers' lease-related and fuel costs was at least $44 million. Subsequently, the District Court remanded the action, holding that Defendant did not meet its burden of proof to establish the amount-in-controversy because Defendant's calculations relied on a flawed assumption that all drivers worked 50 weeks a year. *Id.* at *4. On appeal, the Ninth Circuit reversed. In *Ibarra v. Manheim Investments, Inc*., 2015 U.S. App. LEXIS 334 (9th Cir. Jan. 8, 2015), the Ninth Circuit had held that a Defendant seeking removal bears the burden of proof to establish by a preponderance of the evidence that the amount-in-controversy requirement is satisfied. *Id.* at *5. Further, *Ibarra* also opined that when a Defendant relies on a chain of reasoning that includes assumptions to satisfy its burden of proof, the chain of reasoning and its underlying assumptions must be reasonable ones. *Id.* at *6. Here, the complaint defined the class to include only the truck drivers, all of whom allegedly should have been classified as employees rather than as independent contractors. If Plaintiffs succeeded on their claim that they were employees, Defendant would have to reimburse them for expenditures related to the ownership and operation of their trucks, including lease-related costs and fuel costs. Defendant provided its drivers

with fuel cards to pay for fuel at a discount, and the total fuel costs invoiced on these cards in the first quarter of 2014 were $2,369,628. *Id.* at *7. Defendant contended that if the quarterly fuel costs of $2.3 million were multiplied by 16 quarters in the four-year class period, the amount-in-controversy would be $36.8 million. *Id.* Defendant further extrapolated a more conservative estimate of total fuel costs by taking into account that the number of drivers varied each year. The number of drivers was the lowest in 2010, and even using the lowest number of drivers in 2010 for all 16 quarters during the relevant class period, the total estimated fuel costs would be $21 million. *Id.* at *8. The Ninth Circuit noted that the foregoing method of calculation extrapolated fuel costs based on the actual invoiced fuel costs in the first quarter of 2014 and the actual number of drivers who signed the independent contractor agreements with Defendant during the relevant class period, without relying on the assumption that each driver worked the entire year. The Ninth Circuit thus held that Defendant produced sufficient evidence to establish by a preponderance of the evidence that the amount-in-controversy exceeded $5 million. The Ninth Circuit determined that the chain of reasoning and its underlying assumption to extrapolate fuel costs for the entire class period using the actual invoiced fuel costs of one quarter were sound. *Id*. at *9. Because the complaint alleged that the class included only truck drivers, the fuel costs were necessary expenses in the discharge of the drivers' duties, and nothing in the record indicated that the drivers worked for another company while working for Defendant. Further, while the number of drivers varied during the class period, even using the lowest number of drivers in 2010 for all 16 quarters during the class period, the fuel costs would still exceed $5 million. Accordingly, the Ninth Circuit reversed the District Court's remand order.

***Levanoff, et al. v. SoCal Wings, LLC,* 2015 U.S. Dist. LEXIS 6287 (C.D. Cal. Jan. 16, 2015).** Plaintiffs brought a state court class action alleging that Defendants failed to provide them with meal and rest periods and pay overtime wages in violation of the California Labor Code. Plaintiffs later filed a statement of damages estimating that the proposed class sustained damages of $8,160,000. *Id*. at *3. Subsequently, Plaintiffs filed their second amended complaint to include Dragas Homes, Inc. as a named Defendant. *Id*. at *4. After the state court granted Plaintiffs' motion for class certification, Dragas Homes removed the action under the CAFA in November 2014, three years after the case was initiated and almost one year after it was named as a Defendant. *Id*. Plaintiffs moved to remand the case, arguing that the removal was untimely. The Court granted Plaintiffs' motion to remand. At the outset, the Court found that the basis for removal was not apparent from the face of the complaint. *Id*. at *6. The Court noted that under 28 U.S.C. § 1446(b)(3), a notice of removal may be filed within 30 days after receipt by Defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. *Id*. Defendant Dragas Homes argued that, prior to October 2014, it could not determine that the amount-in-controversy exceeded $5 million until its own recent investigation into the damages Plaintiffs were seeking. *Id*. at *6-7. The Court, however, found that the facts and circumstances strongly suggested that Defendant Dragas Homes could have reasonably and intelligently ascertained the amount-in-controversy well before October 2014. *Id*. at *7. The Court maintained that the removal statute requires a Defendant to apply a reasonable amount of intelligence in ascertaining removability. *Id*. The Court remarked that Defendant Dragas Homes waited close to a year before removing the case. Although Plaintiffs filed their statement of damages prior to amending their complaint to properly add Dragas Homes, the Court opined that Dragas Homes should not be able to ignore pleadings or other documents from which removability could be ascertained and sought removal only when it became strategically advantageous for it to do so. *Id*. at *7-8. Thus, the Court concluded that the removal was untimely, and accordingly, granted Plaintiffs' motion to remand. *Id*. at *9.

***Lucas, et al. v. Breg, Inc.*, 2015 U.S. Dist. LEXIS 53085 (S.D. Cal. April 22, 2015).** Plaintiff brought a state court class action on behalf of thousands of consumers in the United States and/or their insurers who purchased and/or rented BREG Polar Care products pursuant to a physician's prescription during the class period. Defendants filed a notice of a related case entitled *Engler v. Chao, Oasis, Breg, Inc., et al.*, where Defendants admitted millions of BREG Polar Care products had been sold and generated close to $100 million in revenue, and where the jury reached a verdict of $5.196 million and $7 million in punitive damages against Defendant Breg, Inc. *Id*. at *7. The parties stipulated to transfer the case to the trial judge in *Engler*, who then scheduled discovery and class certification. After Plaintiffs served a response to admissions on Defendants confirming that they were seeking in excess of $5 million, Defendants removed

the case. Plaintiffs moved to remand, which the Court denied. At the outset, the Court remarked that a Defendant must remove a case within 30 days after receiving the initial pleading, or after receiving an amended pleading, motion, order or other paper from which it can be ascertained that a case has become removable. *Id*. at *8. The Court noted that the initial complaint was limited to California consumers, and therefore, was not removable as it failed to establish diversity citizenship. The second and the third amended complaints expanded the class to include thousands of consumers throughout the United States, but it was still not clear if the amount-in-controversy exceeded $5 million. *Id*. at *11. Since none of the documents put Defendants on notice that the amount-in-controversy was $5 million, the Court remarked that Defendants were not required to extrapolate or engage in guesswork to determine the size of the class or the amount-in-controversy. *Id*. at *12-13. Since Plaintiffs' response to interrogatories was first fact that put Defendants on notice of the amount-in-controversy, the Court ruled that removal was timely, and denied Plaintiffs' motion to remand. *Id*. at *14-15.

***Marentes, et al. v. Key Energy Services California, Inc.*, 2015 U.S. Dist. LEXIS 21377 (E.D. Cal. Feb. 23, 2015).** Plaintiff, on behalf of himself and other current and former hourly-paid or non-exempt California-based employees of Defendant, brought a state court class action alleging that Defendant failed to compensate the class members for all hours worked and for missed meal and rest breaks in violation of the California Labor Code. Defendant removed the action pursuant to the CAFA, contending that the complaint put the amount-in-controversy in excess of $5 million. Defendant submitted a report of its Senior Director of Employee Services, Marla Hill, stating that at least 1,700 individuals were employed in non-exempt positions during the class period. *Id*. at *5. Hill stated that those employees collectively worked more than 150,000 workweeks at an average hourly rate of at least $16 per hour. *Id*. Based on Hill's report, Defendant asserted that the total amount-in-controversy was at least $10.96 million. Hill also reported that 460 of the class members lost their employment in the class period. Defendant pegged the waiting time penalties of the 460 employees at $1.76 million. *Id*. at *8. Plaintiff filed a motion to remand, and the Magistrate Judge recommended that it be granted. Plaintiff argued that Defendant's calculation relied solely on speculation and unsubstantiated assumptions, and that Hill's report was not competent evidence of the number of class members or workweeks. *Id*. at *8. Plaintiff contended that Defendant's waiting time calculation must be disregarded because Defendant calculated the amount-in-controversy with a 100% violation rate. *Id*. at *9. Plaintiff also asserted that Defendant made the unsubstantiated assumption that there were 460 putative class members who would make a claim for wage statement penalties. As to the meal and rest break claims, the Magistrate Judge noted that Defendant relied only on Hill's declaration to identify the number of putative class members, the number of weeks worked, and the average hourly rate. *Id*. at *16. The Magistrate Judge observed that Hill did not explain why she chose to use the average of the hourly rate of all 1,700 class members, and there was not demonstration that using an average made sense in this case. The Magistrate Judge reasoned that she could not presume that each of 1,700 putative class suffered rest and meal break violations. The Magistrate Judge ruled that Defendant failed to provide any evidence regarding why the assumption that each employee missed two rest periods per week was more appropriate than one missed rest period per paycheck or one missed rest period per month. *Id*. at *18. According to Defendant, Plaintiff's off-the-clock claims placed the amount-in-controversy at $2 million. Defendant noted that Plaintiff testified that he and the class members worked at least 15 minutes off-the-clock each day putting on their work clothes for which they were not compensated. The Magistrate Judge remarked that Plaintiff's testimony supported Defendant's calculations that each class member worked five days per week at an average of $16 per hour, and therefore, putting the amount-in-controversy at $2 million. *Id*. at *20. Finally, as to waiting time penalties, the Magistrate Judge noted that it was not clear whether Plaintiff had standing to bring this claim because he failed to make any allegations that Defendant failed to pay his final wages within 72 hours of the end of his employment. The Magistrate Judge concluded that assuming Plaintiff had a standing to bring the waiting time claims because Plaintiff claimed that those wages were alleged to have been unpaid for full 30 days for each class member, it appeared that there was only $1.68 million in controversy. *Id*. at *23. Accordingly, the Magistrate Judge recommended that the motion to remand be granted.

***Oda, et al. v. Gucci America, Inc.,* 2015 U.S. Dist. LEXIS 1672 (C.D. Cal. Jan. 7, 2015).** Plaintiffs, a group of employees, brought two lawsuits against Defendant, including a putative class action alleging

California Labor Code violations and another action seeking penalties under the Private Attorney General Act ("PAGA"). *Id.* at *1. Plaintiffs asserted that Defendant failed to pay its non-exempt retail employees all wages owed by improperly rounding their hours, failing to pay overtime and vacation time wages, and failing to provide mandated rest, meal, and recovery periods. *Id.* at *2. Defendant removed both actions under the CAFA, and Plaintiffs moved to remand. The Court retained jurisdiction over the putative class action, but granted Plaintiffs' motion to remand the PAGA action. Plaintiffs argued that, in calculating the amount-in-controversy, Defendant improperly assumed the frequency with which Labor Code violations occurred rather than submitting evidence regarding the actual frequency of violations. Defendant calculated the amount-in-controversy by assuming that each of the over 300 class members suffered at least one violation per week and, accordingly, calculated the amount-in-controversy at $471,469 for Plaintiffs' unpaid wages claim and $707,357 for Plaintiffs' unpaid overtime claim. *Id.* at *9. In calculating the amount-in-controversy for Plaintiffs' minimum wage claim, Defendant applied the $8 minimum hourly wage and estimated the amount-in-controversy to be $244,760. *Id.* For the Plaintiffs' waiting time claim, Defendant assumed that each terminated putative class member was entitled to 30 days of continuation wages at 8 hours of standard pay per day and, therefore, calculated the claim as worth $588,046. *Id.* at *10. Defendant assumed that each class member experienced 2.5 meal period violations in a 5-day workweek and 2.5 rest period violations in the same time period and, on that basis, calculated the amount-in-controversy for Plaintiffs' meal and rest period claim as $2,357,346. *Id.* Plaintiffs asserted that Defendant sometimes failed to provide accurate and complete itemized wage statements and, assuming that each putative class member was entitled to receive $4,000, calculated the amount-in-controversy for this claim as $948,000. *Id.* at *11. Because Plaintiffs also sought attorneys' fees, Defendant assumed that Plaintiffs would recover another 25%. Based on the foregoing, Defendant asserted that the amount-in-controversy before attorneys' fees was $5,316,978, and with the 25% fee award, the amount-in-controversy would total $6,646,223. *Id*. at *12. The Court found that, in light of Plaintiffs' allegations that Defendant maintained a policy or practice of not paying additional compensation for missed meal and/or rest periods, Defendant's assumption of a 50% violation was reasonable. *Id*. at *14. Accordingly, the Court concluded that Defendant met the amount-in-controversy requirement and denied Plaintiffs' motion to remand. As to the PAGA claims, Defendant asserted that both the class action and the PAGA action should be treated as one case for jurisdictional purposes. *Id*. at *14. The Court noted that Plaintiffs filed their claims as separate actions, and Defendant never moved to consolidate the cases. *Id*. The Court found that Plaintiffs' PAGA action did not raise a federal question, and Defendant neither proved that diversity jurisdiction existed nor offered any allegations of the amount that would be recoverable solely by Plaintiffs. *Id.* Because the CAFA did not confer subject-matter jurisdiction over the PAGA claims, the Court remanded the PAGA action. *Id.* Accordingly, the Court denied Plaintiffs' motion to remand the class action and remanded the PAGA action.

***Olson, et al. v. USPLabs, LLC*, 2015 U.S. Dist. LEXIS 97096 (C.D. Cal. July 23, 2015).** In this action, Plaintiffs' claims were coordinated in sixteen cases in Los Angeles County Superior Court in In Re JCCP 4808, USPLabs Dietary Supplement Cases (the "JCCP"). Defendants removed the action pursuant to the "mass action" provisions of the CAFA. Id. at *1-2. Plaintiffs then moved to remand the action, which the Court granted. Plaintiffs argued that since they sought to coordinate the various actions solely for pre-trial proceedings, and not for "joint trial," the proceeding did not meet the mass action requirements. Id. at *2-3. After carefully assessing the language of Plaintiffs' petition for coordination to see whether, in language or substance, they proposed a joint trial, the Court found that Plaintiffs proposed coordination was for pre-trial purposes only. Id. at *5-6. First, the Court noted that in their petition, Plaintiffs requested assignment of one judge to determine whether "coordination for discovery" into one proceeding was appropriate. Id. at *6. The Court pointed out that unlike the petition in the similar case of *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014), which proposed coordination "for all purposes," Plaintiffs' petition in this case specifically sought coordination "for discovery," and did not contain the phrase "for all purposes." Id. Plaintiffs had also stated that the cases would involve numerous pre-trial motions, and numerous corporate depositions, and that coordination would save counsel from filing duplicative motions in multiple courts. Moreover, Plaintiffs stated that one pre-trial judge would foster judicial economy and preserve valuable judicial resources, and that coordination would avoid the potential for inconsistent rulings on nearly identical motions and avoid wasteful, duplicative motion practice. Id. The Court thus concluded that unlike

the reasons for coordination given in *Corber*, the reasons given in this case focused on pre-trial issues and not on trial. Id. In particular, the Court found Plaintiffs' motion did not mention "inconsistent judgments," or "conflicting determinations of liability" anywhere in it, key phrases that were critical to the analysis in *Corber*, since each of those phrases was determined to be an implicit request for joint trial. Id. at *6-7. Accordingly, the Court concluded that because Plaintiffs sought coordination for "pre-trial purposes" only, and not for "joint trial," they had not met the jurisdictional requirements under the CAFA. Id. at *7.

***Reyes, et al. v. Dollar Tree Stores, Inc.*, 2015 U.S. App. LEXIS 5222 (9th Cir. April 1, 2015).** Plaintiff, an employee, brought a state court putative class action alleging that Defendant denied its employees proper rest breaks in violation § 226.7 of the California Labor Code. Plaintiff subsequently amended his complaint by asserting a second cause of action for unlawful business conduct in violation of § 17200 of the California Business and Professions Code. Defendant then removed the action on the basis of jurisdiction under the CAFA, and placed the amount-in-controversy at $5,25,950. *Id*. at *4. Plaintiff moved to remand, arguing that Defendant's amount-in-controversy assumption factored an inaccurate 65% violation rate. Plaintiff claimed that only one-third of the shifts were worked alone, and that the amount-in-controversy was therefore only $2,866,722. *Id*. at *5. The District Court agreed and remanded the action. After the remand, Plaintiff sought certification of a class consisting of current and former non-exempt assistant store managers who worked alone. The state trial court issued a tentative ruling, concluding that a class of assistant managers who worked alone would not be ascertainable. *Id*. at *6. Noting that California law permitted the judge to depart from Plaintiff's proposed definition and redefine the class, the tentative ruling instead proposed certifying a class consisting of all assistant managers who did not receive proper breaks, regardless of whether they worked alone. *Id*. Defendant again removed the action, arguing that the expanded class placed at least $5 million in controversy. The District Court subsequently remanded the action on the basis that the second removal was untimely. *Id*. at *7. On appeal, the Ninth Circuit reversed and remanded. At the outset, the Ninth Circuit noted a successive removal petition is permitted only upon a relevant change of circumstance, *i.e.*, when subsequent pleadings or events revealed a "new and different ground for removal." *Id*. at *8. In this instance, the Ninth Circuit reasoned that on the first motion for remand, the District Court construed the amended complaint to cover only rest breaks during shifts in which class members worked alone and found that it did not meet the CAFA's amount-in-controversy threshold. *Id*. When the state trial court certified a class of employees who worked shifts without proper rest breaks, it did so regardless of whether they worked alone. The state trial court expressly acknowledged that it had diverged from the narrower definition of the class that the District Court had ruled in the first motion. Because the class certification order altered the circumstances, the Ninth Circuit opined that the second remand was permissible. *Id*. at *10. The Ninth Circuit also opined that the second notice of removal was timely because an action can be removed during the first 30 days after a Defendant receives an amended pleading, motion, "order," or other paper from which it may first be ascertained that the case becomes removable. *Id*. Because Defendant filed its second notice of removal within 30 days after the state trial court passed the class certification order, the Ninth Circuit concluded that the removal was timely. *Id*. at *11. Accordingly, the Ninth Circuit remanded the action, directing the District Court to exercise jurisdiction.

***Roa, et al. v. TS Staffing Services, Inc.,* 2015 U.S. Dist. LEXIS 7442 (C.D. Cal. Jan. 22, 2015).** Plaintiff, a former employee, brought a state court class action against Defendants alleging numerous wage & hour violations. Defendants removed the case pursuant to the CAFA. Plaintiff moved to remand, which the Court denied. Plaintiff objected to a declaration filed in support of Defendants' notice of removal on several evidentiary grounds and requested that the Court strike most portions of the declaration. *Id*. at *3. At the outset, the Court noted that the U.S. Supreme Court in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), relying on the parallel language in § 1446(a) and Rule 8(a), held that when a Defendant seeks federal court adjudication, Defendant's allegation should be accepted when not contested by Plaintiff or questioned by the Court. *Id*. at *3-4. The Supreme Court explained that when a Plaintiff contests an allegation in the notice of removal, both sides submit proof, and then the Court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied. *Id*. at *4. The Supreme Court instructed that no anti-removal presumption attends cases invoking the CAFA. *Id*. Here, Defendants specifically alleged that they satisfied each element of the CAFA, and that under *Dart*

Cherokee, the Court must accept these allegations as true unless contested by Plaintiff or questioned by the Court. The Court noted that Plaintiff did not contest the allegations themselves, but instead contested Defendants' evidence in support of the allegations. *Id*. The Court reasoned that if Defendants were not required to submit evidence in support of their allegations, Plaintiff's attack on the evidence was fallacious. *Id*. at *4-5. In light of the "no anti-removal presumption" established by *Dart Cherokee*, the Court determined that it had no reason to question Defendants' allegations. *Id*. at *5. Furthermore, the Court remarked that Plaintiff submitted no independent evidence for the Court to consider. *Id*. Accordingly, the Court denied Plaintiff's motion to remand.

***Yocupicio, et al. v. Page Group, LLC*, 2015 U.S. App. LEXIS 13273 (9th Cir. July 30, 2015).** Plaintiff, an employee, brought a class action in state court, alleging violations of the California Labor Code relative to meal and rest periods and failure to pay minimum wages. Plaintiff alleged ten causes of action, nine of which were brought as class claims; the tenth cause of action was brought as a representative claim under the Private Attorney General Act ("PAGA"). *Id.* at *3. Plaintiff sought $1,654,874 in class claims and $3,247,950 for the PAGA claim, totaling $4,902,824. *Id.* Defendants contended that addition of reasonable attorneys' fees would cause the total recovery for the class claims and the PAGA claim to surpass the $5 million threshold of the CAFA. *Id.* On this basis, Defendant removed the action under the CAFA. The District Court denied Plaintiff's motion to remand, and on appeal, the Ninth Circuit reversed. Although causes of action one through nine were class claims, and they would satisfy the CAFA's numerosity and minimal diversity requirement, the Ninth Circuit noted that those claims, taken singly or aggregated, did not meet the $5 million requirement. Further, because the PAGA cause of action was not brought as a class claim and instead was brought as a representative claim, the Ninth Circuit ruled that it could not be deemed to be a class claim governed by Rule 23. *Id.* at *5. The District Court, however, had considered both the amounts asked for in the class claims and in the PAGA claim when it decided that the $5 million threshold was exceeded. The Ninth Circuit reasoned that when a Plaintiff files an action that contains both class claims as well as non-class claims, and when the class claims do not meet the jurisdictional threshold for the amount-in-controversy, the CAFA's diversity jurisdiction cannot be invoked to give the District Court jurisdiction over the non-class claims. Accordingly, the Ninth Circuit reversed and remanded.

(x) Tenth Circuit

***Gibson, et al. v. Continental Resources, Inc.,* 2015 U.S. Dist. LEXIS 137292 (W.D. Okla. Oct. 8, 2015).** Plaintiff brought a state court class action alleging that Plaintiff and putative class members, owners of overriding royalty interests ("ORRI") in wells operated by Defendant, were entitled to payments from Defendant equal to their proportionate share of the proceeds from hydrocarbon sales. Defendant removed the case on the basis of jurisdiction under the CAFA pursuant to 28 U.S.C. §§ 1332(d) and 1453. *Id.* at *2-3. Subsequently, Plaintiff moved to remand and sought leave to conduct additional jurisdictional discovery. *Id.* at *3. The Court granted Plaintiff leave to conduct additional jurisdictional discovery before ruling on her motion to remand. *Id.* at *8. Plaintiff contended that Defendant's removal notice was insufficient to meet the minimal diversity requirement pursuant to § 1332(d)(2) since Defendant's reliance on out-of-state addresses was not sufficient to establish citizenship pursuant to the CAFA. *Id.* at *5-6. The Court noted that in Defendant's notice of removal, Defendant alleged that many of the persons who owned ORRI were citizens of states other than Oklahoma. *Id.* at *7. Further, Defendant contended that the number of class members exceeded 100 and damages were in an amount in excess of $10 million. *Id.* Based on Defendant's notice of removal, the Court found that Defendant satisfied the minimal diversity requirement. *Id.* Plaintiff further contended that the Court should decline jurisdiction under one of the exceptions to the CAFA. *Id.* However, Plaintiff requested that the Court stay its ruling on the motion to remand until after Plaintiff conducted limited discovery into jurisdictional matters regarding the citizenship of the class members. *Id.* The Court held that Plaintiff should be allowed to conduct limited jurisdictional discovery to determine the citizenship of the class members, specifically noting that Defendant acknowledged that the percentage of putative class members with an Oklahoma address implicates the statutory threshold material to the "interest of justice" exception in § 1332(d)(3). *Id.* Accordingly, the Court granted Plaintiff leave to conduct additional jurisdictional discovery regarding the citizenship of the class members, and thus stayed its ruling on the motion to remand. *Id.* at *8.

(xi) Eleventh Circuit

***Faust, et al. v. Maxum Casualty Insurance Co.*, 2015 U.S. Dist. LEXIS 48897 (M.D. Fla. April 14, 2015).** Plaintiff brought a putative state court class action alleging that Defendant breached the terms of insurance policies by refusing to pay submitted mileage expenses. Defendant removed the action, asserting subject-matter jurisdiction under the CAFA. Plaintiff moved to remand the case on the grounds that Defendant failed to satisfy the amount-in-controversy requirement for removal pursuant to the CAFA. *Id.* at *2. The Court granted Plaintiff's motion to remand. *Id.* at *7. Plaintiff argued that the case should be remanded because the amount-in-controversy was less than $5 million. *Id.* at *3. Defendant's notice of removal asserted that the amount-in-controversy exceeded $5 million because the purported class sought "twice the service charge paid," the policy at issue provided for $5,000 of benefits, and there were "thousands" of class members; thus, if only 2,000 class members were considered, the amount-in-controversy would be $20 million. *Id.* at *4-5. The sole evidence provided in support of Defendant's notice of removal was a copy of the insurance policy at issue. *Id.* at *5. Plaintiff contended that the matter should be remanded because claims for mileage reimbursement were generally less than $400. *Id.* The Court rejected Defendant's argument that it should consider the policy limit set forth in the insurance policy, and not consider the speculative amount of each claim when determining if the amount-in-controversy requirement was satisfied. *Id.* The Court noted that Defendant's argument was contrary to case law precedent in the Eleventh Circuit, where many decisions have held that it is the value of the claim at issue, not the value of the policy limit, that is considered for purposes of determining the amount-in-controversy. *Id.* Since Defendant offered no evidence other than a copy of the insurance policy at issue to show that the amount-in-controversy requirement of an aggregate of $5 million in claims was satisfied, the Court held it would be impermissible speculation for the Court to hazard a guess on the jurisdictional amount-in-controversy without the benefit of any evidence on the value of individual claims. *Id.* at *7. Accordingly, the Court granted Plaintiff's motion to remand. *Id.*

(xii) District Of Columbia Circuit

***McMullen, et al. v. Synchrony Bank*, 2015 U.S. Dist. LEXIS 17955 (D.D.C. Feb. 13, 2015).** Plaintiff, a customer, brought a class action in the state court alleging that Defendants fraudulently took out lines of credit against customers and billed against those lines of credit without the customers' knowledge or authorization in violation of the District of Columbia Consumer Protection Procedures Act. Defendants removed the action, and Plaintiff moved to remand, which the Court denied. At the outset, the Court noted that it was undisputed that Plaintiff had alleged a class action and that the parties were minimally diverse. Plaintiff contended that the CAFA's local controversy exception warranted remand. For the local controversy exception to apply, there must be: (i) over two-thirds of the class members should be from the District of Columbia; (ii) at least one Defendant from whom the significant relief was sought was from the District of Columbia; and (iii) the injuries occurred in the District of Columbia. *Id*. at *12-13. The parties agreed that the principal injuries occurred in the District of Columbia, and that no other class action was filed on the same allegations. *Id*. at *14. As to the citizenship of Defendants, Plaintiff asserted three Defendants – One World Fitness, Bullen Wellness, and Washington Chiropractic – were citizens of the District of Columbia because they were limited liability companies formed under the laws of the District of Columbia. Defendant JP Morgan Chase & Co. ("Chase") did not dispute Plaintiff's factual allegations about the companies' formations or their primary place of businesses; instead, it contended that those companies carried the citizenship of their members for diversity purposes, and Plaintiff failed to produce any evidence identifying the companies' members or their members' citizenship. *Id*. at *15. The Court disagreed, finding that the CAFA specifically provides that an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business. Accordingly, the Court ruled that those businesses were citizens of the District of Columbia under the CAFA. Further, Chase did not dispute that the local Defendants formed a significant basis for the claims asserted by the proposed class, as the local Defendants were allegedly responsible for setting in motion the actions that subsequently harmed Plaintiff. *Id*. at *19. Accordingly, the Court concluded that Plaintiff established that there was at least one local Defendant from whom significant relief was sought who was a citizen of the District of Columbia. Finally, as to the citizenship of the proposed class, the Court found that Plaintiff had not clearly limited the class to the District of Columbia citizens and had failed to provide any evidence concerning the citizenship of the

putative class members. *Id*. at *23. As a result, Plaintiff then sought for expedited discovery on the issue of class citizenship. The Court, accordingly, denied the motion to remand, and ordered expedited limited discovery regarding the citizenship of the putative class members.

IX. Other Federal Rulings Affecting The Defense Of Workplace Class Action Litigation

Throughout 2015, federal courts issued key rulings in class action lawsuits and on Rule 23 issues that significantly impact the defense of workplace class actions. Those rulings included class certification procedural issues and proof requirements; preemptive motions to strike or dismiss class allegations; the numerosity requirement for class certification; the commonality requirement for class certification; the typicality requirement for class certification; the adequacy of representation requirement for class certification; the predominance requirement for class certification; the superiority requirement for class certification; workplace class action arbitration issues; non-workplace class action arbitration issues; litigation over class action settlement agreements and consent decrees; ascertainability under Rule 23; class actions involving unions; attorneys' fee awards in class actions; intervention rights in class actions; collateral estoppel, *res judicata*, and settlement bar concepts under Rule 23; notice issues in class actions; multi-party litigation over modification of employee/retirement benefits; civil rights class actions; class action discovery issues; class-wide proof and class-wide damages in class actions; multi-party litigation under the Warn Act; class definition issues; settlement approval issues in class actions; mootness issues in class action litigation; experts in class action litigation; sanctions in class action litigation; issues with the judicial panel on multi-district litigation in class actions; standing issues in class actions; application of tolling principles in class actions; exhaustion principles in class actions; appointment and selection of counsel in class actions; workplace RICO class actions; public employee class actions; injunctions in class actions; FACTA and FDCPA class actions; TCPA class actions; the *cy pres* doctrine in class actions; impact of unethical conduct in class actions; objectors in class actions; privacy class actions; choice-of-law issues in class actions; insurance-related class actions; disparate impact issues in class actions; ADA class actions; government enforcement litigation; alien tort statute and trafficking victims class actions; workplace antitrust class actions; stays in class action litigation; FCRA class actions; appeals in class action litigation; certification of defendant classes; venue issues in class actions; bifurcation issues in class actions; joinder and severance issues in class actions; comity principles in class actions; breach of contract class actions; amendments in class action litigation; foreign worker class actions; juries in class actions; disqualification of counsel in class actions; statute of limitations issues in class actions; medical monitoring class actions; pseudonyms and confidential witnesses in class action litigation; consumer fraud class actions; recusal issues in class actions; settlement administration issues in class actions; removal issues in class actions; employee testing issues in class actions; consolidation issues in class actions; settlement enforcement issues in class action litigation; case management issues of class actions; trial issues in class action litigation; immigration class actions; class actions under 42 U.S.C. § 1981; costs in class actions; media privilege issues in class actions; issue certification under Rule 23(c); special masters in class actions; and incentive awards in class actions.

These rulings of 2015 added to the evolving case law interpreting Rule 23, and significantly impact the defense of workplace class actions.

(i) Class Certification Procedural Issues And Proof Requirements

***Artis, et al. v. Yellen*, 2015 U.S. Dist. LEXIS 80329 (D.D.C. June 22, 2015).** Plaintiffs brought an action alleging class-wide discrimination against African-American secretarial and clerical employees. The Court denied Plaintiff's motion for class certification, and directed the parties to confer and submit a proposed schedule for the next phase of the litigation. *Id.* at *4. Defendant then asserted that Plaintiffs' complaint did not set forth sufficient factual description of their individual claims of discrimination and requested that the Court order Plaintiffs to file an amended complaint setting forth such facts. *Id.* at *5. The Court held that if Plaintiffs intend to file an amended complaint, it must be filed before Phase II discovery began. *Id.* at *6. Because Plaintiffs did not file an amended complaint, Defendant moved to strike the class allegations in Plaintiffs' fourth amended complaint and for an order directing them to amend their complaint to state their individual claims of discrimination only. Thereafter, Plaintiffs moved for an immediate jury trial on issues involving the Court's resolution of various class-discovery disputes and the merits of their class-wide pattern or practice claim. Further, Plaintiffs moved to reiterate their request for a jury trial, requested a

status hearing to discuss the scope of merits discovery, and indicated that if the Court granted Defendant's motion to strike, Plaintiffs would refuse to amend their complaint. The Court granted Defendant's motion and denied Plaintiffs' motion. The amended complaint focused almost entirely on class-wide claims. Because the extent to which class allegations were interspersed throughout the complaint rendered it impossible to discern what individual claims remained after the denial of class certification, the Court remarked that the pleadings should be amended to eliminate class allegations, so that the action could proceed as an individual action. *Id.* at *11. Thus, the Court granted Defendant's request to strike the class allegations. The Court also noted that the pattern or practice method of proof is not available to private, non-class Plaintiffs who ordinarily must show that an employer took an adverse employment action against him or her because of his or her race. *Id.* at *13. Further, the Court observed that a pattern or practice theory alone cannot support Plaintiffs' claims which, after the denial of class certification, must proceed as individual claims. *Id.* at *14. Thus, the Court held that Plaintiffs' complaint must contain a short and plain statement of each Plaintiff's claim for having suffered individual disparate treatment on the basis of race. *Id.* at *16. The Court remarked that if Plaintiffs refused to file an amended complaint, or if they filed one that did not comply with this order, their history of refusal to follow the rules of procedure and the Court's orders would justify the severe sanction of a dismissal on the merits. Accordingly, the Court granted Defendant's motion to strike the class allegations and directed Plaintiffs to file a fifth amended complaint setting forth with sufficient particularity their individual claims of discrimination.

***Belfiore, et al. v. The Procter & Gamble Co.,* 2015 U.S. Dist. LEXIS 137034 (E.D.N.Y. Oct. 5, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant misrepresented that its bath tissues and bath wipes were flushable when they were not flushable, causing clogging of their sewage disposal facilities, in violation of consumer protection laws. Plaintiffs alleged that Defendant's product did not break down sufficiently to pass through pipes and caused a clogged toilet and a sewer backup. The named Plaintiff sought a fixed statutory amount of $50 for each purchase by each class member, individual damages for harm to his home's waste pipes, and an injunction prohibiting Defendant from calling its product "flushable" or "safe for sewer and septic systems." *Id.* at *4. Plaintiffs sought certification of a statutory damages class of consumers in New York who purchased Defendant's wipes marked "flushable." *Id.* Defendant moved to deny class certification. The Court stayed both motions, however, and referred the appropriate definition of "flushable" and related issues to the U.S. Federal Trade Commission ("FTC"). The Court noted that the FTC was engaged in an on-going inquiry into Defendant's use of the term "flushable." The FTC recently negotiated a consent agreement with one of Defendant's competitors that limited the manufacturer's description of its products as "flushable." *Id.* at *19-20. According to the definition used in the consent order, "flushable" products must move through household and municipal pipes quickly enough to avoid clogging. *Id.* at *23. The FTC also informally had questioned Defendant about its activities, and significant media attention, domestically and internationally, had been devoted to questioning the flushability of "flushable" wipes. *Id.* at *25-28. The Court found that certification of a statutory damage class would pit New York State's consumer protection law, which explicitly prohibits statutory damages in class actions, against the federal class action rule, which contains no such prohibition, and undermine the state's policy to prevent catastrophic and unfair judgments against Defendants. Further, certification of a damages or an injunctive relief class might thwart the development of an integrated and transparent national market. With multiple cases pending before the Court and others across the nation, the FTC's engagement in an on-going inquiry of Defendant, and the agency's pending agreement with another manufacturer, the Court found a substantial risk of inconsistent judgments regarding the meaning of "flushable." *Id.* at *5. The Court reasoned that a robust management of the term by the FTC, rather than by the court system, could avoid unnecessary inconsistencies and controversies, helping manufacturers, retail vendors, and consumers alike. *Id.* at *5-6. The Court, therefore, stayed Plaintiffs' motion for class certification and Defendant's motion to deny class certification and referred the issue of an appropriate definition of "flushable" and related issues to the FTC. *Id.* The Court ordered that, when circumstances change, the parties could move to lift the stay, and based on the information before it, it likely would deny certification of a damages class but grant certification of an injunctive relief class.

***Cin-Q Automobiles, Inc., et al. v. Buccaneers Limited Partnership,* 2015 U.S. Dist. LEXIS 58665 (M.D. Fla. May 5, 2015).** Plaintiff, individually and on behalf of those similarly-situated, brought a class action

seeking to recover damages for purported unsolicited facsimiles that Defendant transmitted in violation of the Junk Fax Prevention Act of 2005. Plaintiff also sought to recover for common law conversion claims. Earlier, the Court had granted Defendant's motion to bifurcate liability and class certification issues, determining that the appropriate standard of liability should be addressed prior to any consideration of class certification. Subsequently, the Court had denied the parties' cross-motions for summary judgment. While Defendant moved to bifurcate and proceed directly to trial on liability, Plaintiff moved for reconsideration of the Court's order denying summary judgment or, in the alternative, to certify questions for interlocutory review. The Court denied both the motions. First, regarding Defendant's motion to bifurcate and proceed directly to trial on liability, Defendant argued that an immediate trial on liability could obviate the need for eight to twelve additional months of proceedings and expenses related to class certification. *Id*. at *3. The Court cited the U.S. Supreme Court's holding in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), for the proposition that Rule 23 grants no license to engage in free-ranging merits inquiries at the certification stage. *Id*. at *3-4. The Court noted that the purpose of a Rule 23(b)(3) certification ruling is to select the "method" best suited to adjudication of the controversy "fairly and efficiently." *Id*. at *4. The Court observed that to proceed to a trial on liability prior to class certification would, procedurally, "put the cart before the horse." *Id*. In addition, the Court reasoned continuing the bifurcated procedure would risk an unnecessary trial and multiple intervening appeals that would pose an even greater threat to the speedy and inexpensive disposition of this case. *Id*. at *4-5. Regarding Plaintiff's motion for reconsideration, the Court found that no change in law or the need to correct clear error or manifest injustice existed. *Id*. at *6. While Plaintiff attempted to buttress its position by submitting that a "but-for causation" element would solve one of the Court's interpretive concerns relating to "sabotage liability," the Court did not agree that Plaintiff's proposal would necessarily solve the analytical dilemma. *Id*. Finally, regarding Plaintiff's requests to certify questions for interlocutory review, the Court found that the interpretive issue at hand involved a controlling question of law to which there was substantial ground for difference of opinion. *Id*. at *9. In light of the procedural posture of this case, however, the Court observed that an interlocutory appeal would not materially advance the ultimate termination of this litigation. The Court opined that the case would not proceed directly to trial on liability, but rather would proceed directly to class discovery and Plaintiff's anticipated motion for class certification, and upon disposition of that motion, the parties would be able to petition for interlocutory review. *Id*. at *9-10. For these reasons, the Court concluded that granting interlocutory appeal at this juncture would not avoid a trial, nor would it substantially shorten the life of the action. *Id*. at *10. Accordingly, the Court denied the parties' motions.

***Douglas, et al. v. Uber Technologies, Inc.*, 2015 U.S. Dist. LEXIS 171494 (N.D. Cal. Dec. 22, 2015).** Plaintiffs, a group of drivers, brought a class action against Defendant alleging unjust enrichment, tortious interference with contractual and/or advantageous relations, and violation of the California Labor Code and other state laws by misclassifying Plaintiffs as independent contractors. Previously, the Court granted Plaintiffs' motion for a class certification, including a sub-class of drivers who had signed arbitration contracts (which specified that the drivers had to arbitrate any employment-related claims on an individual basis). In certifying the sub-class, the Court found the arbitration agreements unenforceable, and also denied Defendants' motion to compel arbitration of Plaintiffs' claims. Defendant filed an interlocutory appeal of the orders certifying the class and denying the motion to compel arbitration. Because the Court had set a trial date for June 20, 2016, Defendant filed a motion to stay all proceedings pending its appeal. The Court denied the motion in part and granted it in part. The Court rejected Defendant's arguments that it would face irreparable harm absent a stay. While acknowledging that the appeal raised significant legal questions, the Court opined that Defendant did not present an "all or nothing" situation where it would be forced to "endure the time and expense of a trial" should the arbitration clause ultimately be enforced. *Id.* at *12. Rather, even though it found that Defendant's appeal was apt to be unsuccessful, the Court reasoned that the effect of the class certification order will be to affect the size of the class going to trial, and not the fact or temporal scope of the trial. Accordingly, the Court determined that a stay was unnecessary, but granted Defendant's motion in part by indicating that if the appeal was still pending at the time of the trial, the Court would stay entry of any final judgment subject to the appeal.

***Folks, et al. v. State Farm Mutual Automobile Insurance Co.,* 2015 U.S. App. LEXIS 7061 (10th Cir. April 28, 2015).** Plaintiff brought a putative class action alleging that Defendant failed to pay her personal injury protection ("PIP") benefits under the Colorado Auto Accident Reparations Act ("CAARA"). Plaintiff's action stemmed from injuries she received in 1998 when she was hit by a vehicle insured by Defendant. Under the CAARA, automobile insurers must include a basic level of PIP, as well as optional enhanced PIP benefits in exchange for higher premiums. *Id.* at *3. Notwithstanding the CAARA, Defendant failed to offer or pay enhanced PIP benefits for injured pedestrians, even if the policyholders had selected enhanced PIP benefits for the policy generally. Before the statute of limitations expired on her claim, Plaintiff became part of the putative class in a related class action suit entitled *Clark v. State Farm Mutual Automobile Insurance Co.*, 590 F.3d 1134 (10th Cir. 2009), which tolled her statute of limitations. *Id.* at *4-5. The District Court denied Clark's motion for class certification on multiple grounds, including that, because Defendant undertook a voluntary payment program ("VPP") to pay extended PIP benefits to individuals who potentially were entitled to reformation, Clark's individual claims were moot and he was neither typical nor adequate as a class representative. *Id.* at *6. In 2004, Plaintiff joined as a named Plaintiff a lawsuit that Kim Nguyen brought against Defendant asserting claims for declaratory relief and reformation. *Id.* at *8. The District Court granted Defendant's motion for summary judgment, finding that Nguyen was not entitled to reformation because she was injured as a passenger, not as a pedestrian, and Plaintiff's claims were time-barred because she filed her lawsuit after expiration of the three-year statute of limitations. The Tenth Circuit, however, reversed, finding that Plaintiff's claims were timely because she belonged to the putative class in *Clark* and joined Nguyen's lawsuit before the denial of class certification in *Clark*. *Id.* at *9. Following remand, Plaintiff moved for class certification. The District Court denied her motion on the basis that Plaintiff's individual claims predominated over her class claims. *Id.* at *12. Plaintiff then proceeded to trial on her individual claims and obtained a jury award for $40,000 in actual damages, $96,000 for willful and wanton conduct, and pre-judgment interest. Pursuant to parties' motions, the District Court trebled the $40,000 for a total of $120,000, took away the additional $96,000, and awarded more than $23,000 in pre-judgment interest. *Id.* at *14. Plaintiff appealed, challenging the District Court's denial of class certification and calculation of treble damages and pre-judgment interest. The Tenth Circuit affirmed the District Court's denial of class certification finding that Plaintiff had forfeited her class certification arguments raised for the first time on appeal. The Tenth Circuit noted that, because Plaintiff did not challenge the District Court's determination that class certification was not warranted on the issues of reformation and damages, she intentionally had relinquished or abandoned her arguments regarding reformation and damages. *Id.* at *17. Although Plaintiff argued that she sought a class-wide declaration that Defendant's policy limitation was invalid and a notice to class members that would correct Defendant's misleading statement and enable them to protect their rights, the Tenth Circuit concluded that Plaintiff had forfeited any argument that the District Court erred in failing to consider whether notice would provide a basis to certify a class because in her motion she sought only class-wide contract reformation, a class-wide date of reformation and damages, and she did not argue for notice with sufficient specificity. *Id.* at *19-20. The Tenth Circuit explained that Plaintiff's demand for reformation and damages did not provide cover for her to extrapolate a new, specific demand for corrective notice on appeal, especially when she expressly indicated to the District Court that reformation was required to provide relief to the class. *Id.* at *27-28. Accordingly, the Tenth Circuit affirmed the District Court's ruling.

***Friedman, et al. v. Dollar Thrifty Automotive Group, Inc.,* 2015 U.S. Dist. LEXIS 85698 (D. Colo. July 1, 2015).** Plaintiffs brought an action alleging that Defendant rental car companies tricked consumers into buying loss damage waiver ("LDW"), supplemental liability insurance, and roadside assistance, without proper consent or disclosure. The Court granted Plaintiffs' revised motion for class certification as to Plaintiffs' Colorado Consumer Protection Act ("CCPA") claim and ordered Plaintiffs to file a fourth amended complaint. *Id.* at *2. Defendants subsequently moved for reconsideration of the Court's order and for judgment on the pleadings. The Court granted Defendants' motion for reconsideration. Defendants argued that Plaintiffs could not pursue a class action for damages under the CCPA. The Court observed that § 6-1-113(2) of the Colorado Revised Statute provides that, "[e]xcept in a class action . . . any person who . . . engage[s] in any deceptive trade practice . . . shall be liable in an amount equal to the sum of: . . . (i) [t]he amount of actual damages sustained; or (ii) [f]ive hundred dollars; or (iii) [t]hree times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged

in bad faith conduct; plus . . . the costs of the action together with reasonable attorney fees as determined by the court." *Id.* at *7. The Court noted that previous case law held that the plain and unambiguous language of the statute compelled the conclusion that the remedies provided, including actual damages, were not available in class actions. *Id.* at *9. Because Plaintiffs relied solely on monetary relief under Rule 23(b)(3) as a basis for class certification, and Plaintiffs could not recover monetary damages in a class action, the Court opined that a class action was not a superior method of adjudication. *Id.* at *16. Accordingly, the Court granted Defendants' motion for reconsideration and held that Plaintiffs' motion for class certification should be denied. In addition, the Court granted Defendants' motion for judgment on the pleadings to the extent that Plaintiffs could not pursue a class action seeking monetary damages under the CCPA, but denied the motion to the extent that Defendants sought judgment as to the claims of individual Plaintiffs. *Id.* at *19. Defendants argued that Plaintiffs failed to allege that a deceptive trade practice listed in the statute caused an injury-in-fact consistent with CCPA. The Court disagreed. The Court noted that § 203 of the CCPA requires rental car companies to provide advance written disclosures and states that "the failure by a lessor to comply with any provision of the section is a deceptive trade practice." *Id.* at *21. The Court, therefore, found that Defendants' alleged failure to make advance written disclosures was a material act that gave rise to Plaintiffs' claims, irrespective of whether Plaintiffs alleged that they were misled by the disclosures or the lack thereof. *Id.* Accordingly, the Court granted Defendants' motion for reconsideration, denied class certification, and granted in part and denied in part Defendants' motion for judgment on the pleadings.

***Garcia, et al. v. Concentra Health Services, Inc.,* 2015 U.S. Dist. LEXIS 7476 (C.D. Cal. Jan. 22, 2015).** In this action asserting claims under state law, the Court struck the class allegations from the complaint for Plaintiff's failure to timely file a motion for class certification in compliance with Local Rule 23-3. Local Rule 23-3 provides that within 90 days of service of a pleading to commence a class action, other than an action subject to the Private Securities Litigation Reform Act of 1995, the proponent of the class shall file a motion for certification that the action is maintainable as a class action, unless otherwise ordered by the Court. *Id.* at *1. Plaintiff filed her complaint on February 5, 2014 in California state court, and after conducting discovery concerning her citizenship, Defendant filed a second notice of removal on August 28, 2014. The Court remarked that even assuming that Local Rule 23-3's 90-day requirement began running on August 28, 2014, the motion for class certification should have been filed no later than November 26, 2014. Plaintiff, however, failed to move for class certification by that date. Plaintiff contended that good cause existed to vacate the 90-day deadline because of the complexity of the case and the amount of discovery needed to establish the class certification requirements of Rule 23. The Court noted that although the California state court had issued a stay of discovery on March 11, 2014, the stay was lifted on May 12, 2014. Even if Defendant filed the second notice of removal on August 28, 2014, Plaintiff had not started conducting discovery when she e-mailed Defendant on November 3, 2014 to discuss relief from Local Rule 23-3. Since Plaintiff failed to explain why she did not engage in any discovery more than two months after the case was removed, the Court opined that Plaintiff did not show good cause for her failure to file a motion for class certification within the time permitted by Local Rule 23-3. *Id.* at *3. Additionally, the Court noted that while Rule 23(c)(1) provides that the Court must determine by order whether to certify the action as a class action at an early practicable time, Local Rule 23-3 provides for 90 days' time to file a motion for class certification, and permits the Court to set a different deadline that is both "early" and "practicable" in a manner that is consistent with Rule 23(c)(1). *Id.* at *4. Accordingly, the Court rejected Plaintiff's argument that Local Rule 23-3 was inconsistent with Rule 23(c)(1), and struck the class allegations in her complaint.

***Gbarabe, et al. v. Chevron Corp.,* 2015 U.S. Dist. LEXIS 98552 (N.D. Cal. July 28, 2015).** Plaintiffs, a group of residents in the Niger Delta region of Southern Nigeria, brought a class action alleging that they were affected when the explosion in one of Defendant's drilling rigs caused a fire that burned for 46 days and resulted in environmental damage. Plaintiffs sought to represent 65,000 people who were affected by the explosion. The Court had previously dismissed Plaintiffs' complaint in part because the named Plaintiffs purported to represent some 65,000 other members of the Nigerian communities affected by the explosion and fire through a power of attorney. *Id*. at *2. The Court had reasoned that the federal rules require that an action be prosecuted in the name of the real party in interest. *Id*. at *3. The Court then dismissed the second amended complaint because it failed to allege that the named Plaintiffs had suffered

an injury-in-fact. *Id*. Plaintiffs then filed a third amended complaint ("TAC") without Defendant's consent or leave of the Court, removing five and adding 11 named Plaintiffs. Defendant moved to strike or dismiss the TAC, which the Court granted. Defendant argued that Plaintiff should have sought leave to amend the complaint, and Plaintiffs responded that the TAC named no new Plaintiffs and was filed within the time stipulated in the order permitting Plaintiffs to file appropriate pleadings. The Court remarked that Plaintiffs seemed to suggest that the 11 new Plaintiffs who were added were not new because they were among the 65,000 putative class members that the original named Plaintiffs claimed to represent through a power of attorney. *Id*. at *5. The Court noted that this argument was rejected by the Court on two prior occasions, and it again rejected Plaintiffs' argument. *Id*. The Court opined that Rule 15 essentially provides two methods for pre-trial amendment of a pleading, including: (i) within 21 days after serving of the pleading or after serving of response; or (ii) after obtaining the consent of the opposing party or the court's leave. *Id*. at *6. Since the TAC did not fall in either category, the Court granted Defendant's motion to strike.

***Griswold, et al. v. Coventry First LLC,* 2015 U.S. Dist. LEXIS 19455 (E.D. Pa. Feb. 18, 2015).** Plaintiff brought a putative class action alleging fraud in connection with the sale of a life insurance policy. Plaintiff established a trust to purchase a large life insurance policy. The trust sold the policy to Defendant using broker Kevin McGarrey. Plaintiff filed suit alleging that Defendant committed fraud when, unknown to the trust or to Plaintiff, Defendant entered into a written agreement with McGarrey that required McGarrey to refrain from seeking any other bids or reporting any competing offers in exchange for a $145,000 commission. *Id.* at *3-4. Plaintiff also asserted, on behalf of a putative class, that Defendant implemented various fraudulent and pervasive business schemes to acquire life insurance policies through rigged bids by entering into "secret" agreements with life settlement professionals to manipulate the bidding process of life insurance policies, eliminate competition, induce others to breach fiduciary duties to elderly clients, and reduce the net amount received by elderly clients in the life settlement process. *Id.* at *6. Defendant moved to compel arbitration and contended that the claims were subject to arbitration under the terms of the policy purchase agreement. The District Court denied arbitration, finding that Plaintiff was not a signatory to the purchase agreement. *Id.* at *7. On Defendant's appeal, the Third Circuit affirmed the District Court's ruling that Defendant could not compel arbitration because Plaintiff did not consent to the policy purchase agreement. *Id.* at *17. Because the Third Circuit did not compel arbitration, it did not reach the question of whether Plaintiff would be required to arbitrate on an individual rather than a class basis. However, the Third Circuit noted that, "because the parties request that we specify the answer to that question in this appeal, we will note that [Plaintiff] waived his class action claim on appeal, having neglected to properly brief the issue." *Id.* at *18. Following remand to the District Court, Defendant moved to strike Plaintiff's class action allegations. Defendant asserted that Plaintiff waived his class action claim by failing to address Defendant's contention that Plaintiff lacked the authority to seek class-wide relief. *Id.* at *21-22. Plaintiff responded that the Third Circuit made no such ruling as to the propriety of class-wide litigation, but merely opined, on an advisory basis, that in the event that arbitration was ordered, Plaintiff had waived his right to seek class-wide arbitration. *Id.* at *22. The District Court agreed. Reading the plain language of the Third Circuit's decision, the District Court found no mandate that the case proceed only as an individual action. *Id.* The Third Circuit expressly indicated in its holding that it could not grant Defendant's request to compel arbitration, and therefore, it need not reach the question of whether Plaintiff would be required to arbitrate the claims on an individual rather than a class basis. *Id.* at *25. However, for purpose of answering the question directly posed by Defendant, the Third Circuit noted in a footnote that Plaintiff had waived his class action claim on appeal, having neglected to properly brief the issue. As the footnote was simply a gratuitous statement that did not implicate the adjudicative facts of the case's specific holding, the District Court reasoned that it did not require the District Court to strike Plaintiff's class allegations. *Id.* at *26. The District Court also noted that, even if the footnote was entitled to any precedential weight, it clearly dealt only with Plaintiff's waiver of class-wide arbitration, as opposed to class-wide litigation. The District Court found that the class issue that Defendant briefed and presented on appeal was the question of whether Plaintiff would be entitled to arbitrate on a class-wide basis if arbitration was ordered, and nothing suggested that Defendant raised any issue of Plaintiff's waiver of the right to seek class litigation. *Id.* at *31-36. The District Court, therefore, concluded that the only reasonable interpretation of Third Circuit's footnote was that it addressed only the viability of class arbitration and not class litigation. Because nothing in Third Circuit's ruling addressed Defendant's claim that Plaintiff did not

have standing to represent a class, the District Court allowed Plaintiff to proceed with his class claims. *Id.* at *46. Accordingly, the District Court denied Defendant's motion to strike Plaintiff's class allegations.

***Harnish, et al. v. Widener University School Of Law*, 2015 U.S. Dist. LEXIS 102383 (D.N.J. Aug. 5, 2015).** Plaintiffs, a group of former students, brought a class action alleging that Defendant violated consumer fraud statutes by misrepresenting the employment success of its graduates. Plaintiffs moved for reconsideration of the Court's previous order denying class certification. The Court remarked that Plaintiff's proposed class did not satisfy Rule 23. Although the Court had recognized Plaintiffs' theory that they paid inflated tuition due to Defendant's misrepresentations about its graduates' employment rates, it concluded that individual questions predominated over common questions regarding the loss that each proposed class member sustained by paying Defendant's allegedly inflated tuition. *Id.* at *3. The Court remarked that all proposed class members obtained full-time legal jobs for which they paid tuition, whether it was inflated or not, and their loss was different from that of students who paid the allegedly inflated tuition and did not obtain full-time legal employment. *Id.* Thus, the Court opined that individual questions predominated as to class members' ascertainable losses, and therefore Plaintiffs did not meet the requirements of Rule 23(b)(3). Further, the Court also found that there had been no intervening change in the law and Plaintiffs also failed to present any new evidence in the motion for reconsideration. *Id.* at *4. Accordingly, the Court denied Plaintiffs' motion for reconsideration.

***Horner, et al. v. Warrior Sports, Inc.,* Case No. 15-CV-10716 (E.D. Mich. July 2, 2015).** Plaintiff brought a products liability class action alleging that Defendants sold unsafe lacrosse helmets, which were later deemed unsafe by the National Operating Committee on Standards for Athletic Equipment. *Id.* at 1. The Court found that Plaintiff failed to serve the complaint on Defendants, as the permitted period of 120 days to serve the complaint had lapsed. The Court noted that under Rule 4(c)(1), Plaintiff must serve the summons and complaint within the time allowed by Rule 4(m). Rule 4(m) provides that if Plaintiff had not served Defendant within 120 days after the complaint is filed, the Court, after notice to Plaintiff, must dismiss the action without prejudice. *Id*. The Court, however, noted that if Plaintiff showed good cause for the failure, the Court could extend the time for service for an appropriate period. *Id.* Accordingly, the Court ordered Plaintiff to show cause why the action should not be dismissed against Defendants for failure to serve.

***Lisk, et al. v. Lumber One Wood Preserving, LLC,* 2015 U.S. App. LEXIS 11891 (11th Cir. July 10, 2015).** Plaintiff brought a putative class action against Defendant for violation of the Alabama Deceptive Trade Practices Act ("ADTPA") and for breach of express warranty. Plaintiff alleged that the wood he bought for a fence at his home from Defendant was not properly pressure-treated and that it prematurely rotted. *Id*. at *3. Plaintiff sought to represent a nationwide class of all purchasers of defectively treated wood from Defendant. Defendant moved to dismiss, asserting that the ADTPA did not authorize a private class action and that Plaintiff did not expressly state claims for breach of express warranty under the ADTPA. The District Court granted the motion. On appeal, the Eleventh Circuit reversed and remanded. The first issue arose from a conflict between the ADTPA and Rule 23. *Id.* at *6. The Eleventh Circuit noted that, although the ADTPA authorizes damages of the greater of $100 or actual damages, or up to three times the actual damages together with attorneys' fees, it provided that only the Alabama Attorney General, not a private individual, could bring a class action. *Id*. at *5. If Plaintiff had filed the case in an Alabama state court, therefore, the statute would have precluded a private class action; however, the Plaintiff filed the case in federal court, and Rule 23 contained no exception for cases of this kind. *Id*. at *5-6. The Eleventh Circuit observed that the U.S. Supreme Court addressed a nearly identical issue in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and held that Rule 23 prevailed. *Id*. at *6. The Eleventh Circuit, accordingly, concluded that the Alabama statute restricting class actions did not apply to proceedings in federal court and that Rule 23 was controlling. *Id*. at *12. The second issue addressed whether Plaintiff could recover for breach of express warranty without establishing privity with Defendant. The Eleventh Circuit held that, to recover on third-party beneficiary claims, buyers must show three elements, including: (i) that Defendant bestowed a direct benefit upon them; (ii) that they were the intended beneficiaries of the contract; and (iii) that the contract was breached. The Eleventh Circuit found that Plaintiff alleged that Defendant breached its warranty by selling wood that was not

pressure-treated or was treated improperly, the warranty was intended to benefit remote buyers like Plaintiff, and that Defendant intended to protect future customers of the fence company like Plaintiff, when it warranted the quality of its wood. *Id.* at *16-18. Accordingly, the Eleventh Circuit found that Plaintiff met all three elements of a third-party beneficiary claim and, therefore, it reversed the District Court's judgment and remanded the case.

***Little, et al. v. Washington Metropolitan Area Transit Authority,* 2015 U.S. Dist. LEXIS 53367 (D.D.C. April 23, 2015).** Plaintiffs brought a class action against Defendant Washington Metropolitan Area Transit Authority ("WMATA") and three of its contractors ("the Contractor Defendants") alleging that WMATA's background check policy, which disqualified from employment individuals with a criminal history, violated Title VII of the Civil Rights Act, the Fair Credit Reporting Act, and the District of Columbia Human Rights Act. *Id.* at *3. Plaintiffs sought to certify a class consisting of all terminated employees, employees deterred from applying for internal job openings, employees deterred from taking medical or personal leave, and applicants denied employment based on WMATA's criminal background check policy. *Id.* Defendants moved to dismiss Plaintiffs' class allegations on the grounds that Plaintiffs failed to file a timely motion for class certification, which the Court denied. Plaintiffs filed their complaint on July 30, 2014, and did not ask to extend the time period for filing a motion for class certification until March 9, 2015, when they filed their opposition to Defendants' motion to strike. *Id.* at *10. The Court recognized, however, that its orders may have confused Plaintiffs' counsel because: (i) upon receiving the Contractor Defendants' motion to dismiss, it stayed all discovery pending a decision on those motions; (ii) that order cited to Local Rule 16(3)(c), thereby requiring the parties to meet and confer prior to an initial scheduling conference to discuss, among other matters, dates for filing a Rule 23 motion; and (iii) as a result of that scheduling conference, both WMATA and Plaintiffs submitted a joint report agreeing that pre-certification discovery would be necessary prior to any class certification motion. Thus, the Court found the explanation of Plaintiffs' counsel – that their obligations to file a class certification motion were suspended until such discovery was allowed – was not unreasonable. *Id.* at *11. The Court pointed out, however, that Plaintiffs never asked for, or received, an extension of time to file a timely class certification motion under Local Rule 23(1)(b). *Id.* at *12. Notwithstanding that fact, the Court determined that Plaintiffs' failure to request an extension of time to file a motion for class certification constituted excusable neglect. *Id.* at *13. First, the Court stated that Defendants had suffered no prejudice as a result of the delay because while WMATA reserved the right to raise a timeliness objection, it clearly still contemplated the future filing of a class certification motion. *Id.* Further, although the parties disagreed on its exact scope, they concurred that some discovery was warranted before a class certification motion should be filed. *Id.* at *13-14. Second, the scope of the case had shifted. The case began against WMATA and three small contractors, but at an initial conference, Plaintiffs' counsel agreed to proceed against WMATA only and to treat the contractors as third-parties. *Id.* at *14-15. Third, the Court sidetracked the normal orderly proceeding of this case because when it received a *pro se* Plaintiff's complaint against WMATA for the same alleged disparate treatment, it asked Plaintiffs' counsel, who were appearing pro bono, to consider representation of the *pro se* Plaintiff. *Id.* at *15. The Court noted Plaintiffs' counsel acceded to that request and devoted time and energy to the question, postponing progress on their own complaint. *Id.* Thus, the Court concluded that the delays in this case were not due to Plaintiffs' failure to file a timely class certification motion, but were all out of their control. *Id.* at *15-16. Moreover, Plaintiffs' counsel had acted in good faith. *Id.* at *18. Accordingly, the Court denied Defendants' motions to strike finding that the equities tipped in favor of Plaintiffs.

***McCormick, et al. v. Halliburton Energy Services, Inc.,* 2015 U.S. Dist. LEXIS 62422 (W.D. Okla. April 21, 2015).** Plaintiffs brought a putative class action alleging contamination of the groundwater at and around Defendant's facility on Osage Road in Duncan, Oklahoma (the "site"). Defendant performed a variety of tasks on the site, including work for the U.S. Department of Defense cleaning out missile motor casings. The work involved removing solid rocket propellant, consisting primarily of ammonium perchlorate, from the missile casings. Over time, perchlorate that had collected in the pits on the site reached the groundwater under the site and migrated off-site. Plaintiffs alleged violations of the Resources Conservation and Recovery Act and the Oklahoma Department of Environmental Quality directives. Plaintiffs also asserted causes of action for private nuisance, public nuisance, negligence, trespass, strict

liability, and unjust enrichment. Plaintiffs sought class certification with respect to Defendant's liability to a class of landowners whose real property rights had been injured by Defendant's wrongful practices, which resulted in the migration of perchlorate contaminated groundwater from the site. Plaintiffs further sought the division of the class into two sub-classes, including: (i) the "plume class," consisting of owners that were currently suffering from perchlorate contaminated groundwater from Defendant's site operations; and (ii) the "threatened class," consisting of owners of properties that were not currently suffering from perchlorate groundwater contamination, but due to their proximity to such contamination, their properties were threatened and they had suffered diminished property value. On March 3, 2015, the Court denied Plaintiffs' motion for class certification. Plaintiffs moved the Court to reconsider that order, asserting that recent decisions had determined that individualized injury questions should not defeat class certification. *Id.* at *23. The Court found that none of the cases cited by Plaintiffs supported their contention, and even if those cases were considered controlling law, they would not alter its prior ruling denying class certification. *Id.* at *24. The Court observed that in the March 3, 2015 order, it denied class certification because Defendant's liability as to any of Plaintiffs' causes of action could not be determined on a class-wide basis because certain elements of Plaintiffs' causes of action required significant individualized evidence. Plaintiffs requested the Court to reconsider, under recent "issue class" authority, whether the resolution of the proposed issues on a class-wide basis was proper and the best way to proceed. *Id*. The Court remarked that it had thoroughly considered that issue and had found that even though there may be common questions of law or fact regarding certain elements of Plaintiffs' causes of action, the vast number of important individualized issues relating to Defendant's ultimate liability as to all of Plaintiffs' causes of action were overwhelmed by any common questions. *Id.* at *25. The Court had found that a trial on whether Defendant released perchlorate into the groundwater, as well as the current and future scope and extent of that groundwater contamination, was unlikely to substantially aid the resolution of the ultimate determination of Defendant's liability. *Id.* The Court also opined that proof of those class-wide facts would neither establish Defendant's liability to any class member nor fix the level of damages awarded to any Plaintiff; further, the common facts would not establish a single Plaintiff's entitlement to recover on any theory of liability, or even show that a single Plaintiff was aggrieved. *Id.* Additionally, the Court had found a class action in relation to Defendant's liability was not superior to other available methods for fairly and efficiently adjudicating the controversy because even if it were to certify common issues, the subsequent separate proceedings necessary for each Plaintiff would undo whatever efficiencies such a class proceeding would have been intended to promote. *Id.* The Court therefore denied Plaintiffs' motion for reconsideration.

***Milburn, et al. v. Humana Pharmacy Solutions, Inc.*, 2015 U.S. Dist. LEXIS 106353 (N.D. Ind. Aug. 13, 2015).** Plaintiff brought a putative class action alleging that Defendant placed a non-emergency telephone call using a pre-recorded message without their consent in violation of the Telephone Consumer Protection Act ("TCPA"). After Defendant made an offer of judgment, Plaintiff filed a placeholder motion for class certification, and a motion to stay a ruling on the class certification motion, which the Court denied. The Court noted that the law in the Seventh Circuit until recently – as held in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011) – was that when a Plaintiff received an offer of judgment for full relief, the claim became moot. Because of *Damasco*, Plaintiffs sought deferral of a ruling on class certification until the parties completed discovery. *Id*. at *2. The Court noted that *Damasco* was overruled by *Chapman v. First Index, Inc.*, 2015 U.S. App. LEXIS 13767 (7th Cir. Aug. 6, 2015), which held that the premature filing of a motion for class certification is no longer necessary to avoid mootness because a Defendant's offer of compensation did not moot the litigation or otherwise end the Article III case or controversy. *Id*. The Court further found that filing a motion that the parties are not yet ready to support or defend, and the Court being not yet ready to rule upon, did not promote the efficient administration of justice. Accordingly, the Court denied Plaintiff's motion to stay and denied the motion for class certification as premature.

***Paternostro, et al. v. Choice Hotel International Services Corp.*, 2015 U.S. Dist. LEXIS 113828 (E.D. La. Aug. 27, 2015).** Plaintiffs, a group of guests at the Clarion Inn and Suites Hotel ("the Hotel"), brought a class action alleging that they suffered injury because of negligence of Defendants due to the presence of legionella and pseudomonas aeruginosa in the hotels. Plaintiffs further alleged that Defendants' negligence caused or substantially contributed to the death of Russell Paternostro, whose legal heir was a

Plaintiff in this action. Defendants removed the case on the basis of diversity jurisdiction. Defendants moved to dismiss and/or strike Plaintiffs' class action allegations, arguing that Plaintiffs failed to meet the requirements of Rule 23 in order to plead a certifiable class and so their class action allegations must be dismissed. At the outset, the Court noted that Rule 23(b)(2) permits class actions for declaratory or injunctive relief when the party opposing the class has acted or refused to act on the grounds generally applicable to the class. *Id.* at *17. The Court also observed that monetary relief may be obtained in a Rule 23(b)(2) class action as long as the predominant relief sought is injunctive or declaratory. *Id.* at *18. Further, the Court observed that in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the U.S. Supreme Court held that the key to a Rule 23(b)(2) class was the indivisible nature of the injunctive or declaratory remedy and the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. *Id.* Here, Plaintiffs admitted that their ultimate goal was the recovery of individual monetary damages, and that the Fifth Circuit standard for determining whether Rule 23(b)(2) certification is proper requires that the injunctive relief sought must predominant over the monetary relief sought. *Id.* at *20-21. Plaintiffs, however, argued that although individual Plaintiffs would ultimately seek monetary relief, such relief was not being sought on a class-wide basis and was therefore incidental to the declaratory and injunctive relief sought. *Id.* at *21. The Court held that given that the declaratory judgment and injunctive relief sought would not provide relief to any member of the class, Plaintiffs' claims could only be redressed through individual damage awards, which were not available in Rule 23(b)(2). *Id.* at *21. Accordingly, the Court concluded that Rule 23(b)(2) certification was inappropriate. The Court noted that Rule 23(b)(1)(A) provides that an action may be maintained as a class action when the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying judgements with respect to individual members of the class, which would establish incompatible standards of conduct for the party opposing the class. *Id.* at *22. Here, the Court observed that there was no continuing course of conduct that must be stopped or otherwise enjoined, and found Defendants' argument plausible that Plaintiffs were attempting to use Rule 23 as a vehicle to identify potential new Plaintiffs and not to redress a public health risk. *Id.* at *24. Accordingly, the Court found that certification under Rule 23(b)(1)(A) was also inappropriate, and granted Defendants' motion to strike the class allegations.

***Puricelli, et al. v. Republic Of Argentina,* 2015 U.S. App. LEXIS 13944 (2d Cir. Aug. 10, 2015).** Plaintiffs, a group of bond holders of the Republic of Argentina's bonds after the country defaulted on $80 to $100 billion of sovereign debt, brought a putative class action asserting their right to repayment against the Republic of Argentina. In 2004, the District Court certified eight classes of Plaintiffs who continuously held bonds from the date of the class filing through the entry of judgment. *Id.* at *2. The District Court then granted summary judgment to Plaintiffs and entered aggregate judgments for the classes. Upon Defendant's appeal, the Second Circuit affirmed the class certification order, but vacated the aggregate judgment on the basis that the District Court's inflated estimations were improper. *Id.* at *3-4. On remand, the District Court entered revised aggregate damage awards that deducted amounts for bonds tendered in Defendant's two debt exchange offers, but did not otherwise account for bonds purchased in the secondary market after the state of the class periods, *i.e.*, the bonds that had not been held continuously. *Id.* at *4-5. Upon Defendant's second appeal, the Second Circuit again vacated the aggregate judgment, concluding that the judgments remained insufficiently tied to Defendant's liability to the classes. *Id.* at *5. The Second Circuit also remanded the action with specific instructions to the District Court, including to consider evidence with respect to the volume of bonds purchased in the secondary market, to make findings as to a reasonably accurate, non-speculative estimate, and to determine how to proceed with awarding damages on an individual basis if no reasonably accurate non-speculative estimate could be made. *Id.* at *6. On further remand, the District Court did not hold an evidentiary hearing and did not adopt an individualized approach for awarding damages. Rather than pursuing discovery necessary for the evidentiary hearing, Plaintiffs moved to modify the classes by "returning the class definitions originally requested by the Plaintiffs – classes of all 'holders' of still outstanding bonds." *Id.* at *7. The District Court granted Plaintiffs' request and entered judgment modifying the classes. Defendant appealed for the third time. The Second Circuit vacated the order because that the District Court erred in not following its earlier instructions. The Second Circuit noted that, despite providing explicit instructions to address the issue with identifying class members, the District Court not only failed to hold an evidentiary hearing as instructed, but also expanded

the classes for which the Second Circuit had already prescribed a specific response. *Id.* at *9-10. The Second Circuit reasoned that typically a District Court has discretion under Rule 23 to amend a class certification order; however, here the District Court erred because that discretion under Rule 23 "cannot be exercised in conflict with an appellate ruling." *Id.* at *8. The Second Circuit held that the mandate it gave the District Court earlier did not permit such expansions. *Id.* The Second Circuit therefore vacated the District Court's orders and remanded the action with specific instructions to follow the mandate.

***Reyes, et al. v. NetDeposit, LLC,* 2015 U.S. App. LEXIS 15577 (3d Cir. Sept. 2, 2015).** Plaintiff, a consumer, brought a putative class action alleging that Defendants, a bank and its payment processors, violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") by engaging in a fraudulent telemarketing scheme that caused unauthorized debits from consumer bank accounts. *Id.* at *2. According to the complaint, telemarketers obtained bank account information from consumers that was used to make unauthorized debits from consumers' bank accounts, and conveyed it to the payment processing entities. The payment processors then caused the Bank to initiate an automated clearing house ("ACH") debit of the consumers' bank accounts. *Id*. Plaintiff alleged that Defendants operated a RICO enterprise that was a total sham lacking any legitimate business substance. *Id.* at *7. At the class certification stage, Plaintiff supported his claim referring to the inordinately high "return rates" of the telemarketers who engaged in the alleged scheme. *Id.* at *7-8. The "return rates" referred to how often the ACH debit could not be completed. Plaintiff demonstrated return rates in excess of 25 to 50 times the national average of 1.25%. *Id.* at *8. Plaintiff produced three experts who testified as to the banking practices and fraudulent marketing practices, and relied on internal e-mails between the Bank and its payment processors in which Defendants discussed "staggering" return rates. *Id.* at *8-9. Plaintiff claimed that the evidence established that each of the frauds operated in the same way, luring consumers with some kind of "card" or "benefit" to obtain their bank account information. *Id.* at *9. Two of Plaintiff's experts testified that return rates in excess of 10% were *prima facie* evidence of fraud, and here the return rates ranged from 30% to almost 90%. *Id.* at *14-16. The District Court, however, denied class certification, finding that there were no issues common to the class and Plaintiff could not satisfy either the commonality requirement of Rule 23(a) or the predominance requirement of Rule 23(b)(3). Although the high return rates were common to the telemarketers, the District Court ruled that it was insufficient to prove fraud. *Id.* at *24. The District Court found no commonality and predominance because the bank and payment processors contracted with different marketing firms in different ways to obtain consumers' bank account information. *Id.* On Plaintiff's appeal, the Third Circuit found that the District Court erred in denying certification. The Third Circuit held that the District Court placed an incorrect burden of "absolute proof" on Plaintiff at the class certification stage rather than the appropriate "preponderance of the evidence" standard. *Id.* at *30. The Third Circuit explained that, in a RICO class action, commonality and predominance are satisfied if each element of the alleged RICO violation involves common questions of law and fact capable of proof by evidence common to the class. *Id.* at *42. The Third Circuit noted that the sham theory advanced by Plaintiff relied on a common mode of behavior by Defendants as to all members of the class and a general policy of fraud, and thus Plaintiff presented evidence that demonstrated commonality. *Id*. at *39-40. Although slight variations in the telemarketers' conduct and Defendants' conduct existed, the Third Circuit found that none involved exercises of discretion that affected the class members' damages. *Id.* at *38. Further, according to the Third Circuit, Plaintiff's sham theory, if supported by an appropriate record, could satisfy Rule 23(b)(3)'s predominance requirement by focusing on the overarching material and defining aspect of Defendants' conduct, since predominance does not require the absence of variations in Defendant's conduct, but rather whether Defendants' conduct was common to all of the class members. *Id.* at *41-50. The Third Circuit distinguished telemarketing cases relied on by the District Court from this action because those cases involved legitimate business activities. The Third Circuit agreed with Plaintiff that any variations in the manner in which various individuals were defrauded was irrelevant and not sufficient to preclude a common issue of law from predominating. *Id.* at *44. Accordingly, the Third Circuit vacated the District Court's order denying class certification and remanded the matter for further proceedings consistent with its opinion.

***Senne, et al. v. Kansas City Royals Baseball Corp.*, 2015 U.S. Dist. LEXIS 91147 (N.D. Cal. July 13, 2015).** Plaintiffs, a group of former minor league baseball players, brought an action asserting claims

under the FLSA and various state wage & hour laws against Bud Selig (the former Commissioner of Baseball), the office of the Commissioner of Baseball doing business as Major League Baseball ("MLB"), and MLB's member franchises. Plaintiffs alleged that MLB and the Franchise Defendants failed to pay players minimum wages, failed to pay required overtime pay, and sometimes failed to pay wages at all. The Franchise Defendants moved to dismiss the complaint for failure to state a claim. The Franchise Defendants contended that standing was the threshold jurisdictional question, and that the Court lacked subject-matter jurisdiction over the action. The Franchise Defendants argued that in the wage & hour context, a Plaintiff has standing only if Plaintiff has an employment relationship with Defendant, and pleads that he was injured during and as a result of his employment with Defendant. *Id*. at *67. The Franchise Defendants also invoked Rule 12(b)(6), arguing that Plaintiffs failed to allege an employment relationship with all of the franchises in all of the states whose laws were invoked, and thus they did not state claims that were plausible on their face. At the outset, the Court noted that Article III requires that, in order for a party to have standing to raise a claim: (i) the party must have suffered an actual or threatened injury; (ii) because of Defendant's challenged conduct; and (iii) the injury is redressable. *Id*. at *86. The Court observed that the cases cited by the parties did not shed light on the issue presented here, *i.e.*, standing of a named Plaintiff who was employed by one Franchise Defendant and performed work in a particular state is seeking to represent class members who performed work in the same state for a different Franchise Defendant. *Id*. at *89. The Court remarked that case law authorities were split on the question of whether the standing inquiry can be deferred until after class certification. The Court, nevertheless, agreed with the reasoning of *In Re Carrier IQ*, *Inc.*, Case No. 12-CV-2330 (N.D. Cal. Jan 21, 2015), which found that class certification was logically antecedent to the question of standing in a putative class action that involved not only the laws of multiple states, but also multiple Defendants. *Id*. at *100, 103. The Court found that like Plaintiffs in *In Re Carrier IQ, Inc.*, Plaintiffs here asserted claims under the laws of multiple states against multiple Defendants. As in *In Re Carrier IQ, Inc.*, as to some states' laws, there were named Plaintiffs who alleged that they were injured by some of the Franchise Defendants but there was not a named Plaintiff who alleged injury in that state for each and every Franchise Defendant. Rather, the named Plaintiffs who were proposed as class representatives of the various state-based classes sought to represent unnamed Plaintiffs who were employed by the other Franchise Defendants on the basis that they suffered a similar injury. *Id*. at *105. As to these claims, the Court found that it was appropriate to defer addressing the question of standing until after class certification. *Id*. at *106. The Court similarly rejected the Franchise Defendants' arguments that Plaintiffs failed to state a claim. Accordingly, the Court denied the motion without prejudice to raising the issues of class standing and/or sufficiency of the class claims after class certification, or where applicable, in the context of the class certification determination.

***Stinson, et al. v. City Of New York,* 2015 U.S. Dist. LEXIS 166618 (S.D.N.Y. Dec. 11, 2015).** Plaintiffs, a group of New York city residents, brought a class action alleging that Defendants implemented and sanctioned a policy, practice, and custom of issuing unconstitutional summonses in violation of 42 U.S.C. § 1983, and the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. Defendants filed a motion to remove the statutory seal imposed on records of individuals who received a criminal court summons during the class period. The City initially stated that it sought the unsealing in order to identify those persons who were presumptively class members and to begin noticing their depositions. *Id*. at *3. The City, however, later clarified that it sought the criminal records to obtain information relevant to claims common to the class, and that it was not seeking discovery of individual class members. *Id*. The City represented that there were more than 850,000 summonses at issue. *Id*. The City argued that the eligibility of individual class members could be determined once common issues of fact and law had been resolved. *Id*. at *5. The Court denied the City's motion. It observed that any inquiry into individual circumstances of absent class members would be improper at this stage of the litigation because discovery that relates to individual issues should be postponed until after the common questions have been determined. *Id*. Accordingly, the Court concluded that the City failed to make a showing sufficient to unseal the records, and denied the motion.

***Toler, et al. v. Global College Of Natural Medicine, Inc.,* 2015 U.S. Dist. LEXIS 46907 (E.D. Mich. April 10, 2015).** Plaintiff brought a putative class action alleging that Defendant collected at least $5 million in advance tuition from her and other individuals who enrolled in distance education programs and

failed to refund the money after the school abruptly closed in November 2012. Defendant marketed and sold distance education programs such as Bachelor of Science, Master of Science, and Ph. D. in natural health to students throughout the United States. Defendant required tuition that ranged from approximately $1,000 to more than $10,000 to be prepaid either mostly or entirely before starting coursework. *Id.* at *3-4. Plaintiff paid Defendant approximately $3,120 in tuition for her self-paced Bachelor of Science program in holistic health. *Id.* at *4. After Defendant failed to respond to Plaintiff's complaint, the clerk entered default against Defendant. *Id.* at *4-5. Plaintiff then moved to certify a class consisting of all individuals who entrusted tuition in advance to Defendant and were active students in their distance education programs as of November 2012. The Court granted the motion. First, the Court held that the clerk's entry of default against Defendant did not alter its class certification analysis because certification remained a necessary procedural requirement in order for the class to recover damages. *Id.* at *7-8. Second, considering the requirements of Rule 23, the Court found that Plaintiff's proposed class consisted of more than 1,000 similarly-situated individuals (based on the figure of 1,359 students enrolled with Defendant as of September 11, 2012) and, therefore, was too numerous to accommodate the joinder of all members. *Id*. at *9. Third, the Court found that Plaintiff demonstrated commonality because the essential claim of all class members was the same, *i.e.*, each member enrolled in and paid for a self-paced distance education program with Defendant, but Defendant failed to provide the education program and failed to refund the prepaid tuition when they closed the school. *Id.* at *10. Fourth, the Court found that Plaintiff had asserted claims that were typical of the class because Plaintiff's claims arose from the same course of standardized conduct as the claims of class members, including enrollment in self-paced programs, payment of advance tuition, the school's failure to provide the education, and the school's failure to reimburse unearned tuition after closing. *Id.* at *11. Fourth, the Court found that Plaintiff met the adequacy of representation requirement because Plaintiff had been diligently litigating the case since 2013. Plaintiff successfully opposed Defendant's attempt to discharge her debt in bankruptcy and was the only creditor who filed an adversary proceeding. *Id.* at *12. Fifth, the Court found that Plaintiff met Rule 23(b)(3)'s predominance requirement because she demonstrated that each potential class member was affected by the same course of standardized conduct regarding enrollment, payment of advance tuition, the school's closure, and the school's failure to reimburse unearned tuition. The Court noted that the overriding question affecting the class was what damages Defendant caused through the events surrounding the closing of the school, and the Court found no indication of any question of law or fact affecting only individual members of the class that would rival the predominance of the question common to the class. *Id*. at *13-14. Finally, the Court found that Plaintiff also satisfied the superiority requirement because it was unlikely that any potential class member would have any interest in pursuing his or her claim individually in any other manner or forum. *Id.* at *15. Accordingly, the Court granted Plaintiff's motion for class certification.

***Villa, et al. v. San Francisco Forty-Niners, Ltd.,* 2015 U.S. Dist. LEXIS 63568 (N.D. Cal. May 13, 2015).** Plaintiff brought a putative class action alleging that Defendants – the NFL, NFL Properties ("NFLP"), 30 of the NFL's member teams, and Reebok International, Ltd. – engaged in anti-competitive behavior and entered into exclusive licensing agreements in violation of California and federal antitrust laws. The alleged unlawful conduct was based on agreements related to the licensing of the NFL's and its teams' intellectual property for use in apparel instead for the consumer retail market. Plaintiff moved for partial summary judgment as to liability, which the Court denied. Defendants argued that the motion was procedurally improper prior to class certification under the "one-way intervention" rule. *Id*. at *7. The Court observed that while motions for class certification are typically ruled on first, Rule 23 and its sub-rules are flexible and do not preclude summary judgment prior to class certification. *Id*. The Court also noted that Rule 23(c)(1) requires a ruling on class certification as soon as practicable. As a companion to Rule 23(c)(1), the Court observed that Rule 23(c)(2) prescribes the distribution of notice to all Rule 23(b)(3) class members who are identifiable through reasonable effort. This rule exists in part to protect Defendants from unfair one-way intervention, where the members of a class not yet certified can wait for the Court's ruling on summary judgment and either opt-in to a favorable ruling or avoid being bound by an unfavorable one. *Id*. at *8. Accordingly, the Court denied Plaintiffs' motion for partial summary judgment because it had not yet ruled on Plaintiffs' motion for class certification. Notwithstanding the one-way intervention rule, Plaintiffs argued that Defendants waived the right to invoke the doctrine by twice having moved themselves to resolve the case on the merits prior to class certification. Plaintiffs referred to

Defendants' motion to dismiss, and motion for partial summary judgment on pleadings, which were both denied. Plaintiffs argued that Rule 12 motions were judgments on merits, and therefore, Defendants waived their procedural protections by filing motions under that rule. The Court noted that in *Schwarzschild v. Tse*, 69 F.3d 293 (9th Cir. 1995), the rationale for a one-way intervention rule disappeared when Defendant moved for summary judgement before a decision on class clarification. *Id*. at *13.

(ii) Preemptive Motions To Strike Or Dismiss Class Allegations

***Bell, et al. v. Cheswick Generating Station,* 2015 U.S. Dist. LEXIS 9791 (W.D. Pa. Jan. 28, 2015).** Plaintiffs brought a putative class action alleging that particulates, chemicals, and gases released from Defendant's coal-fired electrical generation facility (the "Facility") caused damage to their property. Defendant moved to strike Plaintiffs' class allegations before Plaintiffs filed a motion for class certification. The Court granted Defendant's motion. The Court noted that it had the authority to strike class allegations, even before Plaintiffs move for class certification, if no amount of discovery will demonstrate that a class action can be maintained. *Id.* at *6. Plaintiffs proposed a class consisting of residents or homeowners who lived or owned real estate within one mile of the Facility who suffered similar damages to their property by the invasion of particulates, chemicals, and gases from the Facility. Defendant argued that Plaintiffs impermissibly had alleged a "fail-safe" class, defining the class members as including all, and only, those who satisfied the elements of Plaintiffs' causes of action. *Id.* at *8-9. The Court noted that, in order to be ascertainable, the class must be precisely defined with reference to objective criteria, and there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *Id.* at *9. Further, the Court opined that, when a class is a fail-safe class, *i.e.*, it requires the Court to address the central issue of liability in the case to ascertain class membership, it is impermissibly vague and may be untenable. *Id.* Thus, when a class definition involves an ultimate issue of liability, the Court would have to conduct mini-hearings in order to determine who belongs to the class, rendering the process administratively infeasible. *Id.* at *10. Here, to determine class membership, the Court reasoned that it would have to determine whether: (i) an individual lived within one mile of the Facility; (ii) he or she suffered similar damage to his or her property; (iii) those damages resulted from the invasion of the property by particulates, chemicals, and gases; and (iv) the particulates, chemicals, and gases originated from Defendant's Facility. Because these determinations would require mini-hearings into the particular facts of each purported class member's situation in order to determine ultimate issues of liability, the Court concluded that the proposed class was an impermissible fail-safe class and unascertainable. *Id.* at *11. Additionally, the Court noted that determining the degree of similarity would require an individualized analysis of each proposed class member's situation, making the class not readily ascertainable. *Id.* at *13. If Plaintiffs were to move forward with the class as constructed, the Court ruled that it would be forced first to determine the ultimate issue of damages suffered by Plaintiffs and then to compare all potential class members to that subjective standard, which made the class unascertainable and unworkable. *Id.* Accordingly, the Court granted Defendant's motion to strike the class allegations.

***Campbell, et al. v. American International Group, Inc.,* 2015 U.S. Dist. LEXIS 6241 (E.D. Va. Jan. 20, 2015).** Plaintiff, an investor, brought a class action alleging that Defendant American International Group, Inc. ("AIG") deliberately devalued her investment to enrich itself and its directors. Plaintiff contended that in 2008, AIG issued equity units along with a prospectus detailing how the equity units operated. The prospectus explained that the number of shares that a purchaser would receive was subject to anti-dilution adjustments, and also warned that there could be no assurance that market value of AIG's common stock on three stock purchase dates would not be less than the price paid by investors. *Id*. at *6. Plaintiff sought a declaratory judgment against AIG and its directors that AIG's prospectus violated SEC regulations, and Plaintiff sought monetary damages under various state law claims. Defendants moved to dismiss, and the Court granted the motion. Plaintiff sought a declaration that the prospectus issued did not comply with the SEC's "plain English" requirements. *Id.* at *11. Defendants argued that Plaintiff could receive a declaration because there is no private right of action for a violation of those regulations. *Id.* at *12. Plaintiff asserted that because the Declaratory Judgment Act itself does not require an independent cause of action, and she met the requirements of the Declaratory Judgment Act, the Court did not need to determine whether there is a private right of action. The Court observed that it must have a properly pled claim over which it has an independent basis for exercising original jurisdiction before it may act pursuant to the Declaratory

Judgment Act. *Id.* at *13. The Court also noted that because a suit arises under the law that creates the cause of action, if the Declaratory Judgment Act created an independent cause of action, any claim for declaratory relief would "arise under" the laws of the United States, which would result in a vast expansion of federal jurisdiction in flat contradiction of the Supreme Court's direction. *Id.* at *14. Accordingly, to be eligible for a declaratory judgment, the Court opined that Plaintiff must first identify an underlying right for which she sought a declaration. In order to determine whether Plaintiff could sue for a violation of the "plain English" regulation, the Court noted that Plaintiff must show that Congress has displayed an intent to create not just a private right but also a private remedy. *Id.* at *15. Here, however, Plaintiff failed to identify language in any statute which would authorize a private right of action for a violation of the SEC's "plain English" regulations. The Court remarked that because the SEC has the power to enforce its rules and regulations, it creates a strong presumption that Congress did not intend for private individuals to have that power. *Id.* at *17. Accordingly, the Court determined that the securities statutes provide no support for finding that Congress intended to create a private right of action for a violation of the SEC's "plain English" regulations, and that under the statutory scheme constructed by Congress, such power resides solely with the SEC. *Id.* Thus, the Court dismissed the claim for a declaratory judgment. Plaintiff also asserted breach of New York's implied covenant of good faith and fair dealing because Defendants adjusted the settlement rate for the shares that she was to receive, by making the language of the prospectus confusing. The Court observed, however, that Plaintiff failed to plead any facts plausibly establishing that any Defendant acted in bad faith. The Court remarked that the fact that Defendants exercised the anti-dilution provisions laid out in the prospectus and that Plaintiff received less money than she expected or hoped for from her investment did not establish that Defendants acted in bad faith or breached the implied covenant. Thus, the Court also dismissed this claim.

***Geary, et al. v. Green Tree Servicing*, 2015 U.S. Dist. LEXIS (S.D. Ohio Mar. 20, 2015).** Plaintiffs, a group of borrowers, brought an action against Defendant for alleged violations of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiffs had jointly filed a voluntary petition for Chapter 7 bankruptcy, received Chapter 7 discharges, and in their bankruptcy cases were closed. *Id*. at *1-2. At the time Plaintiffs filed their Chapter 7 bankruptcy petition, they were behind on payments for an automobile loan serviced by CitiFinancial Servicing LLC, which was also a secured creditor and received notice of Plaintiffs' bankruptcy case. Plaintiffs entered into a reaffirmation agreement with CitiFinancial in the bankruptcy action, which reaffirmed the loan debt in the amount of $2,350 with a 6% annual interest rate. *Id*. at *2. The reaffirmation agreement also included a repayment schedule requiring Plaintiffs to make 24 monthly payments of $140.15 each for a total payment of $3,363. *Id*. Plaintiffs timely made 20 monthly payments to CitiFinancial, each of $174 for a total payment of $3,480 in hopes of paying off the loan 4 months early. *Id*. Plaintiffs alleged that although Plaintiffs fully paid the reaffirmed debt, CitiFinancial continued sending statements, placed phone calls to them, and attempted to collect additional amounts. *Id*. at *3. Plaintiffs claimed that they made several attempts to resolve the matter, but CitiFinancial refused to properly adjust the account. Plaintiffs contended that CitiFinancial assigned their loans to Defendant, which continued to collect the additional amounts. *Id*. at *3-5. Plaintiffs' complaint asserted four distinct FDCPA claims, including: (i) Count I – violation of 15 U.S.C. § 1692e(2)(A) for making deceptive representations in debt collection; (ii) Count II – violation of § 1692g(a) for failing to send a follow-up written notice; (iii) Count III – violation of § 1692g(b) for failing to provide verification of debt; and (iv) Count IV – violation of § 1692e(14) for using CitiFinancial's name as opposed to using Defendant's name in communications. Plaintiffs also asserted class claims for Counts III and IV. Defendants filed a motion to dismiss Counts II, III, and IV, and sought to strike Counts I and II, which the Court granted in part. Defendant sought to strike the class claims on the basis that Plaintiffs' proposed class was an impermissible "fail-safe" class. *Id*. at *36. Plaintiffs sought to represent a putative class that consisted of every consumer who was sent an initial communication from Defendant regarding a consumer debt. *Id*. at *38. According to Defendant, for the Court to ascertain who is in the putative class based on the characteristics Plaintiffs alleged, the Court not only would be deciding that a class existed, but also would be deciding the merits of the claim. The Court remarked that it must exercise caution when striking class action allegations based solely on the pleadings, because class determinations generally involve considerations that are enmeshed in the factual and legal issues comprising a Plaintiff's cause of action. *Id*. at *42. The Court also observed that a motion to strike class claims is disfavored because it requires a reviewing Court to preemptively terminate the class

aspects of litigation solely on the basis of what is alleged in the complaint, and before Plaintiffs are permitted to complete discovery to which they would otherwise be entitled on questions relevant to class certification. *Id*. The Court reasoned that while it may strike class allegations prior to a motion for class certification, it would not do here at a very early stage in the litigation before the discovery was completed. Accordingly, the Court denied Defendant's motion to strike the class claims.

***Heinzl, et al. v. Cracker Barrel Old Country Store, Inc.,* 2015 U.S. Dist. LEXIS 58847 (W.D. Pa. April 24, 2015).** Plaintiff, individually and on behalf of all others similarly-situated, brought a class action against Defendant alleging violations of Title III of the ADA. Specifically, Plaintiff alleged that Defendant's facilities were not fully accessible to individuals who used wheelchairs for mobility, because of various barriers in Defendant's parking lot and along the route to the building entrance. Defendant filed a partial motion to dismiss, arguing that Plaintiff lacked standing to raise claims as to locations she was unlikely to visit under "the intent to return theory" and that her class allegations did not give her standing. *Id*. at *1. The Magistrate Judge issued a report and recommendation denying Defendant's partial motion to dismiss. *Id*. at *2. Defendant served Rule 72 objections and also contended for the first time that the Court should decide the issue of class certification at this juncture of the litigation, prior to addressing the issue of standing. *Id*. Defendant argued that Plaintiff's class action allegations should be dismissed (although Plaintiff had not filed a motion for class certification). The Court adopted the Magistrate Judge's report and recommendation, and denied Defendant's motion to dismiss. At the outset, the Court agreed with Plaintiff that it would be improper for the Court to decide the issue of class certification without the benefit of discovery and briefing. *Id*. at *3. Plaintiff contended that, by asking the Court to forego this "rigorous analysis," in favor of striking the class allegations from the complaint without any evidentiary record, Defendant was seeking extraordinary relief that was not justified. *Id*. at *4. Moreover, the Court found that as a procedural matter, Defendant had not filed a motion to strike the class allegations, and Plaintiff had not filed a motion for class certification. *Id*. at *5. Further, as cited in the Magistrate Judge's report and recommendation, the Court observed that numerous case law authorities, including precedent in the Tenth Circuit, have held that in an ADA class action situation, the Court should first evaluate the named Plaintiff's standing regarding the location she has visited and then determine the issue of class certification as to other locations under Rule 23. *Id*. at *8. The Court thus declined Defendant's invitation to strike Plaintiff's class allegations without discovery, particularly when it had not filed a motion to dismiss the class allegations. *Id*. at *9. The Court concluded that it would be appropriate to follow the prevailing approach of Third Circuit precedent, and strike all class allegations at the preemptive stage in only the rare case. *Id*. Accordingly, the Court adopted the Magistrate Judge's report and recommendation and denied Defendant's motion to dismiss.

***Herrera, et al. v. JFK Medical Center Limited Partnership*, 2015 U.S. Dist. LEXIS 20545 (M.D. Fla. Feb. 20, 2015).** Plaintiffs, a group of emergency radiological services recipients, brought a putative class action alleging that several hospitals ("Defendant hospitals") charged unreasonable amounts for emergency radiological services in violation of the Florida Deceptive Unfair Trade Practices ("FDUTPA"). Plaintiffs were patients at Defendant HCA Holdings, Inc.'s ("HCA") hospitals, were covered by their own personal Injury protection ("PIP") insurance, and signed conditions of admission contracts ("contracts") with the hospitals. *Id*. at *4. In the contracts, Plaintiffs agreed to pay the rates stated in the hospital's price list known as the "charge master." *Id*. Plaintiffs alleged that the charges for the emergency radiological services at the hospitals were 65 times higher than the charges for the same services billed to other patients covered under private or government-sponsored insurance programs. Defendants moved to dismiss and to strike Plaintiffs' class allegations. The Court granted the motion in part. HCA argued that, because it was the ultimate parent company of the hospitals, it had no direct liability for their actions. *Id*. at *8-9. The hospitals argued that Plaintiffs failed to state a claim under the FDUTPA because Plaintiffs did not allege any deceptive or unfair conduct as required under the statute. At the outset, the Court noted that, in *In Re Manager Care Litigation*, 298 F. Supp. 1259 (S.D. Fla. 2003), it held that Plaintiffs sufficiently pled a cause of action for direct liability of the parent corporation because they alleged that all of the substantive practices, policies, and procedures of the health plans were established, implemented, monitored, and ratified by Defendants themselves. *Id*. at *10. The Court, accordingly, concluded that whether the parent company could be responsible for its subsidiary's breach of contract was a fact of

intensive inquiry, and hence permitted Plaintiffs to proceed against HCA. *Id*. at *11. The Court noted that, to state a FDUTPA claim, a Plaintiff must allege: (i) a deceptive act or unfair practice; (ii) causation; and (iii) actual damages. *Id*. at *12. Defendants argued that the contracts expressly incorporated the charge master as the contractual price terms; therefore, it negated Plaintiffs' contention that Defendants materially deceived them about the charges. The Court seriously doubted that the hospitals' practice of incorporating the charges of the emergency radiological services into the contracts by reference rose to the level of unfairness and deception contemplated by the FDUTPA but, nevertheless, in line with other case law authorities that had held these types of allegations sufficient to support an FDUTPA claim, the Court concluded that it would give Plaintiffs an opportunity to prove their case and revisit the issue on summary judgment. *Id*. at *13. Finally, the Court struck Plaintiffs' class allegations because it found that individual issues would predominate. The threshold inquiry was whether Plaintiffs were charged unreasonable rates for their specific medical services, which impacted the portions of their PIP benefits prematurely depleted and the portions of the charges for which they were individually responsible. The Court noted that, if this case were to proceed, the most important issues to settle – the reasonableness of the charge for the specific radiological service and the damages incurred by each putative Plaintiff – would be highly individualized in nature. *Id*. at *23. The Court explained that a reasonable charge for radiological services in one geographical area might not be reasonable for another. *Id*. Accordingly, the Court granted Defendants' motion to dismiss in part and struck Plaintiffs' class allegations. *Id*. at *24.

***Li, et al. v. EFT Holdings, Inc.,* Case No. 13-CV-8832 (C.D. Cal. July 28, 2015).** Plaintiffs brought a class action alleging that Defendants fraudulently induced them to purchase substandard products in order to take part in the endless chain schemes. Based on the purported inadequacy of the two firms proposed as class counsel, Locke Lord LLP and Howarth & Smith, as well as the previous failure by other class representatives to file a motion for class certification within the time given by Local Rule 23-3, Defendants moved to strike the class allegations. *Id*. at 1. The Court granted the motion in part. First, the Court remarked that Locke Lord's predecessor in interest, Edwards Wildman Palmer, was the firm that failed to file for class certification in the time provided by the Local Rules, and this failure resulted in the class allegations being stricken in the original case. *Id.* The Court found that Locke Lord was sued in a state court action over the prior conduct of Edwards Wildman Palmer in this case. Further, the Court also stated that Locke Lord's incentives in this case and the class' interests were not completely aligned. *Id.* at 2. The Court, however, could not find any reason that Howarth & Smith was inadequate class counsel. The Court remarked that the arguments related to Howarth & Smith's actual conduct of the case were not so compelling as to demonstrate inadequacy of counsel. *Id.* Furthermore, the Court also declined to bar the current proposed class representatives from seeking class certification as this action now involved class representatives and class counsel entirely different from those in the original action where Plaintiffs and Locke Lord failed to seek class certification within the time limits of the Local Rules. *Id.* at 3. Accordingly, the Court granted Defendants' motion to strike with respect to Locke Lord's adequacy.

(iii) The Numerosity Requirement For Class Certification

***Mielo, et al. v. Bob Evans Farms, Inc.,* 2015 U.S. Dist. LEXIS 36905 (W.D. Pa. Mar. 23, 2015).** Plaintiff brought an ADA action alleging that Defendant failed to provide full and independent access to individuals who use wheelchairs in the parking areas of Defendant's various properties. *Id.* at *2. Plaintiff asserted that excessive slopes in accessible parking spaces and access aisles to the building entrances caused unnecessary difficulty and risk. Plaintiff moved for certification of a nationwide class, which the Court denied. First, the Court found that Plaintiff failed to meet the numerosity requirement. The Court noted that the number of individuals who might be similarly-situated was too speculative because Plaintiff failed to establish that similar non-compliance issues existed in all of Defendant's parking lots and that others similarly-situated have suffered from the same alleged problems. *Id.* at *14. Further, Plaintiff identified only himself with a mobility impairment who encountered an ADA accessibility issue at a single restaurant, and he did not provide any specific census data concerning the number of qualified individuals with mobility disabilities nationwide who were likely to patronize Defendant's business. *Id.* The Court therefore found that Plaintiff failed to establish numerosity. Second, the Court determined that Plaintiff failed to meet the commonality requirement because he failed to demonstrate that Defendant practiced any common offending policies or design characteristics that called for common accessibility barriers at its restaurants.

Id. at *19. According to the Court, proving the existence and cause of accessibility barriers at each of Defendant's restaurants would be too fact-intensive and individualized as the threshold question of whether any store in particular was out of compliance and if so, in what manner. In essence, this inquiry would have to be answered on a store-by-store basis. *Id.* at *19-20. Third, because Plaintiff's individual circumstances were markedly different from that of other putative class members, the Court further found that Plaintiff was atypical of other putative class members. Plaintiff was named in approximately 27 separate cases, all of which alleged that Defendants violated the ADA due to excessive parking lot sloping. *Id.* at *25. Based on this evidence, the Court stated that Plaintiff might not be a typical customer at any of the locations, but instead might be a "tester" to check for ADA compliance, and this would stand him apart for other putative class members, making him an inadequate representative. *Id.* at *25-27. Finding that disparate factual circumstances predominated, the Court concluded that an injunctive relief could not be granted. The Court noted that the differences and unique designs of each parking lot, and this lack of commonality, made it impossible to craft one injunction that could remedy all injuries to the class in one stroke. *Id.* at *34. The Court explained that "[a]n injunction cannot simply order Defendant to obey the law," but that "[a]an injunction must specify the particular action Defendant must do or refrain from doing and overbroad language that merely order a Defendant to obey the law must be stricken." *Id.* The Court therefore concluded that Plaintiff's proposed class could not be certified, and accordingly, denied the motion for class certification.

(iv) The Commonality Requirement For Class Certification

***Laumann, et al. v. National Hockey League,* 2015 U.S. Dist. LEXIS 63745 (S.D.N.Y. May 14, 2015).** Plaintiffs, a group of Comcast and DIRECTV customers and purchasers of the National Hockey League's ("NHL") streaming service, GameCenter Live, brought a putative class action alleging that the territorial allocation of broadcast rights within the NHL assigned to its member clubs – and thereafter sold to regional sporting networks – violated federal antitrust laws, provided out of market consumers with fewer choices, and inflated prices charged to view broadcasts of live professional hockey games. *Id.* at *6-7. Plaintiffs moved for certification of two classes of consumers, including: (i) those who purchased out-of-market packages on-line (the "Internet Class"); and (ii) those who purchased broadcasts through their television provider (the "TV Class"). *Id.* at *4. Plaintiffs alleged that every consumer in both classes faced, and continued to face, a market for baseball and hockey broadcasting with limited options and that the prices of options increased as a consequence of Defendants' coordinated maintenance of territorial exclusivity. *Id.* at *21. Defendants argued that, because the putative class consisted of both winners and losers, some purchasers actually benefitted from the restraints in dispute, which defeated the commonality of injury and the ability of Plaintiffs adequately to represent the interests of all class members. *Id.* at *34. Defendants further argued that, because some class members no longer subscribed to the packages, they had no legal interest in the prospective relief sought by Plaintiffs and, therefore, they lacked standing to seek injunctive or declaratory relief. *Id.* The Court granted in part and denied in part Plaintiffs' motion for class certification. The Court granted certification to the proposed classes for purposes of seeking injunctive relief but not for purposes of seeking damages. The Court noted that every class member suffered an injury because every member, as a consumer in the market for baseball or hockey broadcasting, had been deprived of an option, *i.e.*, a la carte channels that would have been available absent the territorial injury. *Id.* at *41. The Court further noted that certain class members also suffered an additional injury of having to pay too much for the content they wanted. *Id.* The Court explained that class certification should be determined by a common injury shared by class members, not by an agreement by class members about the best way to address the injury. The Court concluded that a common injury existed in the form of diminished consumer choice and, therefore, concluded that certification was appropriate for Plaintiffs' injunctive relief claim. *Id.* at *38. The Court, however, rejected the damages model put forth by Plaintiffs' expert to calculate damages for the class, finding that it relied on insufficient data and, therefore, held that Plaintiffs' class could not be certified for damages claims. *Id.* at *34. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for class certification.

***Leonard, et al. v. Sears, Roebuck & Co.,* 2015 U.S. Dist. LEXIS 94134 (N.D. Ill. July 20, 2015).** Plaintiffs, a group of Illinois consumers, brought a class action asserting design defects in front-loading, high-efficiency washing machines manufactured by Whirlpool and sold by Defendant. Plaintiffs alleged that

the machines developed serious internal mold problems that produced odor on the clothes washed in the machines. *Id.* at *4-5. Plaintiffs alleged breach of express and implied warranty in violation of the Magnuson-Moss Act and Illinois law. Plaintiffs initially sought certification of a six-state class of owners of Defendant's machines that suffered from the mold problem. The District Court denied class certification. Plaintiffs appealed. The Seventh Circuit reversed on the basis that there was a single, central, common issue of liability, *i.e.*, whether Sears washing machine was defective, and any complications caused by differences in various washing models could be handled by the creation of sub-classes, if necessary. *Id.* at *18. The Seventh Circuit noted that Defendant roughly sold 200,000 of the Kenmore brand Whirlpool washers each year, and the basic question of whether the machines were defective in permitting mold to accumulate and generate noxious order was common to the entire class. *Id*. On remand, Plaintiffs filed an amended motion for class certification seeking to certify a class made up of Illinois-based Plaintiffs, rather than Plaintiffs from six different states. *Id.* at *22. The District Court granted class certification. Defendant asserted that Plaintiffs could not prove a common, class-wide injury because not all washers build up such an excessive amount of mold that it prevented adequate cleaning of clothes. *Id.* at *31. The District Court, however, pointed to the Seventh Circuit's observation that the possibility that a class would include persons who have not been injured by Defendant's conduct did not preclude class certification. *Id.* at *32. Since the basic question remained common to the entire mold class, although damages would likely vary, the District Court concluded that the proposed class could be certified. The District Court accepted Plaintiffs' proposed limitation that the class definition would not include machines built on the Sierra platform, and defined the class to include all of those washer models with the alleged design defect and without the steam feature, regardless of when Defendant manufactured each model. *Id.* at *35-36. The District Court found that the class included a total of 29 different models manufactured during the span of almost ten years. Plaintiffs consistently asserted that the defect causing the mold problem was the same across all washer models, and therefore the District Court did not find it necessary to create sub-classes for different washer models, as the Seventh Circuit had suggested. *Id.* at *37. Accordingly, the District Court granted Plaintiffs' motion for class certification.

(v) The Typicality Requirement For Class Certification

***Cox, et al. v. Teletech@home, Inc.*, 2015 U.S. Dist. LEXIS 14000 (N.D. Ohio Feb. 5, 2015).** Plaintiff brought a putative class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") by rescinding a job offer because of information contained in a consumer report before providing him a copy of the consumer report and a summary of his rights. Plaintiff applied for a customer service representative position with Defendant and received a conditional offer of employment contingent on passing a pre-employment screening. Defendant used Sterling Infosystems ("Sterling"), a consumer reporting agency, to perform the pre-employment screening. Subsequently, on September 17, 2013, Plaintiff received an e-mail from Defendant with the subject "Urgent | Rescinded offer," stating that the results of the pre-employment screening made him ineligible for hire. *Id.* at *4. Whereas Plaintiff did not know who exactly wrote the e-mail, he later learned through a Google search that Defendant used Sterling to conduct background checks. Plaintiff then contacted Sterling by telephone to contest the information. *Id.* at *7. Two days later, Plaintiff received by e-mail a pre-adverse action notice about revocation of his conditional offer, subject to a successful challenge to the accuracy of the consumer report. A few days later, he received a paper copy of the notice, along with the consumer report confirming his suspicions about a conviction and a summary of FCRA rights. Plaintiff also received separate paperwork, which he filled out and returned to contest the report. *Id.* at *7-8. After an exchange of e-mails with Defendant, Plaintiff received a corrected consumer report, and Defendant re-offered Plaintiff the job, but reversed the offer soon thereafter because Plaintiff failed to submit an I-9 form. *Id.* at *10. Plaintiff alleged that Defendant's conduct demonstrated reckless disregard of the FCRA's requirements. Plaintiff moved to certify a class of all applicants for employment with Defendant who had been affected by the alleged violations. Defendant opposed class certification and simultaneously moved for summary judgment. The Court denied both motions. In denying certification, the Court found that Plaintiff could not satisfy Rule 23's typicality requirement. Although the general nature of Plaintiff's claim that Defendant violated the FCRA by taking adverse action before making the required disclosure was typical of the class, the Court found that some of the unique factual circumstances of the case suggested that Plaintiff was atypical in other respects. *Id.* at *21. Particularly, the Court noted: (i) Plaintiff contacted Sterling before receiving the standard dispute forms; (ii) Plaintiff claimed that his

girlfriend e-mailed Defendant on his behalf after he received the September 17 e-mail; (iii) Defendant re-offered the job to Plaintiff; and (iii) Plaintiff arguably failed to submit an I-9 form, a requirement unrelated to the FCRA. *Id.* According to the Court, these facts gave Defendant a unique personal defense to Plaintiff's claims and therefore destroyed typicality. *Id.* In addition, the Court denied Defendant's motion for summary judgment, finding a triable issue on whether the September 17 form e-mail reflected an adverse action or merely a pre-adverse action notice. *Id.* at *12. Whereas one reading of the e-mail, including the subject line, suggested that a final decision already had been made on Plaintiff's job offer, and Defendant took an adverse action by locking Plaintiff's prospective employee on-line account, another reading suggested that Defendant simply kept Plaintiff's application "on hold" pending his challenge to the consumer report. *Id.* at *13. Moreover, hundreds of applicants received the form e-mail without Defendant's knowledge, and Defendant apparently did not have any systematic policy or procedure to ensure compliance with the FCRA. *Id.* at *15. Given the factual disputes, the Court found summary judgment inappropriate. Accordingly, the Court denied Plaintiff's motion for class certification and denied Defendant's motion for summary judgment.

Steginsky, et al. v. Xcelera, Inc., **2015 U.S. Dist. LEXIS 28733 (D. Conn. Mar. 10, 2015).** Plaintiff, a minority shareholder in Xcelera Inc., brought a putative class action alleging that Defendants engaged in a multi-year scheme to deflate Xcelera's stock price so that the company's controlling shareholders could buy-out minority shareholders at a bargain-basement price. According to the compliant, Xcelera's common stock traded for as high as $110 per share on the American Stock Exchange in 2000, but by 2004, it was down to $1. Around that time, Xcelera insiders stopped making required filings with the SEC and withheld information about the company's financial situation, which caused the company to be delisted. In April 2011, Plaintiff sold over 100,000 shares at $.25 per share after a tender offer by OFC Ltd. Plaintiff alleged that OFC was a shell company created by insiders and that the sale was part of a greater scheme to manipulate the price of Xcelera stock. *Id.* at *4. Plaintiff alleged breach of fiduciary duty and violations of the Securities Exchange Act, and moved to certify a class of those who sold to OFC in the tender offer on or after February 6, 2007. *Id.* at *6-7. The Court denied class certification. The Court found that the presence of unique defenses rendered Plaintiff's claims atypical of those of the rest of the proposed class. *Id.* at *19. The records showed that Plaintiff did not rely on Defendants' alleged omissions in deciding to tender her shares. Plaintiff testified during her deposition that, although she did not read the tender offer materials in their entirety, she believed that Xcelera stock was more than the offered rate of $.25. *Id.* at *15. Plaintiff raised the issue with her lawyer but eventually decided to sell her shares, despite suspecting fraud, because she needed the money. *Id*. Plaintiff also testified that she had decided to file this action before tendering her shares, and tendered her shares knowing that she would file this action in the future. *Id.* The Court noted that no other investors in the proposed class suspected fraud, contacted counsel, and/or decided to file a lawsuit before tendering their shares to OFC. Thus, according to the Court, Plaintiff's apparent lack of reliance would subject her to unique defenses that would "unacceptably detract from the focus of the litigation to the detriment of absent class members." *Id.* at *18. The Court thereof concluded that Plaintiff failed to meet the typicality requirement of Rule 23(a)(3), and accordingly, denied class certification.

(vi) The Adequacy Of Representation Requirement For Class Certification

Gordon, et al. v. Sonar Capital Management LLC, **2015 U.S. Dist. LEXIS 34443 (S.D.N.Y. Mar. 19, 2015).** Plaintiffs, investors in Sigma Designs, Inc. ("Sigma"), brought a putative class action alleging that Defendants engaged in an extensive insider-trading scheme that allowed them to obtain millions of dollars in profits and avoid losses in violation of the Securities Exchange Act of 1934. According to Plaintiffs, a former employee of Sigma regularly provided Defendants with material, non-public information consisting primarily of advance quarterly revenue figures, on which Defendants traded. *Id.* at *4. Plaintiffs moved for certification of two classes, including: (i) a seller class consisting of all persons and entities who sold shares of Sigma on any day between July 13, 2007 and November 28, 2007, and (ii) a buyer class consisting of all persons and entities who bought shares of Sigma on any day between December 20, 2007 and March 12, 2008. *Id.* at *6. The Court denied class certification. Whereas both Plaintiffs – Sidney Gordon and Jeffrey Tauber – sought to represent the seller class, Tauber additionally sought to represent the buyer class. Defendants opposed class certification primarily on the ground that neither of the

proposed class representatives satisfied the adequacy requirement of Rule 23(a)(4). According to Defendants, Gordon's relationship with his attorneys created an actual conflict of interest with the class, and Tauber's claims were subject to a potential unique defense regarding economic loss. First, the Court noted that Gordon had revealed in his deposition that he had from the outset consulted with his long-time family attorney and cousin, David Spirt, regarding this action, and Spirt had reached an arrangement with co-lead counsel to receive 5% of any fees awarded to such counsel. *Id.* at *10. Neither Gordon nor the co-lead counsel had revealed the existence of such arrangement at the hearing on appointment of lead Plaintiff and lead counsel, even though the Court inquired into the issue, nor did they disclose these facts in response to Defendants' interrogatories. *Id.* at *11. Subsequent testimony from Gordon and Spirt and review of their e-mail communications revealed troubling inconsistencies about their relation and arrangement. In sum, the Court noted that the close association between Gordon and Spirt, consisting of family, personal, and professional ties, might compromise Gordon's ability to exercise independent judgment in situations like settlement negotiations, in which the interests of the class and counsel might diverge. *Id.* at *13. The Court, therefore, found Gordon inadequate to serve as a class representative. Second, the Court found that Tauber would be subject to the potentially meritorious defense that he suffered no economic loss attributable to Defendants' alleged wronging. *Id.* at *27. The records showed that, taking account of all his purchases and sales of Sigma stock during the class periods, Tauber suffered no economic loss. Although Plaintiffs argued that it was inappropriate to net out a Plaintiff's losses and gain in an insider trading case, the Court found that it would be appropriate to reserve this difficult decision until the time of trial. To the extent Plaintiffs argued, based on § 20A of the Exchange Act, that netting was inappropriate and that Tauber's damages must be calculated on the basis of his sales during the seller class periods and purchases during the buyer class periods, irrespective of his other trading activity, the Court pointed out that § 20A, on its face, says nothing about the netting of Plaintiffs' gains and losses in calculating damages. *Id.* at *21-22. According to the Court, the limitations on damages found in § 20A are just limitations on damages, and they do not abrogate existing case law granting the Court substantial discretion regarding the calculation of damages in securities fraud cases generally. *Id.* at *23-24. Because Plaintiffs retained the burden to prove the economic loss element of their claim, and because Tauber would be subject to a unique defense regarding economic loss, the Court concluded that Tauber was not an appropriate class representative. Accordingly, the Court denied Plaintiffs' motion for class certification without prejudice.

***In Re Community Bank Of Northern Virginia Mortgage Lending Practices Litigation,* 2015 U.S. App. LEXIS 13186 (3d Cir. July 29, 2015).** Plaintiffs, a nationwide class of residential mortgagees, brought a class action alleging that Defendant, PNC Bank, N.A. ("PNC") facilitated an illegal home equity lending scheme. The action, first filed in the early 2000, alleged that the North Virginia mortgage lender Shumway Organization associated itself with several banks in the 1990s in order to circumvent fee caps and interest ceilings imposed by various state mortgage lending laws and in order to charge higher fees to mortgage borrowers. *Id.* at *4. Particularly, Plaintiffs alleged that Shumway formed relationships with area banks, including the Community Bank of Northern Virginia ("CBNV"), in order to disguise the sources of its loan origination services so that fees for those services would appear to be paid solely to the banks. *Id.* Plaintiffs claimed that CBNV, EquityPlus Financial Inc., and various title companies misrepresented home loan settlements to home buyers and provided Shumway with kickbacks for bringing in borrowers. *Id.* at *4-5. Six putative class actions, made up of 44,000 class members, were filed in response to the alleged scheme and consolidated in Pennsylvania in 2003, and alleged violations of Racketeer Influences and Corrupt Organizations Act ("RICO") and the Real Estate Settlement Procedures Act ("RESPA"). *Id.* at *6. Plaintiffs and Defendants eventually agreed on a settlement and the District Court certified classes for the purposes of settlement. A group of objectors appealed the decision and argued that Plaintiffs should have asserted claims under the Truth in Lending Act ("TILA") and the Home Ownership and Equity Protection Act ("HOEPA") on behalf of the putative class. *Id.* at *8. The Third Circuit overturned the settlement approval on two separate occasions, finding that the District Court erred in several ways, including by failing to make an independent inquiry as to whether Plaintiffs satisfied the Rule 23 class actions requirements, and by incorrectly evaluating the adequacy of the named Plaintiffs and class counsel. *Id.* at *11-15. The Third Circuit questioned whether the putative class representatives – whose claims were untimely under the TILA/HOEPA without the benefit of equitable tolling – could adequately represent

putative class members who had timely TILA/HOEPA claims. *Id.* at *11. The Third Circuit suggested that the "most obvious remedy" for the conflict "would be to create sub-classes." *Id*. at *15. In 2011, the original Plaintiffs abandoned settlement negotiations and joined with the objectors to litigate their claims as a newly consolidated class with sub-classes, bringing new claims for violations of the HOEPA and TILA. *Id.* at *16-17. Plaintiffs then moved for certification of a general class and of five sub-classes. Finding no conflict between the sub-classes because the original Plaintiffs and the objectors each asserted TILA/HOEPA claims in the complaint, the District Court granted class certification. On further appeal, the Third Circuit affirmed. The Third Circuit rejected PNC's challenges to class certification, particularly its argument that intra-class conflicts defeated adequacy of representation because the same counsel represented the different sub-classes. *Id.* at *24. The Third Circuit explained that a conflict existed when the settlement class was facing a fixed pool of resources to resolve all claims, and it no longer existed because the sub-classes here were not competing for limited settlement funds, but were pursuing damages under the same statutes and the same theories of liability, and the differences among them would not, at least as things presently stood, pit one group's interests against another. *Id.* at *29-30. Thus, according to the Third Circuit, there was no fundamental intra-class conflict to prevent class certification, and no derivative conflict of interest that could prevent class counsel from fairly and adequately representing the interests of the entire class. *Id.* at *30. The Third Circuit therefore concluded that appointing separate counsel was not a necessary prerequisite for certification of the sub-classes and the District Court did not abuse its discretion in deciding that Plaintiffs satisfied the adequacy requirement. *Id.* at *31. Accordingly, the Third Circuit affirmed the District Court's grant of class certification.

***McCarter, et al. v. Kovitz Shifrin Nesbit,* 2015 U.S. Dist. LEXIS 94 (N.D. Ill. Jan. 5, 2015).** Plaintiff brought a putative class action alleging that Defendant sent her two debt collection letters demanding past-due assessments owed to her condo association in violation of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff moved for partial class certification of all individuals: (i) who, within 12 months prior to the date of filing of this action, resided in Illinois and received a form collection letter similar to Plaintiff's collection letter dated December 3, 2012; and (ii) whose collection letters were not returned by the postal service as undelivered or undeliverable. The Court granted Plaintiff's motion and rejected Defendant's argument that Plaintiff and Plaintiff's counsel could not adequately represent the class. First, the Court rejected Defendant's argument that Plaintiff could not adequately represent the class because she had a poor memory during her deposition. *Id*. at *9-10. Although Plaintiff was reluctant to divulge information that she deemed personal during her deposition, the Court found that the transcript did not support the inference that she was evasive, and such trivial admissions did not undermine Plaintiff's adequacy as a class representative. *Id*. Further, the Court rejected Defendant's contention that Plaintiff failed to disclose that one of her attorneys, Kenneth DucDuong, represented her in another lawsuit against the condo association. *Id*. at *9-11. Although Plaintiff did not disclose her lawsuit against the condo association, she stated that Kenneth DucDuong represented her in the condo association's lawsuit against her. *Id*. at *11. Thus, the Court concluded that Plaintiff sufficiently had disclosed the information and adequately would serve the class' interests. *Id*. at *12. Further, Defendant argued that Plaintiff's attorneys were inadequate because Mark Lavery's law firm was related to a law firm that the Illinois Attorney General sued for taking advantage of consumers, and neither Lavery nor DucDuong had malpractice insurance. *Id*. Defendant asserted that Lavery's law firm, Hyslip & Taylor, LLC, might have future legal troubles because one of its attorneys was affiliated with a law firm that had legal troubles in the past. *Id*. at *12-14. Defendant argued that, if Hyslip & Taylor had to pay a judgment or settlement on hypothetical claims, it could impact counsel's ability to represent and protect the class' interests. *Id*. at *14. The Court, however, found this speculation insufficient to deny class certification under Rule 23(a)(4). *Id*. The Court noted that, with respect to Defendant's broader point about maintaining malpractice insurance, Defendant failed to cite any case law supporting its argument that insurance was an important consideration in class certification. *Id*. Accordingly, the Court concluded that DucDuong and Lavery adequately would represent the class, and granted Plaintiff's motion for partial class certification.

***Real, et al. v. Rescue Mission,* 2015 U.S. Dist. LEXIS 108814 (M.D. Fla. Aug. 18, 2015).** Plaintiff, an individual, brought an action against Defendant, Rescue Mission, and a group of individuals, who worked or volunteered at Rescue Mission, alleging that their prayer policy violated his right to religious freedom

under the First Amendment of the U.S. Constitution. Plaintiff contended that Defendants required individuals to partake in Christian prayers as a condition of receiving free housing and/or meals. *Id.* at *2. Defendants moved to dismiss the complaint, which the Court granted. Plaintiff subsequently filed an amended complaint, where, in addition to his allegation against Defendants' prayer policy, he also sought to certify the case as a class action, sought a preliminary injunction, and also asserted a violation of the Civil Rights Action of 1964. *Id.* at *3. The Court found that Plaintiff did not allege sufficient facts to state a claim for relief and also failed to state any actionable claims against the individual Defendants. *Id.* at *5. The Court noted that Plaintiff's constitutional claims also failed because there was no state action. The Court further opined that the amended complaint did not allege any facts that plausibly suggested that Defendant or its employees were engaged in a joint action with the state or its agents. Thus, the Court dismissed Plaintiff's constitutional claims. In addition, the Court dismissed Plaintiff's civil rights claims as the complaint did not plead facts that asserted a viable Civil Rights Act violation. *Id.* at *9. Plaintiff sought certification of a class of all homeless and poor people of different beliefs residing in Lee County, Florida, who sought access to hot meals or food at the Rescue Mission, and sought to do so without the imposition of a prayer by invoking a belief that they do not believe or disagree. *Id.* at *9-10. The Court, however, found that Plaintiff had failed to establish any of the conditions required under Rule 23(a) or (b) and concluded that Plaintiff, being a *pro se* litigant, could not serve as an adequate class representative and thereby, could not proceed with the class. *Id.* at *10-11. Finally, Plaintiff's request for a preliminary injunction against Defendants was also denied because the Court found that Plaintiff failed to show that he was likely to succeed on the merits and Plaintiff had not alleged any actionable claims. Accordingly, the Court granted Defendants' motion to dismiss Plaintiff's amended complaint.

(vii) The Predominance Requirement For Class Certification

***Adkins, et al. v. Morgan Stanley,* 2015 U.S. Dist. LEXIS 63333 (S.D.N.Y. May 14, 2015).** Plaintiffs, a group of Detroit homeowners, brought a putative class action alleging that Defendant, an investment bank, followed practices that caused a disparate impact on African-American borrowers in violation of the Fair Housing Act and the Equal Credit Opportunity Act. Specifically, Plaintiffs alleged that Defendant actively ensured the proliferation of high-cost mortgage loans through New Century Mortgage Corp. ("New Century") with specific risk factors in order to bundle and sell mortgage-backed securities to investors. New Century ranked among the leaders in originating sub-prime loans and selling its loans to investment banks such as Defendant, which then securitized the loans. *Id.* at *8. Although the parties contested Defendant's influence on New Century's practices, Plaintiffs alleged that Defendant controlled New Century's lending practices and that New Century wrote loans based on Defendant's preferred terms. Thus, Plaintiffs argued that Defendant should bear responsibility for the disparate impact of New Century's lending practices. Plaintiffs sought to certify a class comprised of all African-Americans in the Detroit area who allegedly received what they described as "combined-risk" loans. *Id.* at *18. Plaintiffs defined a combined-risk loan as a loan that both met the definition of a high-cost loan under the Home Mortgage Disclosure Act and also contained two or more high-risk features, including: (i) that it was based on stated income rather than verified income; (ii) that it had a high loan-to-value ratio; (iii) that it had an adjustable interest rate; (iv) that it had interest-only features; (v) that it had balloon-payment features; (vi) that it had pre-payment penalties; or (vii) that it had other defined high-risk features. *Id.* at *18-19. Plaintiffs' expert found that, in the Detroit region, the likelihood that an African-American would receive a combined-risk loan was 1.347 times greater than that of a non-Hispanic white borrower with similar characteristics. *Id.* at *35. Denying Plaintiffs' motion for class certification, the Court concluded that the named Plaintiffs' claims were not typical of those of the putative class and that common questions did not predominate over individual ones. The Court noted that Plaintiffs' definition of "combined-risk loan" yielded hundreds of combinations of risk factors, 33 of which actually existed in at least one loan made by New Century to a putative class member. *Id.* at *39. The named Plaintiffs reflected only a small sub-set of risk factors. The Court thus agreed with Defendant that Plaintiffs with loans that Defendant affirmatively sought, such as loans with adjustable interest rates and pre-payment penalties, would face drastically different proof challenges than Plaintiffs with loans with features that were less desirable, such as state income loans with high loan-to-value ratio. *Id.* at *46-47. The Court found that these differences among the class members would result in arguments available to some on the issue of causation that were not available to others, and the need to conduct separate analyses for the different risk-factor combinations that would cause individual issues to

predominate over common issues. *Id.* at *60-66. Additionally, the Court determined that, because the connection between Defendant's practices and the disparate impact on the African-American community in Detroit could be explained by brokers' exercise of discretion in writing loans, and because mid-level New Century employees and a myriad of independent brokers exercised discretion in the loan-origination process, questions of discretion would also defeat commonality. *Id.* at *68-72. The Court further refused to consider certifying a different class, explaining that Plaintiffs' theory of the case had been consistent for three years, and to change the theory would unfairly prejudice Defendant. *Id.* at *77. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Edwards, et al. v. Ford Motor Co.,* 2015 U.S. App. LEXIS 3073 (9th Cir. Feb. 27, 2015).** Plaintiff brought a putative class action alleging that Defendant violated California's Consumers Legal Remedies Act ("CLRA") and Unfair Competition Law when it sold and serviced 2005-07 Freestyle vehicles without informing customers of a known defect in the electronic throttle control ("ETC") system that caused the Freestyles to accelerate unexpectedly. The District Court denied Plaintiff's motion for class certification. On appeal, the Ninth Circuit reversed and remanded. Defendant contended that the appeal was moot because after Plaintiff filed her petition for permission to appeal, Defendant implemented a repair and reimbursement program concerning the alleged problem. *Id*. at *1-2. In its program, Defendant extended the warranty for repairs, offered a refund for owner-paid repairs made before the program was announced, and gave notice to vehicle owners and the dealers. *Id*. at *2. The Ninth Circuit also determined that the appeal was not moot because Plaintiff sought relief beyond that provided by the program, including reimbursement of the money consumers spent on the Freestyles or on extended warranties. *Id*. The Ninth Circuit found that the District Court's commonality and predominance holdings were irreconcilable. *Id*. at *3. The Ninth Circuit observed that although the District Court correctly concluded that whether a defect existed and whether Defendant had a duty to disclose the defect were both questions common to the class, the District Court characterized those same questions as "individualized" in the predominance analysis. *Id*. Defendant argued that the District Court's error was harmless because individualized issues precluded class certification. *Id*. The Ninth Circuit, however, opined that the argument was unpersuasive because the District Court erred in concluding that individualized proof was required as to the existence of a defect, as factors such as driving conditions did not affect whether Defendant sold the Freestyle with an ETC system defect. *Id*. at *3-4. Moreover, the Ninth Circuit observed that by providing class-wide relief through its notice and repair program, Defendant had acknowledged that a single class defect existed. *Id*. at *4. The Ninth Circuit ruled that the District Court also erred in holding that materiality under the CLRA would require individualized proof. *Id*. Accordingly, the Ninth Circuit reversed and remanded the matter for further proceedings.

***Johnson, et al. v. Nextel Communications, Inc.,* 2015 U.S. App. LEXIS 3470 (2d Cir. Mar. 4, 2015).** Plaintiffs, a group of employees from 27 different states, brought a class action against Defendants, Nextel Communications, Inc. and Plaintiffs' former law firm, alleging that Defendants engaged in various illegal acts against them by entering into a Dispute Resolution Settlement Agreement ("DRSA") to resolve their employment discrimination claims. In or around 2000, Defendant Leeds, Morelli & Brown ("LMB"), a law firm which represented Plaintiffs, had entered into the DRSA with Nextel to resolve various discrimination claims. *Id.* at *4. Following the execution of the DRSA, LMB obtained individual agreements from most of its clients to resolve their claims against Nextel through the dispute resolution process. As a result, LMB received $5.5 million in attorneys' fees as well as an additional $2 million to act as consultants to Nextel on its employment practices. *Id.* at *5-6. Plaintiffs received less than half of the amount that their law firm received. *Id.* Later, in 2002, two employees filed two separate state court actions in Colorado alleging that LMB breached its retainer agreement and its fiduciary duty to its clients. *Id.* at *6. While one action resulted in a class-wide settlement, with 41 employees opting-out, the other action resulted in a verdict for LMB finding that Plaintiffs had knowingly waived any conflict of interest relative to the DRSA by signing the individuals agreements. *Id.* at *7-8. Eventually, six opt-out Plaintiffs brought the instant action asserting state law claims against both Defendants, and sought to certify a class, which the District Court granted. Although Defendants argued that the District Court had to apply a choice-of-law analysis to the claims of each individual class member hailing from 27 different states, and that various differences in applicable state laws rendered individuals issues predominant, the District Court determined that New York law

should be applied to all because it was the state with the "more significant relationship" to parties, and there was no substantive conflicts between the laws of New York and those of the other states. *Id.* at *14-15. The District Court also rejected the argument that individual calculation of damages made individual issues predominant because Plaintiffs sought class certification only as to liability. *Id.* at *15. Upon appeal, the Second Circuit reversed the District Court's ruling on the basis that individual issues substantially outweighed the common issues. *Id.* at *27. Although the Second Circuit agreed that the common issues identified by Plaintiffs were susceptible to generalized proof, it found that the District Court erred in its determination that New York law should be applied to all Plaintiffs. The Second Circuit explained that majority of the alleged wrong-doing took place outside of New York, and therefore the state with the most significant relationship to Plaintiffs' claims would be each individual state in which a class member resided and where he or she were promised legal representation. *Id.* at *42-43. The Second Circuit therefore held that resolution of the common issues would require the application of the substantive laws of 27 different states, and because of this, "the case for finding predominance of common issues and the superiority of trying this case as a class action diminishes to the vanishing point." *Id.* at *43-44. The Second Circuit further reasoned that the individualized inquiries associated with looking at the substantive law of each class member's state were not collateral issues that could be determined in individual hearings after resolution of common questions because they went to the heart of Defendants' liability. According to the Second Circuit, the trier of fact would have to determine whether each class member knowingly waived the conflict of interest, which would require individualized inquiries, and class members whose states allowed such waivers could not be "sensibly segregated from the larger class" by means of a sub-class. *Id.* at *44. The Second Circuit thus concluded that the application of different jurisdictions' laws rendered individuals issues predominant and undercut the superiority of trying the common issues on a class-wide basis. Accordingly, the Second Circuit reversed the District Court's class certification order.

***McCormick, et al. v. Halliburton Energy Services, Inc.,* 2015 U.S. Dist. LEXIS 26682 (W.D. Okla. Mar. 3, 2015).** Plaintiffs brought a putative class action alleging contamination of the groundwater at and around Defendant's operations at a facility on Osage Road in Duncan, Oklahoma (the "site"). Defendant performed a variety of tasks on the site, including work for the U.S. Department of Defense cleaning out missile motor casings. The work involved removing solid rocket propellant, consisting primarily of ammonium perchlorate, from the missile casings. Over time, perchlorate collected in the pits on the site reached the groundwater under the site and migrated off-site. Plaintiffs alleged violations of the Resources Conservation and Recovery Act, as well as directives of the Oklahoma Department of Environmental Quality. Plaintiffs also asserted causes of action for private nuisance, public nuisance, negligence, trespass, strict liability, and unjust enrichment. Plaintiffs sought class certification with respect to Defendant's liability to a class of landowners whose real property rights had been injured by Defendant's wrongful practices, which resulted in the migration of perchlorate contaminated groundwater from the site. *Id*. at *5. Plaintiffs further sought the division of the class into two sub-classes, including: (i) the "plume class," consisting of owners that were currently suffering from perchlorate contaminated groundwater from Defendant's site operations; and (ii) the "threatened class," consisting of owners of properties that were not currently suffering from perchlorate groundwater contamination, but due to their proximity to such contamination, their properties were threatened and they had suffered diminished property value. *Id*. at *5-6. The Court denied certification on the basis that liability could not be determined on a class-wide basis because elements of Plaintiffs' causes of action required significant individualized evidence. *Id*. at *9. The Court found that Plaintiffs nuisance claim would involve questions to each individual Plaintiff, such as if a Plaintiff had a well on his or her property and if so, whether or not the well was used for drinking water. *Id*. at *11. Plaintiffs' negligence, trespass and strict liability claims also required Plaintiffs to show that his or her property contained perchlorate and that the perchlorate came from the site and not from some other source. *Id*. at *12. Therefore, the Court determined that although there might be common questions of law or fact regarding certain elements of Plaintiffs' causes of action, the vast number of important individualized issues relating to Defendant's ultimate liability as to all of Plaintiffs' causes of action overwhelmed any common questions. *Id*. at *13. The Court reasoned a trial on whether Defendant released perchlorate into the groundwater, as well as the current and future scope and extent of that groundwater contamination, was unlikely to substantially aid in the resolution of the ultimate determination of Defendant's liability. *Id*. Thus, the Court concluded that individual issues would predominate over common issues. *Id*. at *14. Even

if the Court were to certify common issues, the subsequent separate proceedings necessary for each Plaintiff would undo whatever efficiencies such a class proceeding would have been intended to promote. *Id*. Thus, the Court concluded that class certification was inappropriate because Plaintiffs could not establish predominance under Rule 23(b)(3).

***Rikos, et al. v. The Procter & Gamble Co.,* 2015 U.S. App. LEXIS 14613 (6th Cir. Aug. 20, 2015).** Plaintiffs, a group of purchasers of Defendant's probiotic nutritional supplement, brought a putative class action alleging that Defendant's product did not promote their digestive health as advertised. Plaintiffs asserted violations of various state unfair competition and deceptive trade practices statutes. *Id.* at *2. The District Court certified five single-state classes of California, Illinois, Florida, New Hampshire, and North Carolina consumers who purchased the product during the defined class period. *Id.* On appeal, the Sixth Circuit affirmed, finding that Plaintiffs demonstrated commonality as well as predominance. Defendant argued that Plaintiffs failed to present evidence that class members suffered a common injury. The Sixth Circuit disagreed, holding that Defendant misconstrued Plaintiffs' burden of proof at the class certification stage. Plaintiffs need not prove at the class certification stage that all or most class members were in fact injured; rather, they must show that their claims depend upon a common contention that is capable of class-wide resolution. *Id.* at *10. The Sixth Circuit found that Plaintiffs identified a common question – whether the product yielded benefits to anyone – was a common question with a common answer for the entire class that, if true, would make Defendant liable to the entire class. *Id.* at *12. Defendant argued that the District Court erred in finding predominance in four separate but related ways. First, Defendant alleged that significant numbers of consumers became aware of and purchased its product based on sources of information unrelated to the advertising at issue, and, therefore, individual proof that class members purchased the product because of its advertising would be necessary, thereby defeating predominance. *Id.* at *22. The Sixth Circuit found that, regardless of how customers first heard of Defendant's product, they decided to purchase the product only for its purported health benefits, and, therefore, the District Court did not err in rejecting Defendant's contention that certain class members did not rely on Defendant's advertising in making their decisions to buy the product. *Id.* at *27-28. Second, Defendant claimed that, under the state laws at issue, individual issues of causation and reliance predominated over the common questions that allegedly affected all members of the class. The Sixth Circuit held that Plaintiffs could prove causation and reliance on a class-wide basis provided that the alleged misrepresentation that the product promoted digestive health was material or likely to deceive a reasonable consumer and Defendant made its misrepresentations in a generally uniform way to the entire class. *Id.* at *28-29. The Sixth Circuit found that Plaintiffs met both factors because consumers had only one reason to buy the product – to promote digestive health – and Defendant undertook a comprehensive marketing strategy with a generally uniform core message such that all class members likely were exposed to the alleged misrepresentations. *Id.* at *43-44. Third, Defendant argued that its product actually worked, at least for some consumers, and, therefore, Plaintiffs would not be able to prove injury on a class-wide basis. The Sixth Circuit held that Defendant's claim went solely to the merits and had no relevance at the class certification stage. *Id.* at *48-50. Finally, Defendant argued that Plaintiffs failed to provide any viable method to determine or award class-wide damages. The Sixth Circuit, however, found that Plaintiffs' damages model – a full refund of the purchase price for each class member – was appropriate because there was no reason to buy the product at issue except for its purported digestive benefits, and Plaintiffs' damages model measured only damages attributable to its theory of liability. *Id.* at *32. The Sixth Circuit, therefore, concluded that the District Court did not abuse its discretion in determining that common issues predominated over individual issues. Accordingly, the Sixth Circuit affirmed the District Court's order granting class certification.

***Village Of Bedford Park, et al. v. Expedia, Inc. (WA),* 2015 U.S. Dist. LEXIS 1012 (N.D. Ill. Jan. 6, 2015).** Plaintiffs, a group of fourteen Illinois municipalities, brought an action against Defendants, several on-line travel companies, alleging that Defendants failed to remit taxes owed under their municipal hotel tax ordinances. Plaintiffs alleged that Defendants, who contracted with individual hotels paying wholesale rates for rooms, had rented the rooms directly to the public for a higher retail price, and remitted the taxes at the reduced wholesale rate. According to Plaintiffs, their hotel tax ordinances applied to the retail rate charged to customers, not just the wholesale rate, and thus Defendants had failed to remit taxes owed

under the ordinances. *Id.* at *5. After the dismissal of seven of the ten claims in Plaintiffs' complaint for failure to state a claim, Plaintiffs moved for class certification. Plaintiffs grouped the hotel tax ordinances into four categories, which they proposed as possible sub-classes, including ordinances that impose a tax upon: (i) the use and privilege of a hotel room; (ii) the rental of hotel accommodations; (iii) persons engaged in the business of renting hotel rooms; and (iv) consideration received for renting a hotel room. *Id.* at *4. The Court denied class certification. The Court found that Plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3). Although Plaintiffs contended that each of the Defendants had failed to remit taxes on its markup or fees to any Plaintiff or class member, regardless of ordinance language, the Court found that predominance could not be satisfied because the language of the hotel tax ordinances varied widely within the proposed sub-classes. The Court noted that the ordinances have differed widely as to "who" was responsible for collecting the tax, and even when the ordinances used the same language to identify who was responsible for collecting the tax, their definitions of the terms varied, particularly, on phrases used to describe "what" was taxed. *Id.* at *12-14. In fact, the ordinances used different phrases to describe "what" was taxed, including "gross rental receipts," "rental or lease payment," "room rental rate," and "one night room charge." *Id.* at *16. Although Plaintiffs asserted that each of these phrases imposed a tax upon the retail room rate, they did not provide a legal argument for why this was so. *Id.* The Court determined that given the variations between the ordinances, it would need to perform an ordinance-by-ordinance analysis to determine whether there were material differences among the language of the ordinances. *Id.* at *20. The Court therefore concluded that Plaintiffs have failed to establish predominance, and accordingly, denied their motion for class certification.

(viii) The Superiority Requirement For Class Certification

***Coleman, et al. v. District Of Columbia*, 2015 U.S. Dist. LEXIS 48116 (D.D.C. April 13, 2015).** Plaintiffs, a group of homeowners, brought a putative class action challenging a District of Columbia law that directed the sale of liens on their properties after they failed to pay their property tax bills. The law permitted the private purchasers of the liens to add interest, costs, and fees to Plaintiffs' bills and, when Plaintiffs failed to pay, to institute foreclosure proceedings. *Id*. at *1. After the foreclosure proceedings, the private purchasers obtained the titles to Plaintiffs' homes, and Plaintiffs received nothing even though the amount of equity they had in their homes far surpassed the amounts that they owed. Because the loss of the surplus equity was dictated by District of Columbia law, Plaintiffs sued to challenge the law. Plaintiffs moved to certify two classes. The Court granted Plaintiffs' motion. At the outset, the Court noted that the class consisted of approximately 34 potential class members. Although Defendant argued that only seven out of the 34 individuals were potential class members, the Court found that Defendant sought an adjudication on the merits of the claims of potential class members in an attempt to exclude them from the numerosity analysis. *Id*. at *18. The Court found that Plaintiffs offered a valuation method that rendered at least 34 putative class members in a position with excess equity, and such method was sufficient at this stage to show numerosity. *Id*. at *26. The Court also found that Plaintiffs raised common legal questions as to their liability claims, including whether the law created a property interest in equity, whether the District of Columbia's tax-sale statutes effected a "taking" of that property, whether any such taking was done without public purpose, and whether the Plaintiffs were granted just compensation. *Id.* at *28-30. The Court ruled that these legal questions were susceptible to class-wide answers because their resolution did not depend upon the particular circumstances of any individual's loss. *Id*. at *37-38. The Court similarly concluded that the common questions, which comprised nearly the entirety of the class' liability claim, were themselves sufficient to support a finding that common issues predominated over individualized ones. Although Defendant argued that the individualized nature of each class member's property value at the time the tax deed was issued would require individualized treatment, the Court held that a number of other factors rendered that issue a minor part of the otherwise striking common class claims. *Id.* at *47-48. Finally, the Court noted that the superiority requirement was intended to ensure that resolution by the class would achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly-situated, without sacrificing procedural fairness or bringing about other undesirable consequences. *Id*. at *53. The Court found that every liability issue in this case was common, with the exception of the valuation of individual properties. *Id*. at *55. The 34 class members in this case, by definition, had less financial resources, a lesser ability to manage their legal affairs, or both, than the average citizen. *Id*. In the absence of a class action, then, class members were less likely to be able to

prosecute separate actions. For these reasons, the Court opined that Plaintiffs established the superiority requirement. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Downing, et al. v. Riceland Foods, Inc.,* 2015 U.S. Dist. LEXIS 34154 (E.D. Mo. Mar. 19, 2015).** After Bayer introduced genetically modified rice into the United States rice supply, rice farmers and others involved in the rice business brought more than 200 suits against Bayer and other entities, including Riceland Foods, in state and federal courts. *Id*. at *3. Riceland Foods filed cross-claims against Bayer and filed two other suits – one in state court and one in federal court – against Bayer. *Id*. The federal cases were consolidated in an MDL. To make the MDL manageable, the MDL Court appointed lead counsel and set up a trust from which attorneys' fees and costs would be paid to all the MDL Plaintiffs' counsel in the event of a recovery against Bayer. *Id*. at *5. The order did not apply to recoveries in state court cases absent consent or an order by a state court. *Id*. Under the order, Riceland Foods was to pay 10% of any recovery against Bayer to the trust. *Id*. Over the course of five years, the MDL Plaintiffs' counsel drafted a consolidated complaint, opposed Bayer's dispositive motions, reviewed more than 2.8 million pages of documents, and took and defended a total of 167 depositions. *Id*. at *5-6. They conducted three bellwether trials, all of which resulted in Plaintiffs' verdicts. *Id*. at *6. In separate state court litigation, Defendant received $92 million from Bayer in a settlement. *Id*. at *4. Plaintiffs in *Downing* sued Riceland Foods to recover 10% of that recovery on unjust enrichment and *quantum meruit* theories, claiming that Defendant used the work performed by the MDL Plaintiffs' counsel to achieve that settlement. *Id*. at *8. They sought to certify, as a class, all persons and entities that provided or paid for services in the MDL action. *Id*. The Court certified the proposed class action, stating that "[t]his action is uniquely suitable for class certification." *Id*. at *3. The Court found that the proposed class satisfied the numerosity requirement because it consisted of more than 30 law firms and more than 5,000 MDL Plaintiffs. *Id*. at *10. The Court determined that the proposed class satisfied the commonality requirement. *Id*. at *11. Specifically, the Court reasoned that the class' claims would face the common legal question of whether an unjust enrichment and *quantum meruit* action could be "based upon the use of an attorney's work-product by a non-client." *Id.* at *11. The Court ruled that typicality was established because "each of the proposed class members would have essentially the same grievances as the named Plaintiffs – that Riceland had unjustly benefitted from work for which they had paid or provided." *Id*. at *12-13. The Court also found that the class representatives and counsel were adequate. *Id*. The Court then turned to the issue of whether Rule 23(b)(3)'s requirements – that common questions predominate over individual questions and that class resolution is superior to other available resolution methods – were met. The Court held that common questions would predominate as to both the unjust enrichment and *quantum meruit* claims because the class members jointly incurred expenses that conferred benefits on Defendant. *Id*. at *22. While agreeing that there would need to be "a great number of factual determinations related to [Riceland Foods'] use of work-product and value received," the Court pointed out that those inquiries would "focus on what Riceland did and what benefit it received" that would be "issues that are common to the class." *Id*. at *24. Further, the Court determined that class litigation was superior to other available methods for the fair and efficient adjudication of the controversy. *Id*. at *25. As a result, the Court concluded that the class members did not have an interest in individually pursuing separate actions and that "any difficulties in managing th[e] class action pale in comparison to the alternative." *Id*.

***Imber-Gluck, et al. v. Google, Inc.*, 2015 U.S. Dist. LEXIS 44839 (N.D. Cal. April 3, 2015).** Plaintiffs brought a putative class action alleging that Defendant charged users for unauthorized purchases made by minor children who played games downloaded from Defendant's Google Play Store. Plaintiffs alleged that Defendant allowed parents to purchase apps for their children through the Google Play Store but failed adequately to disclose that users automatically could purchase in-game currency for a period of 30 minutes without re-entering their password. *Id.* at *3. Prior to the filing of the complaint, the U.S. Federal Trade Commission ("FTC") initiated an industry-wide investigation into the conduct alleged by Plaintiffs and reached a settlement with Defendant that, among other things, required Defendant to provide full refunds to account holders who Defendant had billed for unauthorized in-app charges incurred by minors. *Id.* Defendant filed a motion to deny class certification on the grounds that, in light of the FTC settlement, Plaintiffs could not meet the superiority or adequacy requirements of Rule 23. Specifically, Defendant maintained that Plaintiffs could not demonstrate superiority because the FTC settlement already provided

the relief that Plaintiffs sought, and a class action would result in reduced recovery due to administrative costs and attorneys' fees. *Id.* at *5. Defendant argued that Plaintiffs also could not demonstrate adequacy because they sought to maintain a costly class action when the FTC settlement better served the class members. *Id.* The Court granted Defendant's motion to deny class certification. The Court concluded that Plaintiffs could not meet the superiority requirement of Rule 23(b)(3) because the litigation would require a substantial expenditure of judicial time and largely would duplicate the work of the 18-month FTC investigation. *Id.* at *6. The FTC settlement provided significant relief in the form of a complete refund and an injunction, and defending the class action would prove costly to Defendants and duplicate in part the work expended over a considerable period of time by the FTC. *Id.* at *6-7. Plaintiffs argued that the FTC settlement did not provide punitive damages, to which class members might be entitled. The Court expressed doubt that punitive damages would be available in the case and found that, even if punitive damages were available, because the FTC settlement provided nearly all of the possible relief sought by Plaintiffs, maintaining a class action for those class members who opted-out of the FTC refunds in order to pursue the possibility of punitive damages was not a superior method of adjudication. *Id.* at *10. Finally, Plaintiffs argued that the FTC settlement did not provide adequate notice to the class because it only required Defendant to send one e-mail to class members, and consumers had to submit a refund request to Defendant. Plaintiffs argued that there inevitably would be thousands, if not millions, of consumers who still had valid claims against Defendant. The Court noted, however, that Plaintiffs' argument was unfounded because Defendant already had refunded over $30 million to class members, and the settlement period continued through December 2015. *Id.* at *11. Further, the Court found it unlikely that a class notice and claims process achieved through the litigation would be much different than the notice and claims process under the FTC settlement. *Id.* Accordingly, the Court granted the motion to deny class certification.

***In Re Actiq Sales And Marketing Practices Litigation*, 2015 U.S. Dist. LEXIS 36466 (E.D. Pa. Mar. 23, 2015).** In this class action brought by the Pennsylvania Turnpike Commission and Indiana Carpenters Welfare Fund alleging that the off-label prescription payments made to Defendants were excessive and constituted unjust enrichment, the Court denied Plaintiffs' motion for class certification. Plaintiffs were third-party payors ("TPPs"), who were responsible for paying all or part of the costs of prescriptions for their members, employees, plan participants, beneficiaries, or insureds. *Id*. at *3. Plaintiffs claimed that Defendant engaged in unlawful off-label marketing of Actiq, a drug approved by the FDA to manage breakthrough cancer pain in patients. Plaintiffs claimed that Defendant's conduct caused them to make excessive off-label prescription payments for Actiq to treat conditions not approved by the FDA and for whom less excessive pain management drugs were appropriate and less dangerous. Plaintiffs sought certification of a nationwide class of all TPPs who reimbursed Actiq's cost, and also sought certification of two multi-state alternative classes that Plaintiffs defined as an unjust enrichment restatement class and an unjust enrichment appreciation class. At the outset, the Court noted that the elements of Plaintiffs' unjust enrichment claim could not be succinctly identified because of the multi-state nature of the claim and as the law of each TPP's home state would govern. *Id*. at *53. For example, some states require five elements, including: (i) enrichment; (ii) an impoverishment; (iii) a connection between the two; (iv) absence of justification for the enrichment and the impoverishment; and (v) absence of legal remedy. *Id*. at *53-54. Some states required three or four elements to establish unjust enrichment. In addition, the Court noted that whether the TPPs' payments for Actiq prescriptions resulted in unjust enrichment was a question resolved by examination into the actions not only of Defendant, but also of the individual TPPs and prescribing doctors. *Id*. at *65. Therefore, the Court ruled that the unjust enrichment claim essentially demanded an individualized inquiry, as what may be unjust for one TPP may not be unjust for another depending on individual facts. Accordingly, the Court concluded that common issues did not predominate. As to the Rule 23(b)(3) requirement of superiority, the Court observed that the largest impediment was the difficulty in managing a class action in which the laws of the TPPs' various home states applied and individual questions of fact predominated. *Id*. at *70. Further, the Court noted that the TPPs were sophisticated institutional entities with an interest in controlling litigation where relatively large amounts of money were at stake. Moreover, the Court reasoned that some TPPs had already filed suit based on Defendant's distribution of Actiq, and the Court's analysis revealed that the TPPs had brought and lost individual suits alleging RICO violations and state law claims such as consumer fraud and

misrepresentation. *Id*. Accordingly, the Court found that adjudication of these issues in a class action was not the superior method of adjudication, and denied class certification.

***Parker, et al. v. Asbestos Processing, LLC*, 2015 U.S. Dist. LEXIS (D.S.C. Jan. 8, 2015).** Plaintiffs brought a putative class action alleging that they sustained injuries from exposure to asbestos during their employment at various South Carolina manufacturing plants. According to the complaint, two attorneys, Richard Bishoff (of Georgia) and John Deakle (of Mississippi) solicited a large number of South Carolina residents as asbestos tort Plaintiffs. *Id*. at *4. Although all of the 15,896 Plaintiffs were South Carolina residents, the tort claims were filed in Mississippi state court to take advantage of Mississippi's liberal venue and joinder statutes. *Id*. Over the years, Plaintiffs amended the complaint several times, and importantly, added numerous Mississippi attorneys as Defendants because of on-going relationships they had with insurance adjusters representing companies that manufactured asbestos during the relevant time period. At least some of the potential class members were represented by some of the attorney Defendants. *Id*. at *6. Plaintiffs alleged that Defendants failed to advise Plaintiffs to take steps to protect their potential workers' compensation claims against their employers and failed to advise them of the consequences under South Carolina law of proceeding only with asbestos tort claims. *Id.* at *7. Plaintiffs filed a motion for class certification. The Court denied the motion. The Court opined that although Plaintiffs met the predominance requirement, they could not show that a class action was a superior method of adjudication. With respect to commonality, Defendants argued that myriad individual questions existed that did not generate common answers because of dissimilarities among class members and Defendants. For example, Defendants suggested that the question of whether Defendants had attorney-client relationships with class members was not a common issue with regard to certain Defendants. The Court noted that this argument overlooked that the commonality requirement referred to questions of law or fact common to the class and that differences among Defendants should not be a major concern in the Rule 23(a)(2) analysis. Defendants also argued that Plaintiffs could not satisfy predominance because the threshold consideration under the predominance requirement was the law to be applied to the common issues. Plaintiffs maintained that, in accordance with South Carolina choice-of-law rules as to torts, the applicable law was the law of the place where Plaintiffs sustained their damages, and not the place where Defendants were located when they allegedly failed to provide the necessary legal advice. *Id*. at *35. On the other hand, Defendants asserted that Georgia or Mississippi laws were applicable because the allegedly deficient legal advice occurred in different states. Further, Defendants contended that, because the class members originally filed claims in Mississippi state court, the ethical rules of Mississippi, not South Carolina, should apply because Mississippi was the location of the tribunal. The Court found that, because Plaintiffs showed that only South Carolina law applied, the choice-of-law issue was no impediment to a finding of predominance. Citing *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), Defendants also argued that class certification was not appropriate because Plaintiffs' damages were not capable of measurement on a class-wide basis. *Id*. at *38. Plaintiffs sought two types of damages in this case. First, Plaintiffs contended that they should be compensated in an amount equivalent to the workers' compensation benefits to which they would have been entitled, and, second, they sought a disgorgement remedy under their breach of fiduciary duty claim. The Court remarked that Defendants read too much into the *Comcast* decision because it does not stand for the proposition that all of the Plaintiffs' damages must be calculated on a class-wide basis. *Id*. It merely indicates that the "methodology" for measuring and quantifying damages should be the same for all class members. *Id*. at *39. The Court found that the methodology for both actual damages and disgorgement (assuming the fiduciary duty claim was viable) was the same for all class members. Accordingly, the Court concluded that Plaintiffs satisfied the predominance requirement. *Id*. The Court, however, found that the superiority requirement was not satisfied in this case, and denied the motion for class certification.

(ix) Workplace Class Action Arbitration Issues

***Brooks, et al. v. AT&T Mobility Services*, Case No. 22-CA-127746 (NLRB July 3, 2015).** A group of employees brought unfair labor practice charges alleging that Defendant promulgated, maintained, and enforced individual management arbitration agreements (the "agreement") with collective action and class action litigation waivers that interfered with their rights to engage in collective legal activity in violation of § 8 of the National Labor Relations Act (the "NLRA"). *Id*. at *1. In early 2011, Defendant sent notice of the

agreement via e-mail to 24,000 non-bargaining-unit employees, including its National Retail Account Executives ("NRAE"). The agreement provided employees the option to have employment-related disputes resolved through arbitration, and also provided employees the option to opt-out and not participate in the agreement. *Id*. at *1-2. Defendant stated in the e-mail that it would not impose any adverse consequences on employees who opted-out. *Id*. at *2. The employees who brought the NLRA charges did not opt-out of the agreement. *Id*. at *2. They and others filed a collective action asserting violations of the Fair Labor Standards Act ("FLSA"), and then voluntarily dismissed their claims in favor of arbitration. The Administrative Law Judge ("ALJ") noted that a work rule that does not explicitly restrict concerted activities will be found unlawful where the evidence establishes one of the following: (i) employees construed the rule to prohibit concerted activities; (ii) the rule was promulgated in response to union or protected concerted activities; or (iii) the rule was applied to restrict employees' rights to engage in concerted activities. *Id*. at *3. The ALJ noted that the NLRB in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc. v. Hobson*, 2014 NLRB LEXIS 820 (NLRB Oct. 28, 2014), held that mandatory arbitration agreements that barred employees from bringing joint, class, or collective workplace actions in any forum restricted the exercise of their rights under § 7 of the NLRA to act concertedly for mutual aid or protection. *Id*. at *4. Defendant contended that the decision of whether to agree to the agreement was entirely voluntary, rendering it lawful under the NLRA. The ALJ found that the voluntary nature of the decision was questionable considering the difficulties of determining whether Defendant fully apprised employees of the consequences of their decisions in a manner that they could appreciate, and whether the burden of having to decide whether irrevocably to relinquish their rights under the NLRA was a reasonable one. *Id*. The ALJ observed that, although *D.R. Horton* and *Murphy Oil* did not consider the issue of individual agreements containing opt-out provisions, the NLRB in several other cases had found an employer's offer to allow an employee to waive core § 7 rights to be unlawful. *Id*. Second, relying on *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 24 (2001), Defendant argued that the Federal Arbitration Act ("FAA") proclaims a strong policy in favor of arbitration and, accordingly, the statute requires the enforcement of arbitration agreements. *Id*. at *5. The ALJ found that, in *Chesapeake Energy Corp.*, 362 No. 80 (2015), the NLRB rejected this argument, finding that § 2 of the FAA provides that arbitration agreements may be invalidated for the same reasons that other contracts may be invalidated, including because they are unlawful or contrary to public policy. *Id*. at *5. The ALJ ultimately concluded that *D.R. Horton* and its progeny were binding, and that Defendant violated § 8(1) of the NLRA by maintaining an arbitration policy that waived the rights of its employees to file and maintain class actions and collective actions in all forums, arbitral and judicial. Accordingly, the ALJ ordered Defendant to cease and desist enforcement of the agreement, and to take affirmative action designated to effectuate the policies of the NLRA.

***Chesapeake Energy Corp., et al. v. Escovedo, et al.,* 2015 NLRB LEXIS 324 (NLRB April 30, 2015).** Plaintiffs alleged that their employer violated § 8(a)(1) of the National Labor Relations Act (the "NLRA") by promulgating and maintaining an arbitration agreement and dispute resolution policy (the "Agreement") that required employees to submit all employment-related disputes and claims, including claims under the NLRA, to binding arbitration and precluded class and collective actions. In response to Plaintiffs' unfair labor practice charge, the Administrative Law Judge ("ALJ") held that the Agreement violated the NRLA because it prohibited employees from filing unfair labor practice charges with the Board, but dismissed the allegation that Agreement separately violated § 8(a)(1) by requiring employees to waive their § 7 rights to engage in class or collective employment actions in all forums. *Id.* at *2. The NLRB adopted the ALJ's decision in part. Since 2011, the employer and its related entities maintained the Agreement and required all employees to sign it as a condition of employment. The charging party, a supervisory employee, signed the Agreement on July 19, 2011, and filed his initial unfair labor practice charge in March 2013. Although the employer argued that the complaint was time-barred because the charging party did not allege that the employer attempted to enforce the Agreement during the 6-month period before the charging party filed his initial charge, the NLRB agreed with the ALJ that the employer's arguments lacked merit. Because the charging party alleged that the employer unlawfully "maintained," not enforced, the Agreement, the NLRB found a continuing violation. *Id.* at *5. The NLRB then applied the principles of *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA*, 361 NLRB No. 72 (2014), and found that, although the

Agreement did not explicitly prohibit employees from filing charges with the Board, the employees reasonably would construe the Agreement's language to prohibit them from doing so. *Id.* at *7. Paragraphs 2 and 9 of the Agreement together required employees to agree to pursue any claims or disputes against the employer solely through individual arbitration, and paragraph 5 explicitly stated that any such claims or disputes, including those involving discrimination, harassment, or retaliation arising under the NLRA, were covered by the individual arbitration requirement. *Id.* at *7-8. According to the NLRB, read as whole, the Agreement was sweeping in its scope and encompassed all employment claims, including those within the Board's jurisdiction, and the employees could reasonably construe it to prohibit them from filing Board charges. *Id.* at *8. The NLRB, therefore, determined that the employer's maintenance of the Agreement violated § 8(a)(1) of the NLRA. Because the agreement explicitly prohibited employees from pursuing employment-related claims on a collective or class action basis in all forums, the NLRB also determined that the employer separately violated § 8(a)(1) by maintaining the Agreement. The NLRB noted that, as explained in *D.R. Horton,* such a total proscription of class or collective actions violated § 8(a)(1) because "the right to engage in collective action – including collective legal action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Id.* at *9. Accordingly, the NLRB ordered the employer to cease and desist from maintaining the Agreement.

***Citigroup Technology, Inc., et al. v. Smith,* 2015 NLRB LEXIS 882 (NLRB Dec. 1, 2015).** An employee filed a complaint alleging that Defendants violated § 8(a)(1) of the National Labor Relations Act ("NLRA") by maintaining and enforcing an employment arbitration policy (the "EAP"). *Id.* at *18-19. The NLRB adopted the Administrative Law Judge's ("ALJ") recommendation that the EAP violated § 8(a)(1) of the NLRA and ordered Defendants to cease and desist from maintaining the EAP. *Id.* at *3. Since December 26, 2012, Defendants required all newly hired employees to accept the EAP as a condition of employment, and based on this agreement, precluded their employees from filing any group, class, collective, or other representative claims in arbitration or otherwise in connection with disputes identified in the EAP concerning wages, hours, or other terms and conditions of employment. *Id.* at *14. While Defendants admitted that they precluded employees from filing any group, class, collective, or other representative action claims under the EPA, Defendants presented a litany of recent U.S. Supreme Court decisions, which "have established the broad preemptive sweep of the FAA" by mandating "that arbitration agreements must be enforced according to their terms," and argued that the NLRB's holding in *D.R. Horton*, 357 NLRB No. 184 (2012), was incorrect based on its rejection by the Fifth Circuit. *Id.* at *25-26. The ALJ, however, declined to deviate from NLRB precedent and rejected Defendants' argument that the FAA always must override the NLRA in cases involving mandatory arbitration agreements. *Id.* at *31. Defendants argued that the NLRB had no authority to order them to take action regarding litigation initiated by an employee in another forum involving another federal statute. The ALJ, however, noted that, in *D.R. Horton*, the NLRB explained how the NLRB and case law precedents recognized this authority in cases, such as this one, where mandatory arbitration agreements "restrict the exercise of the substantive right to act concertedly for mutual aid or protection, that is central to the [NLRA]." *Id.* at *37. The ALJ, therefore, concluded that Defendants' EAP was unlawful. The ALJ also found that Defendants violated § 8(a)(1) of the Act by enforcing the EAP, finding that Defendants' efforts to enforce their unlawful EAP by petitioning the American Arbitration Association ("AAA") to reject nationwide class action claims pursuant to the EAP had an illegal basis. *Id.* at *42-43. The NLRB adopted the ALJ's order that Defendants violated the NLRA by maintaining the EAP, but reversed the ALJ's order that Defendants violated the NLRA by enforcing the EAP. *Id.* at *3.

***Employers Resource v. Torres, et al.*, 2015 NLRB LEXIS 359 (NLRB May 18, 2015).** Petitioner, a former server at Beth's Kitchen, Inc. ("BK"), filed an unfair labor practice charge alleging that Respondent unlawfully maintained and enforced a mandatory arbitration provision to restrict the right of employees under the National Labor Relations Act (the "Act") to engage in concerted legal action. Subsequent to her lay-off, Petitioner had brought a wage & hour action in state court against BK and Respondent, and in that action, Respondent had moved to compel individual arbitration of Petitioners' claims. Respondent provided payroll and other personnel services to BK, and its standard employment agreement ("Agreement") contained a mandatory arbitration clause. *Id.* at *2. The Administrative Law Judge ("ALJ") opined that

Respondent engaged in unfair labor practices by compelling individual arbitration of Petitioner's state court wage & hour action. In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), the Board had reaffirmed its prior decision in *D.R. Horton, Inc*., 357 NLRB No. 184 (2012), and held that an employer violated § 8(a)(1) of the Act by requiring its employees to sign an agreement, as a condition of employment, that expressly barred them from pursuing collective or class claims either in court or in arbitration, and by seeking to enforce that agreement in court by moving to compel individual arbitration of the employees' pending collective and class action claims for wage & hour violations. *Id.* at *4. First, because an employer may properly be held accountable for restricting or interfering with the protected rights of employees regardless of whether it is an employer of those employees, the ALJ opined that Petitioner properly named Employers Resource as a Respondent in the complaint. *Id.* at *7-8. Respondent argued that Petitioner was not an employee covered by the Act because BK did not terminate her as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, as provided in § 2(3) of the Act. The ALJ, however, noted that the Act is not restricted to former employees of an employer and that § 2(3) provides that the term "employee" shall "include" any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. *Id.* at *8. Thus, the ALJ stated that Petitioner was an employee under the Act. Further, Respondent's client service agreement with BK specifically stated that no employee would be covered by the Agreement, or become a co-employee of Respondent, until BK completed and delivered an enrollment packet for that individual to Respondent. The client service agreement also prohibited BK from altering the terms of the employment agreement without Respondent's written authorization. Respondent included the agreement in the new employee hiring information packet that Respondent provided to BK. The cover page of new-hire packet instructed the employee to sign the agreement and W-4 tax withholding form and I-9 employment eligibility verification form prior to starting work, failing which the company would not process payroll. *Id.* at *11. Additionally, Petitioner testified that a BK manager told her she had to sign the documents, including the agreement, in order to get paid, and that she signed the agreement before she started working. Thus, the ALJ opined that both Respondent and BK required Petitioner to sign the agreement containing the mandatory arbitration provision as a condition of employment. *Id.* Next, although the mandatory arbitration provision did not expressly bar class or collective arbitrations, Respondent in its motion filed in the state court had argued that the provision implicitly or effectively did so. Following *Murphy Oil* and *D.R. Horton,* the ALJ concluded that the mandatory arbitration provision here violated § 8(a)(1) of the Act. *Id.* at *12. Finally, the ALJ observed that *D.R. Horton* also held that an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by § 7. *Id.* at *13. Thus, the ALJ ruled that Petitioner's wage & hour suit constituted protected concerted activity, and that Respondent's motion in the state court sought to restrict that activity in violation of § 8(a)(1) of the Act.

***Flyte Tyme Worldwide v. Miller, et al.,* 2015 NLRB LEXIS 223 (NLRB Mar. 30, 2015).** In this unfair labor practice charge ("ULP"), the Administrative Law Judge ("ALJ") had found in June 2014 that Respondent violated § 8(a)(1) of the National Labor Relations Act by maintaining and enforcing its arbitration agreement policy ("AAP"), which required employees to individually arbitrate all employment-related claims or disputes, and to waive their right to maintain collective or class actions in all forums, both arbitral and judicial. *Id*. at *12. Relying on *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), the ALJ had also found that Respondent violated § 8(a)(1) when it moved to dismiss a class action wage & hour lawsuit filed by its employees and to compel arbitration under the AAP. *Id*. at *2. To remedy these violations, the ALJ ordered Respondent to rescind or revise its handbook provisions regarding the AAP, and clarify that the AAP does not constitute a waiver in all forums of employees' right. *Id*. While Respondent filed exceptions to the June 2014 decision of ALJ, the employee who filed the ULP moved to withdraw the charge because the employees that he represented had reached a class-wide agreement with Respondent to settle the related class and collective action wage & hour suit, and the parties had agreed to resolve the ULP charge as part of the settlement agreement. *Id*. at *3. The Board denied the employee's motion. The settlement agreement provided for the payment of $900,000 to the eight named Plaintiffs and other class members. As part of the settlement, the individuals for whom the charge was filed had agreed that the charging party would request withdrawal of the ULP charge in this case, and relinquished and revoked any right they may have had to receive any monetary recovery as a result of the charge. *Id*. at *3-4. The Board noted that in

Murphy Oil USA, Inc., 361 NLRB No. 72 (2014), the Board had reaffirmed the decision in *D.R. Horton, Inc.*, and found that an employer violated § 8(a)(1) by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and forgo their rights to pursue a collective or class action to resolve employment-related disputes. *Id*. at *4. The Board remarked that its power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights. *Id*. at *5. Accordingly, the Board found that while the settlement agreement at issue addressed the employees' private rights under federal and state wage & hour laws, it did not address the public interest in protecting employees' statutory right to engage in a collective action regarding terms and conditions of employment. *Id*. at *5-6. Specifically, the Board ruled that the settlement left in place the AAP's requirement that employees waive their right of filing class and collective action claims as a condition of employment. *Id*. at *6. Because the parties' settlement did not address the continued maintenance of a policy mandating arbitration on an individual basis, the Board concluded that approval of the agreement would not effectuate the purposes of the Act, and rejected it.

***Jock, et al. v. Sterling Jewelers, Inc.*, 2015 U.S. Dist. LEXIS 154209 (S.D.N.Y. Nov. 15, 2015).** Plaintiffs brought a class action alleging sex discrimination in Defendant's promotion and compensation policies and practices. Previously, the Court had granted Plaintiffs' motion to refer the matter to arbitration pursuant to the "RESOLVE" dispute resolution agreement signed by Defendant's employees. *Id.* at *3. Subsequently, an Arbitrator issued a class certification award that certified Plaintiffs' Title VII disparate impact claims with respect to declaratory and injunctive relief, but declined to certify Plaintiffs' Title VII disparate impact claims or Plaintiffs' Title VII disparate treatment claims with respect to monetary damages. *Id.* at *4. Further, the Arbitrator permitted class members to opt-out of the certified class for declaratory and injunctive relief. *Id.* Defendant moved to vacate the Arbitrator's class determination award, and the Court granted the motion in part. The Court agreed with Defendant that the Arbitrator acted outside her authority in certifying an opt-out class for injunctive and declaratory relief in the class determination award. The Arbitrator purported to certify the class under Rule 23(b)(2), but the Court noted that *Wal-Mart Stores. Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011), held that Rule 23 provides no opportunity for Rule 23(b)(1) or (b)(2) class members to opt-out. *Id.* at *9. The Arbitrator also relied on AAA Supplementary Rule 4, stating that AAA Supplementary Rule 4 essentially tracks the requirements of Rule 23 and that here, Plaintiffs sought certification of their claims for declaratory and injunctive relief pursuant to Rule 23(b)(2) and certification of their claims for monetary damages pursuant to Rule 23(b)(3). *Id.* at *10. The Court reasoned that the 23(b)(2) class was the one certified. Further, because the Arbitrator also directed counsel to submit a proposed form of opt-out notice, the Court stated that the Arbitrator thus purported to permit opt-outs from a Rule 23(b)(2) class. The Court, however, ruled that the Arbitrator had no power to do so, as the relief sought in the certification of a Rule 23(b)(2) class must affect the entire class at once. *Id.* at *12. Plaintiffs tried to draw a distinction between the types of equitable relief that would be pursued by class members and individuals who opted-out. Plaintiffs argued that while the class would seek to validate and modify criteria used in making pay and promotion decisions, individuals who opted-out would be eligible to seek a promotion they would have received in the absence of discrimination or an adjustment to their pay rate to eliminate a disparity with a similarly-situated male that could not be justified. Further, Plaintiffs asserted that the remainder of the class could seek broad injunctive relief, but those who remained in the class would not be eligible to seek the kind of individualized injunctive relief that those who opted-out could pursue. The Court, however, observed that Plaintiffs failed to explain how individuals who opted-out would not be bound by the broad injunctive relief sought by the remainder of the class. *Id.* at *16. The Court remarked that if, for example, the Arbitrator decided that Defendant must change its criteria for making promotion decisions, it was unclear how some employees would not be subject to such a determination, even if certain employees who opted-out were also able to pursue individualized equitable remedies. Further, Plaintiffs cited no cases which permitted individuals to opt-out of a class certified to seek injunctive or declaratory relief that would necessarily affect the class as a whole, and the Court remarked that changes to Defendant's criteria for making pay and promotion decisions, among other forms of relief that Plaintiffs sought, would do precisely that. Thus, the Court also ruled that because the Arbitrator found that some employees could opt-out of a class certified to seek class-wide injunctive or declaratory relief, she failed to present a barely colorable justification for the outcome reached. Accordingly, the Court granted Defendant's motion to vacate the Arbitrator's class determination award to the extent that it permitted

individuals to opt-out of a class certified for the purposes of seeking class-wide injunctive and declaratory relief.

***Leslies Poolmart, Inc. v. NLRB,* 2015 NLRB LEXIS 643 (NLRB Aug. 25, 2015).** In this action, the NLRB affirmed the decision of an Administrative Law Judge ("ALJ") that the employer's mutual agreement to arbitrate claims that required its employees to resolve certain employment-related disputes exclusively through binding arbitration and to waive, as a condition of employment, their right to file class, collective, or representative claims in any arbitral or judicial forum, violated § 8(a)(1) of the National Labor Relations Act ("NLRA"). The employer, a corporation operating and selling pool and spa chemicals, allegedly required employees to enter into individual arbitration agreements that did not expressly require employees to waive their right to pursue class, collective, or representative actions. *Id.* at *9-10. The charging employee, a retail assistant store manager, filed a complaint in California state court alleging that the employer incorrectly and unlawfully calculated and paid overtime to class members. *Id.* at *15. The employer sought an order to dismiss the complaint, compel arbitration of the charging employee's individual claims, and to dismiss his class and collection actions pursuant to the arbitration agreement. *Id.* at *16. Counsel for the employee contended that, because employer moved to compel the employee to resolve his individual claims through arbitration and sought to dismiss his class and collective claims, those very actions in enforcing the agreement had the effect of leading employees to reasonably believe that they cannot engage in concerted activity protections by § 7 of the NLRA. The ALJ concluded that, even though the agreement was silent regarding the filing of collective actions, the employer violated § 8(a)(1) of the NLRA because, by its own contentions and actions, it essentially mandated that employees waive, as a condition of employment, their right to file class, collective, or representative claims in any arbitral or judicial forum. *Id.* at *18. According to the ALJ, while the agreement was silent as to collective or class actions, in practice, the employer closed the avenue to pursue collective and/or class-wide litigation when it sought to limit the charging employee and other similarly-situated employees to arbitration of their individual claims. *Id.* at *28-29. The ALJ therefore concluded that the employer's arbitration agreement violated the NLRA. The ALJ rejected the employer's contention that the charging employee's charge was time-barred by § 10(b) of the NLRA because it was filed more than 6 months after the date he signed the agreement; in these circumstances, the NLRB found a continuing violation. *Id.* at *20. Here, the agreement mandated that the charging employee arbitrate certain employment-related claims, including wages and compensation, with the employer even after his termination, and the evidence showed that the employer continued to require all new hires to execute the agreement. *Id.* at *20-21. Because the U.S. Supreme Court has not expressly overruled *D.R. Horton*, 357 NLRB No. 184 (2012), the ALJ determined that *D.R. Horton* continues to be controlling law applicable in NLRB matters, and the ALJ found nothing meaningfully distinguishable between the employer's arbitration agreement and the one in *D.R. Horton,* which the NLRB found violation of the NLRA. *Id.* at *27-29. The ALJ thus issued an order that the employer cease and desist and take certain affirmative action designed to effectuate the policies of the NLRA. *Id.* at *34-36. Affirming the ALJ's order, the NLRB ordered the employer to reimburse the charging employee for all reasonable expenses and legal fees, with interest, incurred in opposing the employer's unlawful motion to compel individual arbitration of his class or collective claims and to notify the court that it had rescinded or revised the agreement. *Id.* at *2-6.

***Nitsch, et al. v. DreamWorks Animation SKG, Inc.,* 2015 U.S. Dist. LEXIS 54986 (N.D. Cal. April 24, 2015).** In this consolidated class action alleging workplace antitrust claims against Defendants, various animation studios, the Court granted in part Defendants' motion to compel arbitration. Plaintiffs, a group of artists and engineers employed by four of the named Defendants, alleged that Defendants entered into a scheme not to actively solicit each other's employees, and that they engaged in collusive discussions concerning competitively sensitive compensation information and agreed upon compensation ranges that artificially limited the compensation offered to Defendants' current and prospective employees. *Id.* at *9. Plaintiffs further alleged that Defendants directly communicated and met regularly to discuss and agree upon compensation ranges and that they met at least once a year in California at meetings organized by a third-party that apparently collected industry-specific salary information. *Id.* at *17. Defendants moved to compel arbitration, contending that Plaintiff Nitsch was bound by an arbitration agreement with Defendant DreamWorks Animation SKG, Inc., and therefore was equitably estopped from refusing to arbitrate his

claims against other Defendants, and that his claims should be stayed pending the outcome of the arbitration. The Court granted Defendants' motion for the purpose of allowing an arbitrator to decide, in the first instance, whether the arbitrator should exercise jurisdiction over Plaintiff Nitsch's claims against DreamWorks arising out of Nitsch's employment at DreamWorks. The parties did not dispute that Nitsch had entered into a written employment agreement with DreamWorks, that the employment agreements' explicit incorporation of AAA rules served as clear and unmistakable evidence of the parties' intent to delegate the power to decide arbitrability to an arbitrator, and that Nitsch's claims relating to his payment or compensation arose out of his employment agreement. *Id.* at *30-32. The Court, however, denied Defendants' motion as to Nitsch's claims against Defendant DreamWorks arising out of his employment at Defendant Sony Picture Imageworks, Inc. because the plain language of arbitration clauses did not encompass any claims that arose out of Nitsch's employment with Sony Pictures Imageworks. The Court noted that some of Nitsch's claims against DreamWorks arose not out of his employment or compensation by DreamWorks, but by DreamWorks' alleged participation in an anti-competitive conspiracy that depressed Nitsch's compensation from Sony Picture Imageworks. *Id*. at *33-34. The Court therefore granted Defendants' motion to compel arbitration as to Nitsch's claims against DreamWorks arising out of his employment at DreamWorks and denied it to Nitsch's claims against DreamWorks arising out of his employment at Sony Pictures Imageworks. Further, the Court declined to find that Nitsch was equitably estopped from refusing to arbitrate his claims against the remaining Defendants. The Court pointed out that, although Nitsch's claims might refer to the employment agreements, his claims arose independently of his employment agreements because his claims for relief would be cognizable even if he had worked for DreamWorks without a written employment agreement. *Id.* at *38-41. Defendants offered no explanation for why "efficiency" would justify compelling Nitsch to arbitrate claims that plainly and concededly fell outside the scope of the arbitration clause, and the Court ruled that this action would proceed regardless of whether Nitsch was compelled to arbitrate certain claims against any or all Defendants, as none of the other Plaintiffs executed any arbitration agreement with Defendants. *Id.* at *47-48. Because a limited stay as to Nitsch's claims against DreamWorks based on his employment at DreamWorks would be appropriate, the Court granted Defendants' request to stay the prosecution of Nitsch's claims against DreamWorks arising out of his employment at DreamWorks alone, and denied it to Nitsch's claims against the remaining Defendants. Accordingly, the Court granted Defendants' motion to compel arbitration in part.

***Solar City Corp. v. Irving, et al.,* Case No. 32-CA-128085 (NLRB Dec. 22, 2015).** Amy Beth Irving ("Irving"), an employee of Solar City Corp. ("employer"), brought a class action alleging wage & hour violations under the California Labor Code. *Id.* at 1. The employer moved to compel arbitration of Irving's wage & hour claims on an individual basis. Thereafter, Irving filed a charge with the National Labor Relations Board ("NLRB") alleging that her employer violated § 8(a)(1) of the National Labor Relations Act by maintaining and enforcing the agreements. The administrative law judge ("ALJ") found that the employer violated § 8(a)(1) of the Act, which the NLRB affirmed. *Id.* At the outset, the NLRB noted that the agreements required all employment-related disputes to be resolved by arbitration and included a class action waiver. Thus, pursuant to *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), and *Murphy Oil USA,* Inc., 361 NLRB No. 72 (2014), the agreements were unlawful. *Id.* The employer argued that the agreements were lawful because the agreements permitted employees to file employment claims or charges with federal administrative agencies, such as the EEOC, which could seek a remedy on behalf of all affected employees. The NLRB, however, found that there was a wide range of employment-related claims that were not within the purview of any administrative agency and even if it were, the agency had the discretion to decline it or to do so only on their terms. *Id.* at 2. Finally, the NLRB held that the administrative agency was not a judicial forum in the sense contemplated by *D. R. Horton,* and thus, agencies like the EEOC and DOL could not adjudicate employment-related claims. *Id.* The NLRB also found that the agreements stated explicitly that all or any disputes must be individually arbitrated, thereby conveying to employees that the agreements prohibited the filing of charges with the NLRB. *Id.* The employer contended that the later provisions in the agreements that permit filing charges with federal agencies such as the NLRB nullified this explicit unlawful restriction. The NLRB, however, noted that the ambiguity, coupled with the added effort necessarily involved in resolving the ambiguity, would dissuade employees from collectively seeking redress for grievances, and thus would inhibit them from pursuing collective action. *Id.* at 3. Accordingly, the NLRB affirmed the judgement of the ALJ.

***Tarlton & Son, Inc. v. Munoz*, *et al.,* 2015 NLRB LEXIS 42 (NLRB Jan. 27, 2015).** An employee filed an unfair labor practices charge alleging that Defendant improperly required its employees to sign agreements that compelled them to participate in mandatory binding arbitration. The charging party and two other employees ("Plaintiffs") filed a collective action alleging that Defendant engaged in unfair business practices and violations of the California Labor Code. *Id.* at *5. Subsequently, Defendant presented the mutual arbitration policy along with an employee agreement to arbitrate (collectively, the "MAP") to all of its employees and required them to sign the MAP as a condition of their employment. *Id.* at *8. The MAP required employees to submit most employment claims to binding arbitration on an individual basis. As to the ULP, the National Labor Relations Board ("NLRB") ruled that Defendant violated § 8(a)(1) of the National Labor Relations Act (the "NLRA"). The NLRB noted that § 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7 of the NLRA, which includes the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. *Id.* at *15-16. Further, the NLRB noted that *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), reaffirmed the ruling in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), which held that mandatory arbitration agreements that preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions in any forum, arbitral or judicial, unlawfully restricts employees' § 7 rights, which violates § 8(a)(1). *Id.* at *16. Further, the NLRB observed that, when evaluating whether a rule, including a mandatory arbitration policy, violates § 8(a)(1), the NLRB applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), under which the first inquiry is whether the rule explicitly restricts activities protected by § 7. *Id.* at *18. The NLRB opined that, although the NLRA does not create a right to class certification or the equivalent, it does create a right to pursue joint, class, or collective claims, if and as available, without the interference of an employer-imposed restraint. *Id.* at *22. The NLRB found that the MAP, as a condition of employment, precluded employees from pursuing claims concertedly and, therefore, amounted to a prospective waiver of rights guaranteed by the NLRA. Further, the NLRB noted that Defendant implemented the MAP only after the employees filed a collective action in state court, and, in doing so, Defendant prevented the employees from banding together and had an illegal objective. The NLRB remarked that Defendant's action to force employees covered under the NLRA to waive their rights to file class-wide actions in any arbitral or judicial forum interfered with and restrained them from exercising their § 7 rights. Under the second element of the *Lutheran Heritage* test, the NLRB considered whether the MAP was promulgated in response to protected concerted activity. *Id.* at *30. Defendant argued that the employees involved in the state court action were not employed at the time the MAP was implemented and, therefore, the § 7 rights of those employees were not affected. The NLRB, however, found that it was irrelevant whether Plaintiffs were actually employed by Defendant at the time the MAP was implemented because, under the NLRA, "employees" includes former employees of a particular employer. *Id.* at *32. Additionally, the MAP stated that it applied to all employees, regardless of length of service or status, and covered all employment disputes, whether those disputes already exist or arise in the future. *Id.* at *36. Reviewing the entire chain of events, the NLRB held that Defendant implemented the MAP in response to the employees' protected concerted activity and sought to crush the employees' pursuit of class action lawsuits in forums other than individual arbitration or the negotiated grievance process. Thus, the NLRB concluded that Defendant violated § 8(a)(1) by promulgating the new rule in response to the employees' § 7 activity.

***The Rose Group d/b/a Applebee's Restaurant v. Armstrong, et al.,* Case No. 05-CA-135360 (NLRB April 22, 2015).** The General Counsel of the National Labor Relations Board ("NLRB") issued a complaint against Defendant alleging that it violated the National Labor Relations Act ("NLRA") by maintaining a dispute resolution program (the "Program") with a mandatory arbitration provision that prohibited class actions and collective actions. Since April 2013, Defendant required all of its employees to sign an agreement and receipt for the Program as a condition of employment. An employee (the "Charging Party") filed a charge with the NLRB alleging that Defendant discriminated against him due to his protected concerted activities when it terminated his employment and gave him negative employment references, and alleging that Defendant maintained an unlawful mandatory arbitration policy. *Id*. The NLRB's Regional Director dismissed the first and second allegations, finding that the Charging Party did not engage in

protected concerted activity, that Defendant did not formally terminate him, and that the Charging Party did not file a legal claim against Defendant in court or in arbitration. The matter proceeded to trial before an Administrative Law Judge (the "ALJ"). Relying primarily on the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the NLRB contended that Defendant violated the NLRA by maintaining the Program. Defendant argued that the NLRB had no jurisdiction over the complaint because the Charging Party never exercised his § 7 rights under the NLRA, he did not engage in any protected concerted activity, he raised only individual allegations in his charge, his complaint involved the FLSA and not the NLRA, and Defendant never attempted to enforce the terms of the Program against the Charging Party. *Id.* at 5. The ALJ found Defendant's arguments to be without merit. The ALJ noted that, the fact that there was no underlying unfair labor practice and the allegation only pertained to maintenance, rather enforcement, of a policy was of no relevance. *Id.* at 6. According to the ALJ, "[m]aintenance of a rule that violates employees' Section 7 rights is in itself a violation of Section 8(a)(1)." *Id.* The ALJ, therefore, determined that the NLRB had jurisdiction over the complaint. Defendant also asserted that the case must be decided under the Federal Arbitration Act ("FAA") and that the NLRA did not fall within the statutory exceptions to the FAA. *Id.* at 7. The ALJ, however, held that Defendant's arguments merely rehashed those addressed by the Board in *Murphy Oil* and that Defendant's challenges to the validity of *D.R. Horton* were made in vain because the ALJ was required to apply established Board precedent that had not been reversed by the U.S. Supreme Court. *Id.* Because Defendant's Program precluded employees from pursuing any class or collective claim in any forum, the ALJ concluded that Defendant's maintenance of the Program violated § 8(a)(1) of the NLRA. *Id.* Although the Program did not explicitly prohibit filing a charge with the NLRB, the ALJ found that the language reasonably could be interpreted to prohibit the filing of unfair labor practices charges and, therefore, would tend to chill employees' exercise of their § 7 rights constituting a separate violation of § 8(a)(1) of the NLRA. *Id.* at 8-9. Accordingly, the ALJ ordered Defendant to cease and desist from maintaining an arbitration agreement that waived class actions and collective actions and to take certain affirmative action designed to effectuate the policies of the NLRA.

(x) Non-Workplace Class Action Arbitration Issues

***Bassett, et al. v. Electronic Arts, Inc.,* 2015 U.S. Dist. LEXIS 35895 (E.D.N.Y. Mar. 23, 2015).** Plaintiff, a video game player, brought a putative class action alleging that Defendant misled consumers as to the ability to use Defendant's on-line platform to play certain games with other consumers via the Internet. Plaintiff alleged violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Plaintiff also asserted breach of express warranty, breach of implied warranty merchantability, and breach of implied warranty of fitness for a particular purpose. Defendant moved to compel arbitration, arguing that an arbitration provision in the "terms of service" covered Plaintiff's claims. *Id.* at *9. The Court granted Defendant's motion adopting the Magistrate Judge's report and recommendation in its entirety. The Magistrate Judge had determined that Plaintiff entered into a valid arbitration agreement with Defendant when he accepted Defendant's terms of service in an attempt to access Defendant's on-line platform. *Id.* at *11. Specifically, the Magistrate Judge found that Plaintiff and Defendant entered into a "clickwrap" type agreement when Defendant presented Plaintiff with the terms of service and privacy policy and Plaintiff clicked "I Accept" in order to create an account and register on-line. *Id.* The Court agreed with the Magistrate Judge and found that Plaintiff manifested assent to the agreement to arbitrate when he clicked "I Accept" during both the registration process and when later confronted with updated terms of service, and when he did not opt-out of the arbitration agreement using the process described in the arbitration clause. *Id.* at *17. Although Plaintiff presented a number of general challenges to the terms of service, attacking both its validity and formation, the Court agreed with the Magistrate Judge that challenges to the validity of the terms of service, as a whole, were subject to arbitration. *Id.* at *13. To the extent Plaintiff challenged the arbitration clause itself, the Court found that the Magistrate Judge had correctly determined that Plaintiff agreed to the arbitration clause at the time he registered for an on-line account. *Id.* at *18. The Court also determined that Defendant's mutual obligation to submit to arbitration, and to be bound by arbitration, constituted consideration sufficient to support the arbitration agreement. *Id.* at *19. The Court further agreed with the Magistrate Judge's conclusion that the arbitration provision was not invalid as illusory simply because Defendant had the unilateral right to modify the agreement. *Id.* at *24-25. The Court noted that the terms of service obligated Defendant to provide

Plaintiff with indirect notice of any changes by posting such changes on its website, and to provide updated terms of service, which terms become effective after 30 days from the date of posting. *Id.* at *27. The terms of service also allowed Plaintiff to opt-out changes to the arbitration agreement by sending Defendant written notice within 30 days of the change, and Defendant required its on-line registrants to affirmatively accept new versions of the terms of service by going through a process similar to initial registration. *Id.* The records further showed that Defendant in fact gave Plaintiff actual notice of at least one modification, and he accepted the same. *Id.* The Court thus concluded that a reasonably prudent user in Plaintiff's position would have had notice that he was being bound by the terms of service, including the arbitration provision, and that the agreement to arbitrate was not illusory. *Id*. at *28-30. Accordingly, the Court granted Defendant's motion to compel arbitration.

***DirecTV, Inc. v. Imburgia, et al.*, 2015 U.S. LEXIS 7999 (U.S. Dec. 14, 2015).** Plaintiffs, a group of customers, brought a class action in state court seeking damages from Defendant for early termination fees it charged them in violation of California law. Defendant had entered into a service agreement with its customers that required arbitration for resolution of disputes. *Id*. at *5. Defendant moved to compel arbitration, and the state court denied the motion. On Defendant's appeal, the California Court of Appeal analyzed the contractual phrase "law of your state" to determine whether California law made the contract's class arbitration waiver unenforceable; in doing so, it analyzed the "*Discover Bank*" rule. *Id*. at *6. The California Supreme Court had held in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), that a waiver of class arbitration in a consumer contract of adhesion was unconscionable, and should not be enforced. *Id*. Subsequently, the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 222 (2011), that the *Discover Bank* rule was invalid, as it stood as an obstacle to the accomplishment and execution of the full purposes of the Federal Arbitration Act ("FAA"). The California Court of Appeal, despite *Concepcion*, held that under California law, Defendant's class action waiver was unenforceable. *Id*. at *7. In reaching this conclusion, the Court of Appeal referred to two sections of the California Consumers Legal Remedies Act ("CLRA") – §§ 1751 and 1781(a) – rather than the *Discover Bank* rule itself. The Court of Appeal opined that applying state statutory law alone would render unenforceable the class action waiver in paragraph 9 of Defendant's contract. *Id*. at *8. The Court of Appeal reasoned that as paragraph 10 of the contract stated that the FAA governed paragraph 9 (the arbitration provision) and was a general provision, that provision voided the arbitration agreement if the "law of your state" would find the class arbitration waiver unenforceable. *Id*. at *9. After the California Supreme Court denied discretionary review, Defendant petitioned the U.S. Supreme Court for a writ of *certiorari*. The U.S. Supreme Court reversed the California Court of Appeal's order. At the outset, the U.S. Supreme Court remarked that lower courts must follow *Concepcion*, and the supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. *Id*. at *10. Here, the California Court of Appeal, in effect, interpreted the contract's "law of your state" provision to invalidate *Concepcion*. *Id*. at *11. The U.S. Supreme Court noted that the relevant language in the contract was not ambiguous. The Supreme Court observed that the contract stated that if "the law of your state" would find the agreement (to dispense with the class arbitration procedure) unenforceable, then paragraph 9 of the contract was unenforceable itself. *Id*. at *13. The U.S. Supreme Court opined that the California Court of Appeal did not explain why parties might generally intend the words "law of your state" to encompass even the "invalid law of your state." *Id*. at *14. The Supreme Court remarked that to the contrary, the contract referred to state law that makes the waiver of class arbitration unenforceable, while an invalid state law would not make a contractual provision unenforceable. *Id*. The Court of Appeal had reasoned that invalid state arbitration law, namely the *Discover Bank* rule, maintained its legal force despite the holding in *Concepcion*, because if only the state law was applied to the class action waiver, the waiver was unenforceable. *Id*. at *16. The U.S. Supreme Court concluded that California's interpretation of the phrase "law of your state" did not place arbitration contracts on equal footing with all other contracts. *Id*. at *17. The U.S. Supreme Court rejected this approach. It reasoned that California Court of Appeal's interpretation did not give due regard to the federal policy favoring arbitration. *Id*. at *18. Accordingly, the U.S. Supreme Court concluded that the Court of Appeal's interpretation was preempted by the FAA, and it reversed the judgment. *Id*.

***Healy, et al. v. Cox Communications, Inc.*, 2015 U.S. App. LEXIS 10710 (10th Cir. June 24, 2015).** Plaintiffs, a group of cable service subscribers, brought a class action alleging that Defendant illegally tied its premium cable service to rental of a set-top box. During the pendency of Defendant's motion to dismiss, it began inserting mandatory arbitration clauses into the contracts of some customers, including putative class members. *Id.* at *3. After the District Court denied Plaintiffs' motion for class certification, Defendant moved unsuccessfully to dismiss but did not mention the arbitration agreements in its motion. Subsequent to pre-trial discovery, Plaintiffs again moved to certify a class. Defendant again did not inform the District Court of its arbitration agreements. Subsequently, the District Court granted class certification, and although Defendant moved for reconsideration, it again failed to mention the arbitration clauses. After two years into the litigation, Defendant moved to compel arbitration, which the District Court denied on the basis that Defendant waived its right to arbitration. *Id*. at *6. On appeal, the Tenth Circuit applied a six-factor test in *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 467-67 (10th Cir. 1988), on waiver, and affirmed the District Court's order. *Id.* at *7-8. Defendant had withheld information about the arbitration agreements until after the District Court had completed its numerosity analysis, and the Tenth Circuit remarked that Defendant's complete failure to mention the presence of its arbitration contracts, despite the obvious impact that they would have on the Rule 23 analysis, was clearly inconsistent with an intent to arbitrate. Further, rather than requesting that the District Court stay its motion for summary judgment until the District Court decided its motion to compel, Defendant moved to compel arbitration on the same day it moved for summary judgment, even though it was aware that arbitration could have been raised earlier. *Id.* at *10. The Tenth Circuit observed that this was only one of Defendant's many attempts to manipulate the litigation and omit known material facts about the absent class members from its briefing. Further, Defendant had delayed in mentioning its intent to arbitrate for a substantial period of time, and only moved to compel arbitration close to trial. Moreover, the District Court had noted that the parties had made ample use of every discovery device available and Defendant's actions in this regard were incompatible with the use of arbitration, where discovery was more limited. *Id.* at *12-13. The Tenth Circuit observed that prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to re-litigate the issue by invoking arbitration. *Id.* at *13. Here, the District Court had engaged in extensive Rule 23 analysis, resolved numerous motions, and adjudicated discovery disputes, and also invested a significant amount of judicial resources in this analysis at great expense to the public. Defendant asserted that *Peterson* was inapposite because a party does not invariably waive its right to compel arbitration against absent class members by filing its motion to compel after the District Court certified the class. *Id.* at *15. The Tenth Circuit remarked that the District Court may not have been able to compel arbitration of absent class members at that time, but Defendant's assertion or mention of its right at that point would have fundamentally changed the course of the litigation, ensured a more expedient and efficient resolution of the trial, and prevented improper gamesmanship. The Tenth Circuit reasoned that whether or not the District Court could have compelled a non-class member to arbitrate, the failure to raise the issue can result in waiver, and that Defendant's inconsistent conduct and extreme delay warranted waiver in these circumstances. *Id.* at *19. Accordingly, the Tenth Circuit affirmed the denial of Defendant's motion to arbitrate.

***In Re Checking Account Overdraft Litigation,* 2015 U.S. Dist. LEXIS 13570 (S.D. Fla. Feb. 3, 2015).** In this consolidated action, Plaintiff, a bank customer, alleged that Defendant improperly changed the order of debit card transactions to increase the overdraft fees it charged on Plaintiff's account in violation of Washington law. In June 2010, the Court had denied Defendant's motion to compel arbitration, finding that the arbitration provision at issue was substantively unconscionable and therefore unenforceable. *Id*. at *18. The Court's order was vacated on appeal and remanded for reconsideration. *Id*. at *19. On remand, the Court granted Defendant's renewed motion and compelled arbitration, finding that the delegation clause contained within the arbitration agreement delegated to the arbitrator threshold questions of arbitrability, that such clause was enforceable after the U.S. Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63 (2010). *Id*. at *19-20. On Plaintiff's appeal, that order was vacated on the basis that Defendant had waived its right to have an arbitrator decide the threshold question of arbitrability. *Id*. at *20-21. Upon another remand, Defendant filed its second renewed motion to compel arbitration and dismiss the complaint, which the Court denied. At the outset, the Court found that its conclusion in its original June 2010 order denying Defendant's first motion to compel arbitration remained correct, and that the subject

arbitration provision remained unconscionable. *Id*. at *18. Defendant argued that after the U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion,* 131 S. Ct. 1740 (2011) – holding that the Federal Arbitration Act preempts state laws that classify collective or class action waivers in consumer contracts as unconscionable – the basis for the Court's findings in its original order both that Washington law would apply and that the subject arbitration agreement was substantively unconscionable was no longer valid. *Id*. at *19-21. Plaintiff urged the Court to find again that Washington law would apply, and that the class action waiver was just one factor of several that the Court considered in finding the arbitration provision to be substantively unconscionable. *Id*. at *22. The Court observed that applying Ohio law would violate the fundamental public policy of allowing consumers of banking services to be protected by its consumer protection laws, and thus found that the parties' choice-of-law provision selecting Ohio law was unenforceable, and that Washington law would apply. *Id*. at *25-26. Further, the Court opined that it had already found substantive unconscionability in its original order, and even removing the class action waiver from the analysis as instructed by *Concepcion*, the Court's decision would remain unchanged. *Id*. at *26. Significantly, the Court found that several additional factors rendered the arbitration provision substantively unconscionable, including: (i) the confidentiality provision in the arbitration agreement was one-sided and only benefitted Defendant; and (ii) the agreement did not adequately ameliorate the burdens to access to an arbitral forum posed by the costs of arbitration, including the filing fees and attorneys' fees provisions. *Id*. at *26-27. Thus, the Court adopted and incorporated those parts of its analysis that remained undisturbed by *Concepcion* and again ruled that the arbitration provision was substantively unconscionable and therefore unenforceable. *Id*. at *27. Accordingly, the Court denied Defendant's second renewed motion to compel arbitration and dismiss the complaint.

***Katz, et al. v. Cellco Partnership*, 2015 U.S. App. LEXIS 13055 (2d Cir. July 28, 2015).** Plaintiff, a telephone subscriber, brought a putative class action asserting breach of contract and consumer fraud claims under New York state law on the basis of a monthly administrative charge assessed by Defendant. Defendant's wireless customer agreement contained an arbitration clause that invoked the Federal Arbitration Act ("FAA") and required that any dispute be submitted to arbitration. *Id.* at *3. Plaintiff moved for partial summary judgment and Defendant moved to compel arbitration and to stay the proceedings. The District Court denied Plaintiff's motion and allowed Defendant's motion to compel arbitration, but denied its motion to stay. *Id.* at *4. On appeal, the Second Circuit held that the FAA neither violates Article III of the Constitution nor imposes an unconstitutional rule of decision and affirmed the denial of Plaintiff's motion and grant of Defendant's motion. *Id.* at *5. The Second Circuit, however, vacated the dismissal of the action. The Second Circuit noted that § 3 of the FAA mandates that District Courts refer an action to arbitration if the parties have an arbitration agreement. *Id.* at *7-8. Further, the Second Circuit observed that a mandatory stay comports with the FAA's statutory scheme and pro-arbitration policy, and that the statute's appellate structure permits immediate appeal of orders hostile to arbitration but bars appeal of interlocutory orders favorable to arbitration. *Id.* at *9. The Second Circuit noted that the FAA authorizes immediate interlocutory review of an order refusing to compel arbitration or denying a stay of proceedings, and that by contrast, the FAA explicitly denies the right to an immediate appeal from an interlocutory order that compels arbitration or stays proceedings. *Id.* The Second Circuit remarked that the dismissal of an arbitrable matter that properly should have been stayed effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order, and that affording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress. *Id.* at *9-10. Additionally, the Second Circuit opined that a mandatory stay is consistent with the FAA's underlying policy to move the parties to an arbitrable dispute out of the judicial system and into arbitration as quickly and easily as possible, and that a stay enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award. *Id.* at *10. Because the FAA mandates a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay was requested, the Second Circuit vacated the dismissal of the action.

***Nicosia, et al. v. Amazon.com, Inc.,* 2015 U.S. Dist. LEXIS 13560 (E.D.N.Y. Feb. 4, 2015).** Plaintiff brought a putative class action alleging that Defendant sold weight loss supplements containing sibutramine – a controlled substance that has never been available for sale without a prescription and that

is associated with a serious risk of cardiovascular events and strokes – in violation of various federal and state consumer protection laws and in breach of various implied warranties. Defendant moved to dismiss on the basis of a mandatory arbitration clause included in its standard purchase agreement and in its "Terms and Conditions" that governed Plaintiff's claims. The Court granted the motion. The Court noted that Plaintiff agreed to be bound by the Terms and Conditions, which included the arbitration provision, each time he purchased the weight loss supplement known as "1 Day Diet." *Id.* at *4. Every time Plaintiff purchased the supplement, Defendant's website required him to navigate past a final checkout page that included the warning, "[b]y placing your order, you agree to Amazon.com's privacy notice and conditions of use." *Id.* at *6. The website displayed the phrase "conditions of use" in a blue font and contained a hyperlink to the Terms and Conditions in effect at the time of the purchases. *Id.* A purchaser using Defendant's website could only place his or her order after viewing the hyperlink to the conditions of use, and he or she could make a purchase only by creating an account and agreeing to be bound by the Terms and Conditions. *Id.* at *22-23. The Court, therefore, found that Plaintiff, at minimum, was on notice of the current terms of the conditions of use when making his purchases. *Id.* Plaintiff argued that he was not bound by those terms because Defendant reserved the right to change its terms at any time and that any contract relating to the sale of 1 Day Diet was void as an illegal contract because Defendant could not lawfully sell any product containing sibutramine without a prescription. *Id.* at *24. The Court, however, held that its role was limited to determining the threshold question of whether a valid arbitration agreement existed. *Id.* at *27. The Court found a valid arbitration agreement and concluded that any challenge to the validity of the contract as a whole or the binding effect of the arbitration clause should be considered by the arbitrator and not the Court. *Id.* Accordingly, the Court granted Defendant's motion to dismiss the complaint in favor of arbitration.

***Pearson, et al. v. United Debt Holdings, LLC,* 2015 U.S. Dist. LEXIS 109152 (N.D. Ill. Aug. 19, 2015).** Plaintiff brought a putative class action alleging that Defendant attempted to collect void and unenforceable debts in violation of the Fair Debt Collection Practices Act ("FDCPA"). In 2014, Plaintiff began receiving calls from Defendant attempting to collect a debt that Plaintiff allegedly owed on a loan; the loan, however, did not originate from Defendant, but with a company called Plain Green. *Id*. at *2. The complaint was sparse on specifics with respect to the loan itself, but it was clear that the interest rate on the loan exceeded 200% and Plain Green was not licensed by the Illinois Department of Financial and Professional Regulations to loans whose interest rates exceeded 20%. *Id*. Defendant filed a motion to compel individual arbitration, which the Court denied. Defendant based its motion on a loan agreement, stating that Plain Green was a lender organized under the laws of the Chippewa Cree Tribe, and that the loan was subject to the laws and courts of the Chippewa Cree Tribe, and also provided an arbitration clause. *Id*. at *3. The Court noted that the loan agreement was not attached to the complaint, and the complaint itself made no mention of an arbitration provision in the loan agreement. The Court remarked that support for the existence of an arbitration provision was found exclusively in the document attached to Defendant's motion. *Id*. at *6. The Court opined that it could consider agreements containing arbitration provisions referred to within, but not attached to the complaint, and only if the proponent of the arbitration properly authenticated the document containing an arbitration provision. *Id*. Here, the Court determined that the document was not properly signed, nor had Plaintiff indicated that he agreed to the document. *Id*. at *7-8. Because Defendant failed to establish that the document it produced was a document that Plaintiff had signed, the Court concluded that Defendant's arguments based on the purported class action waiver and choice-of-law provisions contained within the document also failed.

***Ross, et al. v. Citigroup, Inc.,* 2015 U.S. App. LEXIS 20025 (2d Cir. Nov. 19, 2015).** Plaintiffs, a group of credit card holders, brought a putative class action alleging that Defendants collusively adopted arbitration clauses barring class actions in violation of the Sherman Act, so as to prevent cardholders from redressing their injuries collectively through the legal process. *Id.* at *2. After a bench trial, the District Court entered judgment in Defendants' favor. On Plaintiffs' appeal, the Second Circuit affirmed on appeal. At the outset, the Second Circuit noted that an antitrust conspiracy in violation of § 1 of the Sherman Act requires proof of joint or concerted action as opposed to unilateral action. *Id*. at *4. Because Plaintiffs conceded that they had no direct evidence of a conspiracy, the Second Circuit concluded that they must prove a conspiracy through inferences that may be drawn from the behavior of the alleged conspirators.

Id. The District Court had found that an agreement among competitors may be inferred on the basis of conscious parallelism, when such interdependent conduct was accompanied by circumstantial evidence. *Id*. These factors included a common motive to conspire, evidence that showed that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of inter-firm communications. *Id.* The District Court analyzed these factors, including: (i) whether Defendants had a motive to collude; (ii) the quantity and nature of inter-firm communications between Defendants and other issuing banks; and (iii) whether the acts were contrary to the self-interest of Defendant. The District Court concluded that the final decision to adopt clauses barring class actions was something that the issuing banks decided individually and internally. *Id*. at *5. The Second Circuit remarked that when the record was viewed in its entirety, it was evident that the District Court had not erred. Accordingly, the Second Circuit affirmed the District Court's order entering judgment in Defendants' favor.

***Sgouros, et al. v. TransUnion Corp.,* 2015 U.S. Dist. LEXIS 13691 (N.D. Ill. Feb. 5, 2015).** Plaintiff brought a putative class action alleging that Defendant sold lower credit scores to consumers than the credit scores it provided to lenders. Plaintiff alleged violations of the Fair Credit Reporting Act ("FCRA"), Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), and the Missouri Merchandizing Practices Act ("MMPA"). Defendant moved to compel arbitration. Defendant argued that Plaintiff affirmatively assented to the terms of a service agreement by clicking on a button on Defendant's website while purchasing the credit score. The agreement contained an arbitration clause. Plaintiff alleged that he did not assent to the terms of the agreement by clicking the button, and that it merely constituted his assent to the terms in the "authorization" paragraph. *Id*. at *5-6. The Court denied Defendants' motion. The Court found that the agreement failed to meet the thresholds for a valid clickwrap or browsewrap agreement. *Id.* at *20. The Court noted that Defendant's website placed the authorization paragraph in between the window and the button instructing that users clicking the button agreed to authorize Defendant to obtain their personal information, and the literal text of the authorization paragraph was so explicit that it was reasonable for users to assume that their click merely constituted their assent to the authorization, not to the terms displayed in the window. *Id.* at *16. The Court acknowledged that the layout of the window, the button, and the paragraph did not provide reasonable notice that a users' click would constitute assent to the terms in the window. *Id.* The Court therefore found that the agreement was not a valid clickwrap agreement. The Court also ruled that the agreement was not a valid browsewrap agreement. The Court noted that the location of the window and the button, as well as the visible scroll bar might have provided sufficient notice of terms to users, were insufficient to inform users that their clicks would constitute assent to the terms in the window. *Id.* at *19. The Court also determined that Defendant failed to provide constructive notice to users because there was no explicit reference indicating that users should read the terms in the window. *Id.* at *20. The Court explained that it would be unreasonable to expect users to scroll down the window when they were not aware of a possibility of being bound by the terms in the window. *Id.* The Court therefore concluded that the agreement was not valid and enforceable. Accordingly, the Court denied Defendants' motion to compel arbitration.

***Torres, et al. v. Simpatico, Inc.,* 2015 U.S. App. LEXIS 4830 (8th Cir. Mar. 25, 2015).** Plaintiffs, a group of current and former unit franchisees, brought a putative class action against their respective master franchisers alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs entered into standard unit-franchise agreements (the "Agreements") that included broad, standard-form arbitration provisions. Defendants moved to compel individual arbitration under the terms of the Agreements. *Id*. at *5. The District Court granted the motion. In doing so, the District Court rejected Plaintiffs' argument that the arbitration provisions were unenforceable as unconscionable and that those Defendants who were not signatories (the "non-signatory parties") could not invoke or enforce the arbitration provisions. *Id*. at *5. On Plaintiffs' appeal, the Eighth Circuit affirmed. Plaintiffs contended that the arbitration provisions were unconscionable and should not be enforced because the prohibitively high costs associated with individual arbitration proceedings would prevent them from pursuing their claims. *Id*. at *9. In support, Plaintiffs pointed to terms in the arbitration provisions requiring them to pre-pay filing and other fees and to reimburse Defendants' costs and expenses if Defendants prevailed. *Id*. Among other things, Plaintiffs' counsel submitted a general schedule of filing fees, an American Arbitration Association

study of average daily rates charged by commercial arbitrators in four locations, and an affidavit estimating that an individual hearing would take three days to complete; in addition, this submission showed that the average loss among all putative class members was approximately $6,100, that the cost of arbitration would exceed the amount of any class member's claim, and that no members of the putative class could afford the costs of individual arbitration. *Id*. at *10. The District Court found that the average daily arbitrator fees that Plaintiffs quoted did not necessarily reflect the likely cost to arbitrate because, by definition, some arbitrator fees were below average. *Id*. at *11. The Eighth Circuit agreed with the District Court. The Eighth Circuit found the rates irrelevant because none of Plaintiffs resided in the four geographic areas for which Plaintiffs provided average daily arbitrator rates, and Plaintiffs did not provide fee data for the states in which they resided. *Id*. Accordingly, the Eighth Circuit concluded that Plaintiffs failed to carry their burden to show that the costs of individual arbitration were so high as to prevent them from effectively vindicating their rights in the arbitral forum. *Id*. Plaintiffs also argued that, even if the arbitration provisions were enforceable, they could be invoked and enforced only by the master franchisers who actually signed the respective Agreements and not by the non-signatory parties. *Id*. at *13. The Eighth Circuit disagreed, finding that the Defendants and the non-signatories to the respective Agreements were nevertheless the named beneficiaries of the Agreements. *Id*. at *14-15. The Eighth Circuit ruled the language of the Agreements was sufficiently broad and inclusive to express an intent to benefit not only the actual signatories and named beneficiaries, but also the other non-signatory parties. *Id*. at *15. Accordingly, the Eighth Circuit affirmed the District Court's judgment.

(xi) Litigation Over Class Action Settlement Agreements And Consent Decrees

***Coffee, et al. v. Brady*, 2015 U.S. Dist. LEXIS 18424 (M.D. Fla. Feb. 16, 2015).** Plaintiffs filed a class action in 1971 against the Chief of Jacksonville's Fire Department and various other City officials. Plaintiffs were African-American residents of Jacksonville who were seeking to integrate the City's fire department, which at the time, had only two African-American firefighters in a department of nearly 700. In 1982, the Court entered a consent decree requiring the City to hire an equal number of African-American and white firefighters until the ratio of African-American firefighters to white firefighters reflected the ratio of African-American citizens to white citizens in the City of Jacksonville. *Id*. at *3. Since then the number of African-American recruits increased in the Fire Department. In 2007, new counsel for Plaintiffs filed a motion for an order to show cause as to why the City should not be held in contempt for failing to follow the terms of the 1982 decree. The City filed a motion to dissolve the decree and dismiss the case. The Court granted the motion. Plaintiffs claimed that the City unilaterally stopped obeying the consent decree in 1992 without seeking the Court's approval and that, therefore, the City had been in contempt for 15 years. *Id*. at *12. Plaintiffs claimed that between 1992 and 1997, the City hired 126 firefighters, yet only one was African-American, and that after 1997 the number of African-American firefighters hired continued to be far below the number of white firefighters hired, in violation of the decree. In response, the City moved to dissolve the decree and dismiss the case with prejudice because it fully had complied with the self-executing terms of the decree that permitted the City to stop hiring one-to-one as soon as the African-American to white ratio of the firefighters matched the African-American to white ratio of the City's population and because Plaintiffs' effort to resurrect the case was barred by laches. *Id*. The Court noted that, in 1971, the City agreed to an order requiring the fire department to hire 50% African-American and 50% white until the ratio in the department equaled the ratio in the City's population. *Id*. at *36. The Court observed that 10 years later, still under the decree to hire one-to-one, the City had hired 251 new firefighters, only 66 of whom were African-American. *Id*. The 1982 consent decree was entered only because the City had been unable to achieve desegregation in the Fire Department under less onerous terms. *Id*. at *37. The Court opined that, based on the record, it appeared that at the time the City stopped complying in 1992, it gave no notice to the Court, the lawyers for the Plaintiffs, or the public. The Court noted that the City should have asked the Court to modify or dissolve the decree if it thought that it had achieved compliance. The City argued that, even if it was in violation by waiting 15 years to raise the issue, the gaps in the record were such that the City could not defend itself, and Plaintiffs therefore were barred by laches from obtaining any relief. The Court noted that, even if it found that laches did not apply, and even if it had further found the City in contempt, it could not have simply reinstated the 1982 decree because changes in the law dating back to the early 1990's had rendered problematic the one-to-one hiring scheme under the 1982 decree, even to remedy past discrimination. *Id*. at *46. Finding that the 1982 consent decree could not be enforced

because of laches, the Court formally dissolved it. *Id*. at *50. Accordingly, the Court granted the City's motion to dissolve the decree and dismissed the case.

***International Union, et al. v. Hydro Automotive Structures North American, Inc.*, 2015 U.S. Dist. LEXIS 16992 (W.D. Mich. Feb. 12, 2015).** Plaintiffs, a union and its retirees, brought two separate class actions alleging that Defendants violated collective bargaining agreements by curtailing retiree health benefits. Subsequently, the parties settled the action and the Court granted preliminarily approval to the proposed settlement agreement. Thereafter, the parties notified the Court of a disagreement concerning the tax consequences of settlement payments to certain class members. At issue was whether some or all of the settlement payments were subject to the Federal Insurance Contributions Act ("FICA") tax, and if so, whether Defendants could withhold the required employee contributions from settlement payments to certain class members, or whether Defendants must gross up the settlement payment amounts to ensure that the cash-in-hand for each class member equaled the stated amount of the settlement payments recited in the agreement. *Id.* at *5-6. The Court declined to address whether FICA taxes applied to some or all of the settlement payments, holding that it was not the appropriate forum to resolve the issue. The Court remarked that although the federal government was an interested party in such a matter, it was not a party to the case, and that the scope, collection, and operational details of the FICA tax was subject to special administrative and other procedural requirements. *Id.* at *7. Further, the Court opined that the parties were free to litigate the underlying tax issue with the appropriate federal authority under the appropriate procedure. The Court found that the agreement did not require payment and receipt by class members of a particular dollar amount of cash-in-hand regardless of third-party issues, and that the agreement instead required that the particular settlement payment amounts be fully applied to the benefit of each class member. *Id.* at *8. The actual net cash amount to the class member could vary depending on any number of things, including tax issues, garnishments, or other third-party issues, and the contract did not guarantee any class member a particular amount of cash-in-hand regardless of all potentially legitimate third-party claims. *Id.* at *9. The Court determined that if the third-party followed proper procedures, Defendants would be obligated to honor such legal process, and a particular class member would receive less cash-in-hand, but would still receive the full value of the settlement because a portion of the payment would be applied to a third-party obligation on the class member's behalf. *Id.* Hence, the withholding of tax could result in less cash on hand for particular class members, but each class member would still be receiving the full value of the settlement by having the FICA tax withheld and applied for that class member's benefit. *Id.* at *10. The Court opined that to rule otherwise would require Defendants to pay more than they agreed to pay in settlement, and would allow the class members to receive economic value beyond that promised in the agreement. Thus, the Court concluded that Defendants would need to withhold from payments to retirees' FICA taxes Defendants believed were due, and also pay the employer portion of any FICA tax they believed due over and above the settlement payments to the class members. *Id.* Finally, finding that the agreement was fair and reasonable, the Court approved the settlement.

(xii) Ascertainability Under Rule 23

***Allen, et al. v. Conagra Foods, Inc.*, 2015 U.S. Dist. LEXIS 2653 (N.D. Cal. Jan. 8, 2015).** Plaintiff, a consumer, brought a class action alleging that the label on Defendant's "Parkay Spray" was misleading regarding the fat and calorie contents. *Id.* at *1-2. Plaintiff moved for certification of a multi-state class, divided into several sub-classes, which the Court denied. The Court observed that to demonstrate ascertainability, Plaintiff should present a plan for how the class members would be identified. *Id.* at *2. Plaintiff had failed to do so, and therefore the Court remarked that ascertainability was lacking. Additionally, at the beginning of the class period, the label of the product at issue stated that the product contained zero grams of fat and zero calories; however, later in the class period the label stated that the product contained zero grams of fat and zero calories "per serving." *Id.* at *3. Plaintiff had only purchased the product with the revised label. The Court noted the possibility of a jury finding the original label misleading while finding that the revised label was not. If that were so, the Court opined that Plaintiff's claim would fail, and there would be no one to represent the absent class members who did have a claim based on their purchase of Parkay Spray with the earlier label. Additionally, Plaintiff sought to certify a class of people from different states, including sub-classes for claims of breach of express warranty and for violation of the consumer protection laws of many of those states. The Court determined that Plaintiff failed

to show how common questions would predominate in a case involving so many states, and did not demonstrate how the proposed multi-state class action would be manageable. Accordingly, the Court denied certification to Plaintiff's proposed class.

***Ault, et al. v. J.M. Smucker Co.*, 2015 U.S. Dist. LEXIS 103328 (S.D.N.Y. Aug. 6, 2015).** Plaintiff, a consumer, brought an action alleging that Defendants' labelling of certain Crisco cooking oils as "All Natural" was misleading. Plaintiff contended that the oils were made using genetically modified organism ("GMO") crops, and were so heavily processed that they were man-made. While Crisco's Vegetable and Com Oils bore an "All Natural" label from 2002, and the label was added to the Canola and Natural Blend Oils in late 2009, the labels of the five remaining varieties never contained the label at issue. *Id.* at *3. Defendants removed the label from the Natural Label Oils prior to February 2013, and in 2014 began shipping Vegetable Oil, Com Oil, and Canola Oil that did not contain the labels. *Id.* Defendant was also finalizing label artwork without the "All Natural" label for Crisco Natural Blend Oil. *Id.* Plaintiff moved for certification of a class comprised of consumers who purchased Crisco Pure Vegetable Oil and/or Crisco Pure Corn Oil between February 15, 2009 and June 1, 2014; and/or Crisco Pure Canola Oil and/or Crisco Natural Blend Oil between June 1, 2010 and June 1, 2014 in New York. The Court denied the motion for lack of ascertainability. Plaintiff argued that the class was ascertainable because it was defined by objective criteria, *i.e.,* those who purchased one or more of the Natural Label Oils during the class period. Plaintiff contended that to the extent retailer records were needed, many class members could be individually identified. The Court remarked that even if the criteria was objective, Plaintiff did not show that it was administratively feasible, and opined that her mere assertion that records existed to identify many class members was insufficient. *Id.* at *9. Moreover, the Court observed that Defendant sold to retailers and distributors, not to consumers; therefore, it had no records regarding the ultimate purchasers of the Natural Label Oils. Further, Plaintiff claimed to have obtained identifying information for 4.5 million sales from California retailers, but she offered no evidence concerning what percentage of sales this number represented, whether she could obtain similar information from New York retailers, and whether such data would identify more than a small percentage of class members. *Id.* at *10. Additionally, the Court observed that taking the variations in Crisco products in conjunction with the fact that the challenged product was a low-priced consumer item (of which the normal consumer likely does not retain significant memory about), the likelihood was slim that a potential class member would be able to accurately identify themselves as a purchaser of the allegedly deceptive product. *Id.* at *12-13. Defendant sold nine different brands of cooking oil, only four of which ever bore the label at issue. The Court determined that permitting potential class members to self-identify would require them to specifically recall each variety of Crisco cooking oil they purchased during the class period. It observed that because the label appeared on the four brands at different times, and the class period was defined differently for the Vegetable and Corn Oils than the Canola and Natural Blend Oils, this would complicate the matter. Because the number of Crisco cooking oil brands, plus the differing class periods, rendered accurate self-identification infeasible, and also as Plaintiff herself could not recall the number of bottles of cooking oil she had purchased during the class period, the Court determined that the class was not ascertainable and denied class certification.

***Breecher, et al. v. Republic Of Argentina*, 2015 U.S. App. LEXIS 20018 (2d Cir. Sept. 16, 2015).** Plaintiff, a bond holder, brought a class action after Defendant defaulted on between $80 and $100 billion of sovereign debt in 2001, and imposed a moratorium on payment of all principal and interest with respect to its external debt, including bonds. The Second Circuit, in related matters, had found that Plaintiffs' proposed method of calculating damages was inflated, and remanded the matters to the District Court with instructions to conduct an evidentiary hearing. *Id*. at *3. In those cases the District Court had granted summary judgment to Argentina, and had ordered evidentiary hearing as to damages. *Id*. Plaintiff, however, offered the District Court an alternative solution to these difficulties by simply modifying the class definition to remove the continuous holder requirement and to expand the class to all holders of beneficial interests in the relevant bond series. *Id*. The District Court subsequently certified the class. Defendant appealed, arguing that the class was not ascertainable. The Second Circuit agreed, and vacated and remanded. At the outset, the Second Circuit opined that a class is ascertainable if it is sufficiently definite so that it is administratively feasible for the District Court to determine whether a particular individual is a class member. *Id*. at *4-5. Plaintiff argued that a class defined by reference to objective criteria is

sufficient to satisfy ascertainability. *Id*. at *5. The Second Circuit disagreed, finding that while objective criteria may be necessary to define an ascertainable class, it cannot be the case that any objective criterion would do. *Id*. The Second Circuit explained that, for example, while a class defined by those wearing blue shirts was objective, it could not be identifiable because it had no limitation or context, and the composition of the class makeup would be ever-changing. *Id*. at *5-6. The Second Circuit observed that this case presented such a circumstance where an objective standard – such as owning a beneficial interest in a bond series without reference to time owned – was insufficiently definite to allow ready identification of the class or the persons who would be bound by the judgment. *Id*. at *7. The Second Circuit found that without a defined class period or temporal limitation, such as the continuous holder requirement, the nature of the beneficial interest itself and the difficulty of establishing a particular interest's provenance in the particular circumstances of this case made the objective criterion used here inadequate. *Id*. The Second Circuit also reasoned that the lack of a confined class period, taken in light of the unique features of the bonds case, made the modified class insufficiently definite as a matter of law. *Id*. at *9-10. The Second Circuit explained that although the class as originally defined may have presented difficult questions of calculating damages, it did not suffer from a lack of ascertainability. *Id*. at *10. Accordingly, the Second Circuit concluded the District Court's class certification order violated the ascertainability requirement, and vacated the order.

Bryd, et al. v. Aaron's Inc., **2015 U.S. App. LEXIS 6190 (3d Cir. April 16, 2015).** Plaintiffs, a group of individuals who leased and then purchased computers from Defendants, brought a putative class action alleging that the Defendants secretly installed software called "PC Rental Agent" and collected thousands of webcam photos, screen shots, and keystroke logs in violation of the Electronic Communications Privacy Act ("ECPA"). Plaintiffs moved to certify two classes of people who leased and/or purchased computers on which the spyware was installed without their consent. The District Court denied the motion because it found that the classes were not ascertainable. On appeal, the Third Circuit reversed and remanded. At the outset, the Third Circuit noted that the ascertainability inquiry is two-fold and requires a Plaintiff to show that: (i) the class is defined with reference to objective criteria; and (ii) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *Id*. at *15. The Third Circuit noted that, in *Marcus v. BMW of North America, LLC*, 687 F.3d 583 (3d Cir. 2012), it found that, if class members are impossible to identify without extensive and individualized fact-finding or mini-trials, a class action is inappropriate. *Id*. at *16. Similarly, in *Hayes v. Wal-Mart Stores, Inc*., 725 F.3d 349 (3d Cir. 2013), the Third Circuit applied the ascertainability rule established by *Marcus* and required Plaintiffs to offer some reliable and administratively feasible alternative that would permit the District Court to determine whether the class was ascertainable. *Id*. at *16-17. Applying these principles here, the Third Circuit noted that the District Court misstated the law governing ascertainability by conflating the standards to include whether the class is precisely defined, and whether the named Plaintiffs are members of the class. *Id*. at *22. The Third Circuit found that the District Court erred by blending ascertainability with the class definition issue, which is a separate preliminary inquiry that precedes the Rule 23 analysis. *Id*. at *23. Further, the Third Circuit noted that the question of whether Plaintiffs are members of the class has nothing to do with either the requirements of a viable class definition or the ascertainability standard. *Id*. Further, the Third Circuit found that the District Court abused its discretion by finding that the proposed classes were not ascertainable because they were under-inclusive. The District Court reasoned that, although the records provided that Defendants might reveal the computers on which the spyware was activated and the owner/lessee of that computer, Plaintiffs did not provide an administratively feasible way to determine whose information was surreptitiously gathered. *Id*. at *24. The Third Circuit declined to engraft under-inclusivity on to the ascertainability requirement, finding that individuals who are injured by a Defendant but are excluded from a class are simply not bound by the outcome of that particular action. *Id*. at *26. Finally, the Third Circuit ruled that the District Court erred in determining that the proposed classes were not ascertainable because they were overbroad. The Third Circuit explained that the classes consisting of owners and lessees were ascertainable because there were objective records that could readily identify those class members. *Id*. at *31. Accordingly, the Third Circuit reversed the denial of class certification and remanded the action.

***Karhu, et al. v. Vital Pharmaceuticals, Inc.,* 2015 U.S. App. LEXIS 9576 (11th Cir. June 9, 2015).** Plaintiff, a purchaser of VPX meltdown fat incinerator ("Meltdown"), brought a class action alleging that Meltdown did not help in burning fat and achieving rapid fat loss, as Defendant advertised. Plaintiff asserted claims for breach of express warranty under the Magnuson-Moss Warranty Act, breach of express warranty, unjust enrichment, and violation of the Florida Deceptive and Unfair Trade Practices Act. Previously, the District Court denied Plaintiff's motion to certify a nationwide class of Meltdown purchasers as well as a sub-class of New York purchasers, finding that the proposed classes did not satisfy Rule 23's implicit ascertainability requirement. On appeal, the Eleventh Circuit affirmed. At the outset, the Eleventh Circuit noted that Plaintiff's proposal to identify class members using VPX's sales data was incomplete, insofar as Plaintiff did not explain how the data would aid in class member identification. *Id*. at *10. The Eleventh Circuit also found that any potential identification procedure was not obvious because VPX's sales data identified mostly third-party retailers, and not class members. *Id*. Thus, the Eleventh Circuit held that the District Court acted within its discretion when it rejected Plaintiff's proposal to identify class members via VPX's sales data. *Id*. at *10-11. Similarly, the Eleventh Circuit ruled that the District Court acted within its discretion when it rejected identification via affidavit. *Id*. at *11. As Plaintiff had not himself proposed an affidavit-based method, he necessarily had not established how the potential problems with such a method would be avoided. *Id*. at *11-12. The Eleventh Circuit observed that without a specific proposal as to how identification via affidavit would successfully operate, the District Court had no basis to accept the method. *Id*. at *12. The Eleventh Circuit therefore upheld the District Court's ascertainability holding. Further, the Eleventh Circuit opined that Plaintiff's argument that the Eleventh Circuit construed the ascertainability requirement too strictly was not convincing. *Id*. For example, the Eleventh Circuit found that Plaintiff was incorrect that a strict ascertainability requirement conflicted with *Klay v. Humana, Inc.,* 382 F.3d 1241 (11th Cir. 2004). *Id*. Plaintiff argued that a strict ascertainability requirement violated the holding in *Klay* that any concerns over case manageability should not stand in the way of certification. *Id*. The Eleventh Circuit, however, reasoned that the manageability concern was at the heart of the ascertainability requirement and was more fundamental than the manageability concern addressed in *Klay*. *Id*. at *13. Furthermore, the Eleventh Circuit observed that in the motion to alter or amend the order denying class certification, Plaintiff explained that VPX sold Meltdown primarily to third-party retailers, and proposed identifying class members by subpoenaing the retailers for their records. *Id*. at *14. While the District Court took no issue with the abstract principle that a Plaintiff could satisfy the ascertainability requirement by proposing a subpoena-based method for identifying class members, it held that Plaintiff should have proposed the method in his class certification papers, instead of only upon moving to alter or amend. *Id*. The Eleventh Circuit opined that had Plaintiff done so, he might well have satisfied the ascertainability requirement before the District Court. *Id*. The Eleventh Circuit concluded that Plaintiff's bare-bones proposal that the District Court ascertain class members through VPX's sales data was insufficient to satisfy the ascertainability requirement. *Id*. at *15. As a result, the Eleventh Circuit upheld the District Court's ascertainability decision, and thus affirmed without reaching the District Court's Rule 23(b)(3) decision. *Id*.

***LeBlanc, et al. v. ExxonMobil Corp.,* 2015 U.S. Dist. LEXIS 32533 (M.D. La. Mar. 17, 2015).** Plaintiffs brought a putative class action alleging that Defendant knowingly distributed defective fuel that damaged the engines of their vehicles. According to the complaint, the fuel distributed from Defendant's Baton Rouge terminal contained elevated unwashed gum that caused engine damage and decreased its efficiency and performance. Following consumer complaints, Defendant shut down the terminal, and paid approximately $4.6 million in claims. *Id*. at *3. Seeking to represent a class of purchasers of the defective fuel created, sold, or distributed by Defendant for the twelve months preceding April 3, 2014, as well as owners of property damaged by the fuel during this period, Plaintiffs moved for class certification. Plaintiffs argued that every purchaser of a defective fuel was entitled to a refund of the purchase price under Louisiana redhibition law. *Id*. at *8. The Court denied certification, finding that the class was not ascertainable because determination of class membership was entangled with the underlying merits of the claim. *Id.* at *12. Under Louisiana law, only redhibitory defects are actionable, and for the subject fuel to be redhibitory or defective, it requires proof that the fuel purchased was either "absolutely useless" or "its use is so inconvenient" that it was presumed that the buyer would not have purchased the gas for the price paid. *Id.* at *7. Thus, according to the Court, determining whether a particular purchaser of the defective

fuel had a redhibition claim would require inquiry into the nature and degree of uselessness or inconvenience, if any, the purchaser or user experienced, and it was not amenable to uniform or formulaic class-wide proof. *Id.* at *8. Plaintiffs' proposed class definition included both purchasers of the defective fuel and owners of the property damages by such fuel. According to the Court, not all owners were necessarily "purchasers," and thus not every claimant meeting the class definition had a claim in redhibition. *Id.* at *6. The Court explained that in ascertaining class members, "all purchasers of defective fuel" was not only a matter of identifying purchasers of defective fuel during a determined time period, but also identifying individuals who experienced uselessness or a degree of inconvenience that gave rise to a presumption that he or she would not have purchased the fuel. *Id.* at *12. Because such inquiries into the merits of each potential class member's claim would be necessary to determine whether an individual fell under the defined class, the Court concluded that the class was not ascertainable. *Id.* Accordingly, the Court denied Plaintiffs' motion for class certification.

***Mullins, et al. v. Direct Digital LLC,* 795 F.3d 654 (7th Cir. 2015).** Plaintiff brought a class action under the Illinois Consumer Fraud and Deceptive Business Practices Act against Defendant for fraudulently representing that its product, Instaflex Joint Support, relieves joint discomfort. The District Court certified a class of consumers "who purchased Instaflex within the applicable statute of limitation of the respective [c]lass [s]tates for personal use until the date notice is disseminated." *Id.* at 658. Defendant filed a petition for a leave to appeal under Rule 23(f), arguing that the District Court abused its discretion in certifying the class without first finding that the class was ascertainable. *Id.* The Seventh Circuit accepted the petition, and affirmed the District Court's order granting class certification. *Id.* at 674. The Seventh Circuit noted that it has long recognized an implicit requirement under Rule 23 that a class must be defined by objective criteria. *Id.* at 657. The Seventh Circuit further observed that other circuits – most notably the Third Circuit in *Carrera v. Bayer Corp*., 727 F.3d 300 (3d Cir. 2013) – have imposed a new requirement that Plaintiffs prove at the certification stage that there is a reliable and administratively feasible way to identify all who fit within the class definition; this heightened requirement has often prevented certification in consumer class actions in those circuits. *Id.* The Seventh Circuit declined to follow this new approach, noting that nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3). *Id.* at 658. The Seventh Circuit reasoned that the policy concerns motivating the heightened ascertainability requirement are better addressed by applying the carefully explicit requirements of Rule 23(a) and Rule 23(b)(3). *Id.* Applied here, the Seventh Circuit ruled that Plaintiff's class definition was not vague, since it identified a particular group of individuals (purchasers of Instaflex) harmed in a particular way (defrauded by labels and marketing materials) during a specific time period in particular areas. *Id.* at 660-61. Further, the Seventh Circuit found that the class definition was not based on subjective criteria. *Id.* at 661. Thus, the Seventh Circuit held that Defendant did not demonstrate that the District Court abused its discretion in certifying the class. *Id.* at 674. Accordingly, the Seventh Circuit affirmed the District Court's order granting class certification. *Id.*

Editor's Note: Ascertainability is becoming one of the primary battlegrounds in class certification battles. The Seventh Circuit's ruling in *Mullins* is one of the first counter-attacks to the Third Circuit's holdings on ascertainability, which stemmed from *Carrera*. In so ruling, the Seventh Circuit affirmed the certification of a food labeling class, holding that ascertainability does not require an administratively feasible method of identifying a proposed class, just an objective one.

***Shelton, et al. v. Bledsoe, Warden Of USP,* 2015 U.S. App. LEXIS 253 (3d Cir. Jan. 7, 2015).** Plaintiff, a federal inmate, brought a class action for alleged violations of the Eighth Amendment and the Federal Tort Claims Act. Plaintiff alleged that Defendants engaged in a pattern, practice, or policy of improperly placing inmates who were known to be hostile to each other in the same cell and that the prison guards failed to intervene in the resulting inmate-on-inmate violence. Plaintiff proposed a class consisting of all persons who were currently or would be imprisoned and sought injunctive and declarative relief on behalf of the class. The District Court denied Plaintiff's motion for certification, finding that the class was not "objectively, reasonably ascertainable." *Id*. at *7. Plaintiff appealed. The Third Circuit reversed and remanded. Relying on precedent in other circuits and an Advisory Committee Note to Rule 23, the Third Circuit held that "a judicially-created implied requirement of ascertainability – that the members of the class

be capable of specific enumeration" was inappropriate for Rule 23(b)(2) classes seeking only injunctive and declaratory relief. *Id.* at *12. Distinguishing between class actions filed under Rule 23(b)(2) and Rule 23(b)(3), the Third Circuit explained that because the focus of Rule 23(b)(2) was more heavily placed on the nature of the remedy sought and because a remedy obtained by one class member naturally affects all members of the class (as they do not have a right to opt-out of the class), it was not critical to ascertain the identities of individual class members in a Rule 23(b)(2) class. *Id.* at *11. Conversely, in class actions under Rule 23(b)(3), ascertaining the individual members of the class is critical because questions of law or fact common to all class members must predominate and the class members have the right to opt-out of the class. *Id.* at *10. Thus, according to the Third Circuit, "the requirement that the class be defined in a manner that allows ready identification of class members, serves several important objectives that do not exist or are not compelling in [Rule 23](b)(2) classes." *Id.* at *13. The Third Circuit therefore concluded that the District Court erred in denying class certification based on its ascertainability analysis, and remanded the action to consider whether Plaintiff's properly-defined putative class meet the remaining Rule 23 requirements for class certification.

***Sherman, et al. v. YAHOO!, Inc.,* 2015 U.S. Dist. LEXIS 127809 (S.D. Cal. Sept. 23, 2015).** Plaintiff brought a class action alleging that Defendant sent unsolicited text messages using an automatic telephone dialing system in violation of the provisions of the Telephone Consumer Protection Act ("TCPA"). *Id*. at *4-5. Plaintiff allegedly received a text message from an individual via Defendant's Mobile SMS Messenger Service ("PC2SMS Service") that allowed registered Yahoo users to send instant messages to mobile devices from their computers through the Yahoo messenger platform. Whenever a Yahoo user sends a message using the PC2SMS Service, Defendant automatically checks a database called the Optin DB to see whether anyone has previously sent a message to that mobile number using the PC2SMS Service, and if that recipient's mobile number has never before received a text message via the PC2SMS Service, then Defendant automatically appends a "welcome message" to the user's message. *Id.* at *5-6. Plaintiff alleged that this welcome message violated the TCPA, and moved for certification of a class of individuals to whom Defendant sent substantially similar or identical text messages on a telephone number assigned to cellular telephone provider AT&T and/or Cingular during a defined period and whose cellular telephone number was associated with a Yahoo account. *Id.* at *2. Plaintiff proposed to ascertain the putative class by: (i) obtaining Defendant's records from the Optin DB showing the time and date that it sent each welcome message to the corresponding mobile number during the proposed class period; (ii) limiting the unique mobile numbers to those assigned to AT&T and/or Cingular; and (iii) comparing the mobile numbers listed in the Optin DB with information obtained from Defendant's UDB database in order to obtain names, e-mail addresses, and mailing address information for account holders to whom Defendant sent the welcome message. *Id.* at *14-15. Plaintiff also intended to subpoena AT&T for the complete information, and as an alternative, proposed sending class notice to members' Yahoo e-mail accounts. *Id.* at *15. The Court denied class certification, finding that Plaintiff failed to demonstrate ascertainability. While the Court acknowledged that Plaintiff appeared to have obtained a complete list of mobile numbers that received the welcome message during the defined period, it also noted that the Optin DB from which Plaintiff obtained the numbers did not contain the names, e-mail addresses, or postal addresses of the individuals who owned those mobile numbers. *Id.* at *19-20. Plaintiff failed to show that cross-referencing the phone numbers with information contained in Defendant's UDB would provide complete or even accurate contact information for class members, and even if it did, that information might not be current and individualized inquiry would be needed to determine which account holder owned the number during the class period. *Id.* at *20. Further, Plaintiff offered no explanation as to why AT&T would turn over its subscriber records, and the Court found no reason to believe that AT&T would, in fact, turn over the user information Plaintiff required. *Id.* at *22. The Court similarly found Plaintiff's proposal to send notices unworkable, reasoning that even if the notice were to reach the right individuals, those people would have to recall whether or not they received a single, non-personal e-mail during a one month period over two years ago, and this was highly improbable. *Id.* at *23. Thus, as Plaintiff failed to provide an objective, reliable, and administratively feasible method of ascertaining the class, the Court denied Plaintiff's motion for class certification.

***Stewart, et al. v. Beam Global Spirits & Wine, Inc.,* 2015 U.S. Dist. LEXIS 74116 (D.N.J. June 9, 2015).** Plaintiffs brought a putative class action alleging that Defendants violated the New Jersey Consumer Fraud Act ("NJCFA") when they marketed and sold "Skinnygirl Margarita" beverages as "all natural" even though they contained sodium benzoate. *Id.* at *3. Following denial of class certification for failing to satisfy the ascertainability requirement, Plaintiffs renewed their motion for class certification. Plaintiffs submitted a declaration from Steven Weisbrot, executive vice president of a class action notice and claims administration firm, in which Weisbrot detailed a claim submission process to identify class members. *Id.* at *16. Weisbrot represented that he reviewed the proposed class definition, the pleadings, and relevant documents, and opined that the parties could implement a reliable and administratively feasible method to ascertain individual class members. *Id.* at *17. According to the declaration, the proposed class members would be asked to provide a claim form and receipt for purchase of Skinnygirl Margarita, and the claims of those with a receipt of purchase within the class period would be accepted as valid. In the absence of a receipt, prospective class members would be afforded the opportunity to submit a sworn affidavit setting forth the dates on which they purchased the product, the state of purchase, the retailer, the amount paid, and a description of the product. *Id.* at *17. Weisbrot then would apply a sophisticated state-of-the-art data matching technology to review all claims and identify patterns of duplication. *Id.* at *18. Plaintiffs argued that Defendants' liability could be determined from objectively quantifiable sales data without depending on the number of claims submitted. *Id.* at *19. The Court denied Plaintiffs' renewed motion for class certification. The Court found that Plaintiffs failed to propose an objective way of identifying class members, suggesting only the submission of claim forms by putative class members without any verifiable records or documents to corroborate the claims. *Id.* at *26. Further, Plaintiffs had difficulty remembering the details of their purchases, and it was unlikely that any class members retained receipts for their purchases approximately four to six years ago or would be able to provide the details necessary to substantiate their claims. The Court opined that a process requiring reliance on affidavits of putative class members as the primary method of ascertaining the class members would leave Defendants without a suitable and fair method for challenging the individuals' purported membership in the class. *Id.* at *29-30. The Court, therefore, concluded that Plaintiffs failed to demonstrate a reliable and administratively feasible mechanism for ascertaining class members. Accordingly, the Court denied Plaintiffs' renewed motion for class certification.

***Vista Healthplan, Inc., et al. v. Cephalon, Inc.,* 2015 U.S. Dist. LEXIS 74846 (E.D. Pa. June 10, 2015).** Plaintiffs, a group of consumers and Third-Party Payors ("TPPs") who purchased the brand-name pharmaceutical Provigil or its generic equivalent, brought a putative class action alleging violations of antitrust and consumer protection laws of 23 states and the District of Columbia. According to the complaint, Cephalon patented a specific formulation of a wakefulness-promoting drug named Provigil. On December 24, 2002, four general pharmaceutical companies (the "Generic Defendants") filed Abbreviated New Drug Applications for generic Provigil, each certifying that Cephalon's patent was either invalid or would not be infringed by their generic product. Cephalon sued the Generic Defendants for patent infringement, but later settled. The settlements permitted the Generic Defendants to launch their generic Provigil on a "date certain" prior to the expiration of Cephalon's patent, and Cephalon paid approximately $300 million to the Generic Defendants. *Id.* at *9. Plaintiffs alleged that, but for these payments, the Generic Defendants would have launched generic Provigil at risk, and lower-cost generic competition would have been available to the prospective class members by 2006. *Id.* at *10. In moving for class certification, Plaintiffs proposed two classes, including: (i) a class of end payors asserting claims under state antitrust and consumer protection laws; and (ii) a class of end payors asserting claims for unjust enrichment under state laws. *Id.* at *16. Plaintiffs excluded numerous categories of uninjured class members. In support of the motion, Plaintiffs presented the expert testimony of Dr. Raymond S. Hartman and asserted that Dr. Hartman's methodology of measuring antitrust impact and aggregate damages demonstrated that the elements of Plaintiffs' claims could be satisfied through proof at trial that was common to the class. *Id.* at *11-12. The Court denied class certification, finding that Plaintiffs failed to establish ascertainability. The Court found that the records before the Court were insufficient to ascertain the identities of the class members, and Dr. Hartman was unaware of any available records from which the identities of class members could be derived. *Id.* at *34-35. The Court noted that, aside from two exhibits – one that listed the prescriptions of one consumer and one that identified consumers by number as

opposed to including their identifies – Plaintiffs presented no evidence that the records could be utilized to identify class members. *Id.* at *34. Further, Plaintiffs failed to establish that any methodology for identifying class members would be administratively feasible. Dr. Hartman, in fact, acknowledged that, in order to identify consumers and TPPs that fall within the class, he would need to conduct a detailed analysis of the contracts between various entities and also examine each individuals' purchase history. *Id.* at *40. The Court reasoned that this multi-step process would entail extensive and individualized fact-finding that made class certification inappropriate. The Court further found that Plaintiffs failed to identify and remove a significant number of uninjured class members that remained within the class definition. *Id.* at *58. Despite Plaintiffs' assurances, Defendants identified several categories of consumers and TPPs that had not been excluded from the class definition, but would be uninjured, and showed that identifying and removing them would require extensive individualized inquiry. *Id.* at *61-66. The Court, therefore, concluded that Plaintiffs failed to satisfy the ascertainability requirement. Accordingly, the Court denied Plaintiffs' motion for class certification.

(xiii) Class Actions Involving Unions

***Addington, et al. v. US Airline Pilots Association*, 2015 U.S. App. LEXIS 10858 (9th Cir. June 26, 2015).** Following the merger of US Airways and American Airlines, Plaintiffs, a group of pilots, sued the US Airline Pilots Association ("USAPA") alleging that it breached its duty of fair representation. The dispute arose in 2005 when US Airways merged with America West Airlines, setting their respective pilots on a collision over a single, integrated seniority list. *Id*. at *1. At the time of the merger, the US Airways pilots ("East Pilots") and the America West Pilots ("West Pilots") were both represented by the Air Line Pilots Association ("ALPA") as they attempted to negotiate a seniority list. *Id*. The East Pilots advocated a list based on date of hire, while the West Pilots advocated a list based on the strength of their pre-merger airline. *Id*. at *2. When the negotiations failed, the issue was decided by an arbitration panel, which did not fully accede to the wishes of either group. *Id*. Subsequently, US Airways, American Airlines, US Airways, the USAPA, and the Allied Pilots Association ("APA") negotiated a multi-party Memorandum Of Understanding ("MOU") setting forth procedures for a merger transition between APA and New American Airlines. The USAPA advisory committee then made tailored presentations to its divided audiences. When presenting the MOU to the West Pilots, the USAPA representative stated that the MOU was neutral with respect to seniority, and, while speaking to East Pilots, the representative stated that the MOU was beneficial because, in effect, it confirmed that the arbitration award was dead. *Id*. at *17. This lawsuit followed. The District Court entered judgment in USAPA's favor. On appeal, the Ninth Circuit reversed in part and vacated in part. At the outset, the Ninth Circuit noted that, to establish that the union's exercise of judgment was discriminatory, Plaintiffs must adduce substantial evidence of discrimination that was intentional, severe, and unrelated to legitimate union objectives. *Id*. at *39. The Ninth Circuit found that, under the Transition Agreement's seniority-integration process, the groups of pilots were committed to working out a single, integrated seniority list through ALPA's Merger Policy. When the East Pilots repudiated their promise to be bound by the agreed-upon process, they dumped the ALPA rules and found a new rule-maker (the USAPA) that they could control and that was irreconcilably opposed to the negotiating position of the West Pilots. *Id*. at *46. The Ninth Circuit reasoned that, since USAPA's initial act of proposing a revised seniority list in 2008, it continued to oppose any efforts to reach a single agreement, which would have triggered the implementation of the arbitration award under the terms of the Transition Agreement. *Id*. at *47. The Ninth Circuit held that the District Court erred in deferring to paragraph 10(h) of the MOU, which maintained in-place the separate seniority lists for East and West Pilots that persisted as US Airways. The District Court had identified three possible reasons why USAPA included paragraph 10(h), including: (i) to obtain the benefits of the MOU while remaining neutral as to seniority; (ii) to avoid conflict; and (iii) to advantage the East Pilots by promoting date-of-hire seniority over the arbitration award. *Id*. at *57. The Ninth Circuit disagreed with the District Court and concluded that, once USAPA assumed the duty to act as statutory representative for all of the pilots, it could not rightly refuse to represent all of the pilots' interests fairly and impartially. *Id*. at *58. The Ninth Circuit ruled that USAPA violated the most elementary principle of the duty of fair representation. Accordingly, the Ninth Circuit reversed the District Court's judgment in part, vacated in part, and remanded.

***Association Of Administrative Law Judges, et al. v. Colvin*, 2015 U.S. App. LEXIS 1063 (7th Cir. Jan. 23, 2015).** Plaintiffs, a union representing the Social Security Administration's administrative law judges ("judges"), brought an action alleging that the Administration interfered with the judges' decisional independence by requiring judges to decide at least 500 social security disability cases a year, in violation of the Administrative Procedure Act ("APA"). The APA provides that when conducting a hearing, an administrative law judge is not subject to direction or supervision by other employees of the agency that he is employed by, and may not be assigned duties inconsistent with his duties and responsibilities as an administrative law judge. *Id.* at *3. In 2007, the Administration issued a directive setting a goal for judges such that they would be able to issue 500 to 700 legally sufficient decisions each year. *Id.* The District Court dismissed the complaint for lack of subject-matter jurisdiction, holding that the Civil Service Reform Act of 1978 ("Act") precluded Plaintiffs' resort to the APA. *Id.* at *3-4. On appeal, the Seventh Circuit affirmed. It noted that the Act creates remedies for prohibited personnel practices taken against federal employees, and defines "personnel practices" to include significant change in duties, responsibilities, or working conditions. *Id.* at *4. The Seventh Circuit found that Plaintiffs were alleging a significant change in duties, responsibilities, or working conditions, and if this were so, their exclusive remedy was under the Act. The Seventh Circuit, however, remarked that Plaintiffs had no remedy under the Act either, even if the challenged directive was a quota rather than a goal, because the Act does not prohibit an increase in a production quota unless the increase violates a prohibition listed in 5 U.S.C. § 2302(b), and the increase challenged here did not. *Id.* Plaintiffs argued that the quota altered the judges' preferred ratio of grants to denials of benefits and by doing so infringed their decision-making independence. The Seventh Circuit observed that if the result of the quota was that the percentage of such awards had risen, that was not contended to be an aim of the quota, but an unintended and presumably unwanted by-product. *Id.* at *5-6. Further, the Seventh Circuit noted that because the social security disability insurance trust fund was on the verge of being exhausted, the Administration was under pressure to reduce the aggregate disability benefits that its judges awarded. *Id.* at *6. Thus, the Seventh Circuit opined that the aim of the quota was to speed up decision-making rather than to prod the judges to grant more applications for disability benefits. *Id.* at *6-7. Plaintiffs also alleged that because of the quota, they granted benefits in cases in which, had they more time, they would have denied benefits, and thus the quota affected their decision-making. The Seventh Circuit remarked that increasing a workforce is not an actionable interference with the workers' decisional independence. *Id.* at *8. Further, the Seventh Circuit held that the government would not be interfering with judges' decisional independence by failing to increase the number of judges in proportion to the increase in case load otherwise the system would be flooded with cases brought by civil servants complaining that, as an incidental and unintended effect of a change in their working conditions, they had decided to reduce the amount of effort they devoted to each task they were assigned. *Id.* at *8-9. Thus, the Seventh Circuit ruled that an incidental and unintentional effect of a change in working conditions is not actionable under the APA.

***Barnes, et al. v. Air Line Pilots Association International,* 2015 U.S. Dist. LEXIS 133182 (N.D. Ill. Sept. 30, 2015).** Plaintiffs, a group of United Airlines pilots, brought a putative class action alleging that Defendant discriminated against them when allocating $225 million of retroactive pay ("retro pay") that United provided to its pilots after Defendant and United entered into a collective bargaining agreement in late 2012. *Id.* at *1. Plaintiffs took issue with three features of Defendant's retro pay calculation, including: (i) off-setting their retroactive pay by the amount they received from United in annual bonuses; (ii) using the average number of pay credit hours flown by the management pilot's bid category as opposed to their actual hours worked; and (iii) excluding certain credit hours from the calculation. *Id.* at *3-4. Plaintiffs sought to represent two putative classes of United pilots, including management pilots and pilot instructors. Plaintiffs alleged that Defendant breached its duty of fair representation ("DFR") to both classes, and, as to the management pilots only, Plaintiffs alleged that Defendant unjustly enriched itself in violation of Illinois law by accepting the payment of dues and contract maintenance fees. Plaintiffs moved for class certification. The Court granted the motion as to the management pilot class on both the DFR and unjust enrichment claims. *Id.* at *2. As to the management pilot class, the Court ruled that Plaintiffs met the numerosity requirement because the class contained more than 120 members. *Id.* at *8. The Court found that Plaintiffs met the commonality requirement because each putative class member's claim presented a common question of whether Defendant breached its DFR to management pilots in allocating the retro pay

or whether Defendant unjustly enriched itself by accepting dues and contract maintenance fees from management pilots even though it did not represent them. *Id.* at *14. The Court determined that Plaintiffs met the typicality requirement because Plaintiffs alleged that they were deprived of their proper share of the retro pay like all management pilots. *Id.* at *13. Defendant argued that Plaintiffs were not adequate representatives of the larger group of management pilots because one Plaintiff had been in management for eight of the relevant months and therefore his interests more closely aligned with the non-management "line pilots," and two other Plaintiffs were part of senior management and therefore had opposing interests from the common class members. *Id.* at *9-11. The Court rejected Defendant's argument on the basis that, despite the management pilots' claims that they should have received a larger share of the $225 million payment and the line pilots should have received less, they now were seeking payment directly from Defendant – out of funds Defendant specifically set aside in the event of legal challenge to the allocation – and not a claw back from line pilots. *Id.* at *10. Thus, according to the Court, "because victory for management pilots would result in Defendant's disbursement of additional funds to compensate them appropriately, the fact that a sub-group of management pilots may or may not be included does not necessarily harm the other management pilots." *Id.* at *11-12. The Court, therefore, found that Plaintiffs met the adequacy requirement. The Court also held that Plaintiffs met the predominance requirement. Whereas Defendant contended that an individualized fact-specific inquiry would be necessary because the putative class members worked for different lengths of time as management pilots during the relevant period, the Court held that, if Defendant ultimately was found liable, the need to calculate damages for each putative class member did not defeat predominance. *Id.* at *20. The Court further ruled that the issue of whether Defendant unjustly enriched itself by accepting fees and dues predominated over any conceivably individual issue pertinent to that claim. *Id.* at *21. Accordingly, the Court granted Plaintiffs' motion for certification of a management pilot class to pursue DFR and unjust enrichment claims against Defendant.

***Centeno, et al. v. Jay Inslee, Governor Of The State Of Washington,* 2015 U.S. Dist. LEXIS 125142 (W.D. Wash. Sept. 17, 2015).** Plaintiffs, a group of individual healthcare providers, brought a class action alleging that Defendant's automatic deduction of union dues/agency fees from their paychecks violated their First Amendment rights. The action arose following the U.S. Supreme Court's decision in *Harris v. Quinn,* 134 S. Ct. 2618 (2014), which held that the imposition of involuntary "agency fee" payments to unions in lieu of equivalent union membership dues violates First Amendment rights. *Id.* at *2. In response to *Harris*, the State of Washington changed its practice and imposed an opt-out system for union membership and/or dues deduction. *Id.* at *3. Plaintiffs, a group of individuals who care for disabled relatives and did not wish to join the union or have had dues deductions from their paychecks, sought certification of a class of all individual providers who provided written notification to the union or the State of Washington that they objected to paying dues or fees to the union and were subjected to automatic deductions of union dues or agency fees without their affirmative consent. *Id.* at *3-4. Defendant opposed certification and sought a stay on the action in light of the Supreme Court's grant of *certiorari* in *Friedrichs v. California Teachers Association,* 135 S. Ct. 2933 (2015). In *Friedrichs,* the Supreme Court agreed to hear the questions of whether *Abood v. Detroit Board of Education*, 97 S. Ct. 1782 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment, and whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech. *Id.* at *21. The Court denied class certification and granted Defendant's motion to stay. In denying class certification, the Court found that Plaintiffs failed to meet typicality and predominance requirements. The Court noted that the named Plaintiffs would be subjected to defenses unique to them because they were allegedly full-fledged employees, while the rest of the class were quasi-public employees, and thus Plaintiffs' claims were atypical to the class. *Id.* at *12-13. Since individualized hearings would be required to determine whether any class member suffered a First Amendment injury under the current or prior system of dues deductions or whether the union was unjustly enriched by their dues, even if the First Amendment required the imposition of an opt-in system for dues discussion, the Court found that common questions did not predominate over individual issues. *Id.* at *18-19. Further, because of the personal nature of the First Amendment injuries at issue, the Court found no way to avoid individualized damages based on the deductions made during specific periods where the individual

provider subjectively did not wish to "join or support" the union. *Id.* at *20. The Court, therefore, denied class certification. In addition, the Court granted Defendant's motion to stay the action, finding it appropriate under the given circumstances. Although *Friedrichs* concerned full-fledged public sector employees and the Supreme Court had held that the rule established in *Abood* does not apply to quasi-public employees, and an answer in the affirmative to the first question would affect the outcome of this case only if Court ultimately agreed with the union that the named Plaintiffs were full-fledged public employees, the Court found that, to some degree, judicial economy would be served by avoiding the need to consider the union's fact-intensive arguments about Plaintiffs' employment status. *Id.* at *21-22. According to the Court, the reasoning that the Supreme Court might use in discussing the constitutionality of opting-out would likely influence its understanding of the issue even if the Supreme Court answered the questions in negative. Hence, a stay would facilitate guidance by the ultimate arbiter of the First Amendment and assist in resolving the central open legal question. *Id.* at *22-23. Further, because the stay would last no longer than the year, and any Plaintiffs with a strong objection to due deductions could effectively enjoin Defendant's future deductions on an individual basis by opting-out any time, the Court determined that a stay would be appropriate. Accordingly, the Court granted Defendants' motion to stay the action.

***Hamidi, et al. v. Service Employees International Union Local 1000,* 2015 U.S. Dist. LEXIS 67419 (E.D. Cal. May 22, 2015).** Plaintiffs, employees of the State of California, brought a putative class action challenging Defendant's practice of deducting money for political activities from employees' wages unless they opt-out of the procedure. Although Plaintiffs were not members of the union, the union required them to pay a "fair share fee" for compensation for their employment relations with the state. *Id.* at *2. The State Controller deducted fair share fees directly from a public employee's wages and remitted them to Defendant on a monthly basis. *Id.* at *3. Plaintiffs alleged that Defendant's opt-out system, which required non-members to notify Defendant of their objection to paying for non-chargeable expenses and to renew their objection annually, violated the First Amendment. *Id.* at *5. Plaintiffs also alleged that Defendant improperly included litigation expenses incurred in an earlier fair share fee case in its June 2013 Notice's allocation of chargeable expenses in violation of the First Amendment. *Id.* Seeking to represent a class consisting of all former, current, and future State of California employees represented by the union, Plaintiffs moved for class certification. *Id.* at *3-4. Plaintiffs proposed three sub-classes to determine the amount of damages and asserted that all members of the general class shared the asserted claims. *Id.* at *4-5. The Court granted Plaintiffs' motion in part, certifying only Plaintiffs' first claim to the extent it asserted a facial First Amendment challenge. *Id.* at *25. The Court found that only Plaintiffs' first claim satisfied Rule 23's requirements. *Id.* at *10. The Court determined that the proposed class of at least 40 unconscionabilty 40 members satisfied the numerosity requirement. *Id*. at *7. Plaintiffs' first claim raised two core common questions of law, including: (i) whether the opt-out procedure served a compelling state interest; and (ii) whether that interest could not be achieved through significantly less restrictive means. *Id.* at *10-11. The finding of commonality further supported the conclusion that Plaintiffs' first claim was typical of absent class members. *Id.* at *12. To the extent Defendant argued Plaintiffs differed from many absent class members in their reasons for refraining from union membership and in their opposition to Defendant's political activities and thus had conflicts of interest, the Court opined that a mere preference did not properly "conflict" with Plaintiffs' constitutional interests such that it rendered the representative parties inadequate. *Id.* at *14-17. Plaintiffs demonstrated knowledge of the fair share fee, the opt-out procedure, and other facts relevant to their claims, and the Court concluded that Plaintiffs would vigorously prosecute the action on the class' behalf. *Id.* at *19-22. Since a refund would come directly from the injunctive and declaratory relief Plaintiffs sought, the Court further determined that the order would not prompt individualized damages inquiries and class certification pursuant to Rule 23(b)(2) would be appropriate for Plaintiffs' first claim. *Id.* at *24. The Court, however, ruled that Plaintiffs' second claim lacked commonality as there was no evidence that the proposed class as a whole opposed Defendant's political activities, and lacked typicality to the extent Plaintiffs asserted an "as applied" challenge to the opt-out procedure in addition to their facial First Amendment challenge with no evidence. *Id.* at *11-12. Accordingly, the Court granted Plaintiffs' motion for class certification as to Plaintiffs' First Amendment claim only to the extent that it claimed Defendant's opt-out practice as a "facial challenge," in which they challenged the application of the opt-out system as unconstitutional.

***Rauner, et al. v. American Federation Of State, County And Municipal Employees, Council 31, AFL-CIO,* 2015 U.S. Dist. LEXIS 65085 (N.D. Ill. May 19, 2015).** Plaintiff, the Governor of the State of Illinois, brought an action seeking a declaration that the "fair share contract provisions" of the Illinois Public Labor Relations Act ("IPLRA") were unconstitutional. Under the IPLRA, a labor organization that represents the interests of all public employees in the unit may include in its collective bargaining agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process. *Id.* at *7-8. Three non-union member public employees (the "employees") moved to intervene. Thereafter, the Governor filed a first amended complaint ("FAC") adding the employees as Plaintiffs, and moved to confirm the amended complaint and to dismiss as moot Defendants' motions to dismiss the original complaint. The Court granted the employees' motion and dismissed the original complaint and the FAC for lack of subject-matter jurisdiction and standing. The Court opined that, because issues raised in the suit were based on state law, it did not have subject-matter jurisdiction over the case, because the existence of a federal defense was inadequate to confer jurisdiction, even if the constitutional defense was the only real issue in the case. *Id.* at *11. With respect to standing, the Court noted that state officials generally lacked standing to challenge the constitutionality of state law in federal court where their interests were official as opposed to where their interests were personally adversely impacted. *Id.* at *12. Here, the Governor had no personal interest at stake because he was not subject to the fair share fee requirements. The Governor merely claimed to have a duty to protect the First Amendment rights of all public employees in the state, which were official rather than personal interests. Thus, because the Governor brought the action in his official capacity, seeking to represent the non-member employees subject to the fair share provisions of the collective bargaining agreements, the Court concluded that the Governor had no standing. The Court rejected the Governor's argument that his FAC governed the Court's jurisdictional inquiry. Although the Court agreed that leave to add or drop parties under Rule 21 should be freely granted, it reiterated that, because the original Plaintiff, the Governor, lacked standing, the Court lacked subject-matter jurisdiction over the case, and it had no power to enter an order allowing the addition of the employees as Plaintiffs. *Id.* at *14. Further, even if the Court allowed the employees to join as additional Plaintiffs, the Court found that it could not assert supplemental jurisdiction over the Governor's claims because it already had determined that he lacked standing to bring them. Finally, because a party cannot intervene if the Court has no jurisdiction over the original action, the Court found that the employees' motion to intervene could not save the Governor's original complaint. *Id.* at *15. Nevertheless, the Court noted that, where the intervening party brings separate claims, and the Court has an independent basis to exercise jurisdiction over those claims, the Court could dismiss the original claims in the action for lack of subject-matter jurisdiction while retaining jurisdiction over the intervener's claims. *Id.* at *16. Accordingly, the Court granted the employees leave to file their complaint in intervention as the operative pleading, and dismissed the Governor's complaint.

***Schlaud, et al. v. Snyder,* 2015 U.S. App. LEXIS 7786 (6th Cir. May 12, 2015).** Plaintiffs, a group of childcare providers who received subsidies for offering services to low-income families, brought a putative class action seeking equitable relief and monetary damages alleging that the union dues deduction requirement in their collective bargaining agreement ("CBA") violated their First Amendment rights. *Id.* at *4-5. The State of Michigan's Child Development and Care Program ("CDC") provided childcare services for low-income families. Beginning in 2006, Michigan's Department of Human Services ("DHS") worked with a variety of local agencies to improve standards for child care providers, culminating with the approval of a CBA between the Child Care Providers Together Michigan (the "Union") and the Michigan Home Based Child Care Council, the entity charged with the authority to bargain collectively on behalf of the Michigan DHS. The CBA required all home childcare providers receiving subsidies from the CDC to either become members of the union or to pay the union an agency fee through a subsidy deduction. *Id.* at *4. In January 2009, DHS began deducting 1.15% from subsidy payment made to home childcare providers and forwarded them to the union. *Id.* Plaintiffs alleged that the deduction violated their First Amendment Rights. Plaintiffs sought class certification under Rule 23 on behalf of similarly-situated child care providers. The District Court denied class certification. It reasoned that Plaintiffs' proposed class would include 4,806 providers who had reviewed the proposed CBA and had voted in favor of the provisions requiring the payment of union dues or agency fees, which would create a conflict of interest between Plaintiffs and a substantial part of the proposed class. *Id.* at *6. Plaintiffs asked for an amended judgment,

changing the class to encompass providers who paid union dues but who did not "sign authorization cards for the union or vote in elections that regarded union representation or ratification of the union's collective bargaining agreement." *Id.* at *7. The District Court denied certification again and determined that short of deposing each proposed class member, it would be impossible to ascertain the motivations of each class member. *Id.* Plaintiffs appealed to the Sixth Circuit. The Sixth Circuit upheld the dismissal. Thereafter, in August 2013, Plaintiffs sought further review and a year later, the Supreme Court granted the petition for a writ of *certiorari* in light of its decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), a case that involved a similar compulsory agency-fee regime in Illinois. *Id.* at *8. Plaintiffs argued that *Harris* supported their claim because *Harris* had made clear that it was unconstitutional for the union to seize fees from home child care providers without their prior consent. The Sixth Circuit, however, distinguished *Harris* because that case addressed the merits of the claims at issue and did not discuss class certification principles. *Id.* at *15. Thus, according to the Sixth Circuit, nothing in *Harris* changed its earlier analysis. Focusing on Rule 23(a)(4), the Sixth Circuit reaffirmed its ruling that the divergent interests of Plaintiffs and the members of the proposed class defeated class certification. *Id*. The Sixth Circuit further reiterated its finding that the high rate of turnover among child care providers was a problem because elections were held years before deductions for fees took place. *Id.* The Sixth Circuit thus held that the conflict between the named Plaintiffs, who opposed paying union fees and many members of the proposed class, who favored paying fees to the union, meant that the named Plaintiffs failed to satisfy the requirement that the representative parties would fairly and adequately protect the interest of the class. *Id.* at *15-16. The Sixth Circuit thereby affirmed the denial of class certification.

***Spirit Airlines, Inc. v. Association Of Flights Attendants, et al.*, 2015 U.S. Dist. LEXIS 78241 (E.D. Mich. June 17, 2015).** In this action challenging the domestic partner health care benefits available to flight attendants, Plaintiffs sought to vacate an arbitration award issued by a three-member Board that resolved in favor of Defendant. *Id.* at *1. An issue arose during the arbitration proceedings as to whether one of the Board members, Carmen Linn, could continue her service on the Board, in light of her retirement as a flight attendant, which occurred during the arbitration proceedings, before the Board issued its final award. *Id.* at *2. Interpreting a provision of the parties' collective bargaining agreement ("CBA") requiring that the two partisan Board members be full-time company employees, the neutral arbitrator, Susan Brown, unilaterally determined that Linn's continued service on the Board after her retirement was appropriate because the composition of the Board was proper when initially constituted and a Board member's status does not change during the life of a case even though that member may become ineligible to serve on future Boards. *Id.* at *3. The Court, however, denied Defendant's motion for judgment on the pleadings, which sought enforcement of the arbitration award, holding that the Board's award resulted from a violation of the majority-vote provisions of the Railway Labor Act ("RLA") and CBA. *Id.* The parties then cross-moved for summary judgment, and the Court granted Defendant's motion to enforce the award. The Court observed that the RLA mandates only that final system Board decisions, *i.e.*, decisions that conclude the grievance proceedings, be by majority vote, and does not require a majority vote for preliminary decisions leading to a final decision, such as Brown's decision on the Board composition issue. *Id.* at *7. Because Brown's decision resolving the Board composition issue was not a final judgment or decision, or one that ended the proceeding leaving nothing further to be done, the Court found that it did not require a majority vote, and thus, Brown's failure to decide the issue by majority vote did not constitute a violation of the RLA's majority-vote provision. *Id.* at *8. The Court also opined that Brown's decision on the Board composition issue did not clearly violate any provision of the parties' CBA because the CBA did not contain any explicit guidance on how disputes arising during the course of the grievance proceedings should be decided, and it was unclear whether all system Board decisions, as opposed to only final decisions resolving the grievance, were subject to the CBA's majority-vote requirement. *Id.* at *9. Thus, because the CBA arguably did not prohibit Brown from issuing a unilateral decision resolving a procedural issue growing out of the grievance proceedings, the Court refrained from concluding that Brown ignored or misread the plain language of the CBA by issuing a unilateral ruling on the Board composition issue. The Court's previous decision declining to enforce the award was based entirely on the finding that Brown's unilateral decision on the Board composition issue violated the RLA and CBA. Subsequently, the Court opined that because the decision did not, in fact, violate the RLA and drew its essence from the CBA, the unilateral nature of the ruling was not an appropriate basis on which to decline to enforce the Board's ultimate award

in favor of Defendant. *Id*. at *11. Additionally, the Court remarked that its earlier ruling about Linn's post-retirement eligibility to serve on the Board was in no way meant to preclude an arbitral finding that Linn remained eligible despite her retirement or otherwise limit the options available to the parties going forward with regard to any avenues available under the CBA for completing the arbitration. *Id.* at *14. Finally, Plaintiff argued that the award was wholly baseless and reflected the arbitrator's own notions of industrial justice. The Board had held that the airline's policy of treating married flight attendants and their spouses more favorably than partnered flight attendants and their partners by affording the former group more healthcare options than the latter violated the CBA's prohibition on marital status discrimination. *Id.* at *17. Because the Board had construed and applied the CBA, the Court enforced the arbitration award.

(xiv) Attorneys' Fee Awards In Class Actions

***Andrews, et al. v. City Of New York,* 2015 U.S. Dist. LEXIS 101115 (S.D.N.Y. Aug. 3, 2015).** Plaintiffs, a group of female Safety Agents ("SSAs") employed by the City of New York, brought a class action alleging that Defendant paid them less than Special Officers ("SOs"), a predominantly male group of employees who performed similar work, in violation of Title VII of the Civil Rights Act. *Id.* at *3. Plaintiffs agreed to settle all claims against Defendant in exchange for back pay awards ranging from $250 to $7,000 per Plaintiff, totaling around $32 million, depending upon factors such as their dates and lengths of employment. *Id.* The parties also agreed that the rates of pay for SSAs and SOs will be equalized, and that each named Plaintiff would receive service awards of $18,000. *Id.* On March 26, 2015, the Court approved the settlement, finding the agreement fair and reasonable. Plaintiffs' counsel then moved for an award of attorneys' fees as well as reimbursement of their costs. Class counsel requested the Court to order Defendant to pay statutory fees in the amount of $3,830,466 and statutory costs in the amount of $872,082 pursuant to the fee-shifting provision of the FLSA, and a percentage of the common settlement fund. *Id.* at *4-5. The Court held that the class counsel was entitled to a reduced award of statutory fees and costs, but not to a percentage of Plaintiffs' recovery. *Id.* at *5. Because there was nothing in the action to preclude the operation of the fee-shifting statute and class counsel had no contractual right to a percentage of Plaintiffs' recovery, the Court determined that the use of common fund doctrine was not appropriate. *Id.* at *13. The Court explained that awarding the class counsel a percentage of Plaintiffs' recovery in addition to reasonable statutory fees would provide an unwarranted windfall to class counsel to be taken from money that would otherwise go to members of the collective action. *Id.* The Court then reviewed class counsel's billing records and determined that an amount of $1,831,032 would constitute reasonable attorneys' fees in this action. *Id.* at *14. The Court inflated the hourly rates of each attorney and made an overall reduction of 20% for the billing deficiencies to reach a lodestar figure of $1,831,032 toward total fees. *Id.* at *33. The Court also reviewed the costs records and found that clerical overtime and computer research costs charged were unrecoverable. *Id.* at *34. Accordingly, the Court awarded Plaintiffs' counsel $1,831,032 in attorneys' fees and $80,664 in costs, for a total award of $1,911,696.

***Evangeline Red, et al. v. Kraft Foods, Inc.,* Case No. 10-CV-1028 (C.D. Cal. April 29, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant mislabeled their food products and thus violated California's Unfair Competition Law, False Advertising Law, and the Consumer Legal Remedies Act. On three separate occasions, the Court rejected Plaintiffs' attempts to certify a class, but allowed them to amend their motion to seek class certification of their injunctive relief claims under Rule 23(b)(2). In response, Defendant argued that Plaintiffs' claims were effectively moot because it was no longer using the challenged health and wellness labels. Rejecting Defendant's argument, the Court concluded that Plaintiffs' claims would be moot only if Defendant agreed to stipulate to an order preventing it from reintroducing the challenged labels. Defendant voluntarily agreed and in October 2012, the Court entered an order prohibiting Defendant from using certain labels on the packaging for a number of challenged products. *Id.* at 2. Plaintiffs then filed a motion seeking attorneys' fees of $3.3 million for enjoining Defendant from using certain packaging labels and causing a change in Defendant's business practices. *Id.* Plaintiffs arrived at the $3.3 million figure by increasing their $1.43 million lodestar calculation by a 2.3 multiplier for "exceptional results." *Id.* Finding that Plaintiffs' fee request was grossly inflated, the Court awarded Plaintiffs $101,702.38 in fees and costs based on Plaintiffs' limited success in prohibiting Defendant from re-introducing food labels it had largely stopped using before the filing of this action. *Id.* Plaintiffs then settled their individual claims with Defendant and preserved their right to appeal

the class certification rulings, and then filed a second fee award motion seeking $1.9 million based on a lodestar calculation of $1,587,025.50. *Id.* at 3. Plaintiffs contended that they were the "prevailing" and "successful" parties for purposes of a fee award, as they achieved a permanent injunction against Defendant, caused changes in Defendant's business practices, and received an amount of money to settle their individual claims. *Id.* at 5. The Court granted Plaintiffs' renewed motion, but awarded them only $11,368.25 in attorneys' fees. While the Court agreed that Plaintiffs were prevailing or successful parties to the extent they succeeded in securing an injunction against Defendant, it noted that they were not prevailing or successful parties in achieving changes in Defendant's business practices, food formulas, or anything else not covered by the permanent injunction or the settlement of individual claims. *Id.* at 6. The Court raised doubts as to how the action could be considered a practical success as it had dismissed many of Plaintiffs' claims, denied class certification multiple times, found no liability, and Plaintiffs' cash settlement could be considered only an achievement of one of Plaintiffs' primary objectives as individual litigants. *Id.* The Court further found that Plaintiffs increased their total lodestar from the initial $1.43 million to $1.59 million despite no significant development of case after the first fee motion, obtaining limited results, and receiving nothing they set out to obtain through this action. *Id.* at 7. Although the Court found Plaintiffs' "excessive" fee demand sufficient to warrant outright denial, it granted attorneys' fees in an amount of $11,368.25 for work done to settle Plaintiffs' individual claims. *Id.* Accordingly, the Court granted Plaintiffs' renewed motion for attorneys' fees awarding them only $11,368.25.

***Gutierrez, et al. v. Wells Fargo Bank, N.A.,* 2015 U.S. Dist. LEXIS 67298 (N.D. Cal. May 21, 2015).** Plaintiffs brought a class action against Defendant for engaging in unfair business practices by imposing overdraft fees and for engaging in fraudulent practices by misleading clients. Following a bench trial, the Court found Defendant's conduct fraudulent under the California Unfair Competition Law and awarded full restitution of $203 million and injunctive relief. Class counsel thereafter filed a fee petition seeking $50.7 million in fees. *Id.* at *5-7. The Court granted the fee petition in part. The two law firms – McCune Wright and Lieff Cabraser – represented that they informally had agreed to a sliding scale ranging from 50/50 to 70/30, giving Lieff Cabraser a greater share of the fee award. The Court refused to enforce the private agreement and awarded Lieff Cabraser $16,262,985.75 and McCune Wright $2,263,471.50 in fees. The Court employed the lodestar method with a percentage cross-check. The Court reasoned that justice would be better served by tying the fee award to the actual hours that class counsel reasonably expended on the action because the large size of the recovery was due to the large size of the class rather than class counsel's specialized skill and efforts. *Id.* at *13-14. The Court therefore rejected McCune Wright's claimed lodestar of $1.9 million. *Id.* at *16-17. The Court reviewed McCune Wright's timesheets and found that many of its claimed fees were massively overstated, inadequately detailed, unrelated to productive effort, and/or not compensable. *Id.* at *17. The Court also found that McCune Wright had exaggerated its contributions, especially in tasks such as discovery, closing argument, and appeal, and had padded its timesheets with projects reflecting overstaffing, duplication, inefficiency, lack of billing judgment, and an abundance of inter-office teleconferences. *Id.* The Court, therefore, held that McCune Wright's lodestar under historical rates was $1,131,735.75. *Id.* at *18. At the same time, the Court fully credited Lieff Cabraser's calculated lodestar under historical rates of $2,956,906.50. The Court recognized the full $203 million in restitution that it obtained for the class at trial, the incidental benefits from the injunction it obtained for the class, and its superior efforts on appeal. *Id.* The Court then considered other factors, including the novelty and difficulty of the questions involved, the results obtained, and the customary fees in such cases, and determined that McCune Wright deserved a multiplier of 2 because it took on a seven-year risk of non-payment and delay in fees by commencing the action, and Lieff Cabraser deserved a multiplier of 5.5 because it confronted several obstacles and secured a full recovery of $203 million in restitution plus injunctive relief. *Id.* at *23-24. The Court, therefore, concluded that class counsel was entitled to an award of $18,526,457.25 in attorneys' fees. *Id.* at *25. Accordingly, the Court granted in part class counsel's fee petition.

***In Re Bank Of New York Mellon Corp. Forex Transaction Litigation,* No. 12-CV-3066 (S.D.N.Y. Sept. 24, 2015).** Plaintiffs, a group of bank customers and investor clients, sued Defendants in multiple class actions for breach of their fiduciary duties, unjust enrichment, and corporate waste. Plaintiffs claimed that Defendants told customers it provided the "best execution" on their foreign exchange transactions, but

instead charged the most expensive price of the trading day to buy currencies, and then paid the least expensive price when Defendants sold them, and kept the difference. After substantial litigation, the parties agreed to a settlement of $335 million, which the Court approved. Subsequently, the Court awarded a total of $83.75 million in attorneys' fees to a consortium of law firms who prosecuted the class actions.

Editor's Note: The fee award $83.75 million in this ruling is the largest fee award in 2015.

***In Re Dairy Farmers Of America, Inc., Cheese Antitrust Litigation,* 2015 U.S. Dist. LEXIS 20408 (N.D. Ill. Feb. 20, 2015).** Plaintiffs, a group of purchasers, brought a putative class action alleging that Defendants combined, conspired, and agreed to fix or manipulate the prices of milk futures and other contracts in violation of the Commodity Exchange Act ("CEA"), the Racketeering Influenced and Corrupt Organizations Act ("RICO"), the Sherman Act, and the Cartwright Act. The parties subsequently settled, and Defendants agreed to pay $46 million as consideration. After final approval of the settlement, the class counsel moved for an award of attorneys' fees and reimbursement of expenses. The Court granted class counsel's fee petition and awarded one-third of the settlement fund plus costs and expenses. While the Court acknowledged that there was no shortage of cases supporting the reasonableness of class counsel's fee request, it also pointed out the specific complexities inherent in this six-year MDL antitrust matter, and the sizable legal and expert fees amassed in litigating these claims. *Id.* at *18-19. Particularly, the Court cited the long and arduous litigation, compounded by the intricacies of the particular commodities markets, the parsing of actions on a day-by-day basis over a long time period, and the inclusion of both traders and purchasers in the settlement class to conclude that there was no justification for any reduction of the requested fee. *Id.* at *19. Although class counsel benefitted from a large volume of documents and multiple deposition transcripts collected via a price-manipulation investigation by the U.S. Commodity Futures Trading Commission, the Court noted that class counsel had nonetheless engaged in enough proprietary legal services that distinguished their efforts in the current litigation. *Id.* at *21-22. Further, the absence of objections, except from Schreiber Foods, Inc., convinced the Court that the requested award was reasonable. *Id.* at *24. Schreiber argued that class counsel's fees should be measured by the lodestar method. *Id.* at *27. Because the Court adopted the percentage-of-the-fund approach, Schreiber's lodestar-based objections did not significantly impact the Court's analysis. *Id.* at *29. To the extent Schreiber's objections called into question the reasonableness of fee request, the Court found no unique argument that required further discussion. *Id.* at *36. Accordingly, the Court granted the class counsel's fee petition awarding $15,333,333.33 in fees, plus $488,491.24 in costs and expenses.

***In Re Hyundai And Kia Fuel Economy Litigation,* Case No. 13-ML-2424 (C.D. Cal. Mar. 19, 2015).** In this multi-district litigation involving 12 putative consumer class actions alleging that Defendants misrepresented the fuel efficiency of Hyundai and Kia cars, the Court partly granted Plaintiffs' six separate motions for an award of attorneys' fees. Because this was not strictly a common fund settlement, and Defendants agreed to pay attorneys' fees separately from the amount allocated to the class, the Court applied the lodestar method. *Id.* at 1. First, the Court granted Plaintiffs' motion for attorneys' fees and costs in the *Wilson* case in the amount $78,964, finding it presumptively reasonable. The Court noted the requested fees billed at $300 per hour and $250 hour were lower than the comparable legal services rates and comparable lodestar rates that other counsel in this action requested. The Court also found that the detailed billing sheets that showed the number of hours and type of work by counsel supported the reasonableness of the requested fees. *Id.* Second, the Court granted Plaintiffs' motion for attorneys' fees in the amount of $2,700,000 in the *Hunter* and *Brady* cases based on a total lodestar of $1,909,995, representing 5,512 hours of work. The Court found the lodestar amount reasonable given the complexity and volume of work. Furthermore, the estimated multiplier of 1.22 fell within the acceptable range for class counsel in this complex and multi-year action. *Id*. Third, the Court granted Plaintiffs' motion for attorneys' fees in the amount of 1,257,000 in the *Liaison* case, with the exception of Bonsignore, PLLC's motion for attorneys' fees in amounts ranging from $5,000 to $346,000. *Id.* at 6. The Court found that the requested fees, with the exception of the request of Bonsignore, PLLC, were presumptively reasonable, as they were discounted from the lodestar amounts in percentages that accounted for the fact that the non-settling Plaintiffs had a more minor role in this action and did not participate in negotiating the primary settlement.

Id. The Court additionally noted that counsel in the *Liaison* case efficiently managed the requests from well over 20 different law firms and effectively represented the interests of non-settling Plaintiffs, including actively participating in revisions to the proposed settlement in a manner that addressed many weaknesses in the original proposed settlement. *Id.* Because Bonsignore, PLLC did not make a compelling argument for how the firm's efforts benefitted the class as a whole, the Court denied its request of fees of $357,485. Fourth, the Court denied Plaintiffs' motion for attorneys' fees in the amount of $2,789,522.50 in the *Birth, Krauth,* and *Hasper* cases. The Court found the listed rate of $925 per hour for one of three attorneys was especially exorbitant in the context of the actual work performed. *Id.* Furthermore, counsel did not submit detailed billing records with its request or any numerical comparison of the rates, and thus the Court could not justify the type and complexity of legal work. *Id.* at 2-3. The Court therefore requested counsel in the *Bird*, *Krauth*, and *Hasper* actions to submit additional documentation and new briefing on a more reasonable request for attorneys' fees. *Id.* at 4. Fifth, the Court denied Plaintiffs' motion for attorneys' fees and costs of $6 million in the *Espinosa* case. Although the requested fees were within the amount acceptable under a common fund method of calculating fees, the Court noted that it represented a multiplier under the lodestar method that was far higher than the 1.22 multiplier requested by other counsel. Although *Espinosa* was an earlier action compared to the *Hunter* and *Brady* actions, the Court pointed out that the legal theories in the *Hunter* and *Brady* cases were the primary ones that gave rise to the class settlement. *Id.* The Court therefore requested counsel in *Espinosa* to further explain why it should be awarded a 3.0 multiplier when counsel in *Hunter/Brady* only sought a 1.22 multiplier. *Id.* at 5. Finally, the Court denied Plaintiffs' request for attorneys' fees of $800,172.79, including the costs in the *Virginia* case, finding that counsel's work was largely duplicitous or without merit, and it did not meaningfully contribute to the class settlement. *Id.* at 7.

***In Re IndyMac Mortgage-Backed Securities Litigation,* 2015 U.S. Dist. LEXIS 37052 (S.D.N.Y. Mar. 24, 2015).** In this class action, the lead plaintiffs, the Wyoming State Treasurer and the Wyoming Retirement System, alleged that Defendants, JPMorgan Chase and other financial institutions, mislead investors about the inherent risk of IndyMac Bank's mortgage-backed securities. After the parties settled the litigation for $346 million, Plaintiffs moved for attorneys' fees and reimbursement of expenses. Eight law firms that served as Plaintiffs' counsel requested an aggregate fee award of $44.89 million or about 13% of the $346 million settlement fund. *Id.* at *3. The aggregate lodestar of $24.57 million reflected 55,372 hours worked multiplied by hourly rates between $210 and $420 per hour for associates and $410 to $835 per hour for partners. *Id.* The total requested fee thus reflected a blended multiplier of 1.83, with proposed multipliers varying by firm. *Id.* Finding the requested fee of $44.89 million unreasonably high, the Court instead approved an aggregate fee award of approximately $28.48 million, a figure it arrived at by cutting the portion of the aggregate lodestar attributable to discovery costs by 25% and by adopting reduced multipliers. *Id.* at *8. Although Plaintiffs' counsel argued that the proposed 13% of the $346 million settlement fund would be modest and on the low end of percentage fee awards by other judges in similar securities fraud litigation, the Court held that, in light of its own experience as well as its knowledge of the case, a fee of 8% to 10% of the settlement fund would be more appropriate. *Id.* at *8-11. The Court noted that, taking into account the 55,372 lawyer and professional staff hours reflected in counsel's billing records, the proposed fee of $44.89 million would result in a blended hourly rate for all attorneys and other time-keeping staff of $810.71 per hour, which was excessive. *Id.* at *13. According to the Court, its adopted range would remunerate Plaintiffs' counsel beyond their lodestar of $24.57 million and would reflect a more reasonable proportion of the total recovery. *Id.* The Court further found that the lodestar cross-check also confirmed that the proposed fee was too high. Although the hourly rates appeared reasonable, the Court raised concern on the hours expended on discovery. Plaintiffs' counsel had reported that they devoted 32,658 hours to discovery, a figure amounting to nearly 60% of all hours spent on the action. *Id.* at *20. The Court conducted a detailed inquiry into the hours expended on discovery, and exercised its discretion to cut "surplusage" on a percentage basis by reducing the portion of each firm's lodestar attributable to discovery by 25%. *Id.* at *21. This resulted in a revised aggregate lodestar of $21.42 million. *Id.* at *22. The Court then reduced the portion of any multiplier greater than 1 by 60% across the board, which yielded a new blended multiplier of 1.33 (instead of the proposed blended multiplier of 1.83) and a total fee award of 28.48 million. *Id.* Thus, the revised award reflected 116% of counsel's original lodestar, 133% of counsel's adjusted lodestar, 8.2% of the total recovery, and a blended

hourly rate of $514.29. *Id.* The Court opined that the revised fee award more reasonably balanced the interests of the class with the goal of adequately compensating Plaintiffs' counsel for their work on this litigation. The Court further considered all the factors, including counsel's time and labor, the litigation's magnitude and complexity, the risk of the litigation, the quality of representation, the requested fee in relation to the settlement, and public policy consideration, and concluded that these factors also supported an award between 8% and 10% of the settlement fund. *Id.* at *16-19. Accordingly, the Court granted Plaintiffs' motion for attorneys' fees and reimbursement of expenses in the aggregate amount of $31,469,489.61.

***In Re Platinum And Palladium Commodities Litigation*, 2015 U.S. Dist. LEXIS 98691 (S.D.N.Y. July 7, 2015).** In this class action, Plaintiffs alleged that Defendants engaged in a manipulative scheme to create artificially high prices of platinum and palladium futures contracts traded on the New York Mercantile Exchange ("NYMEX"). Plaintiffs' action consisted of two classes, including: (i) a physical class comprised of all persons and/or entities who purchased, invested in, or otherwise acquired an interest in platinum and/or palladium bullion in the physical market, and (ii) a futures class comprised of all persons that purchased or sold a NYMEX platinum futures contract or a NYMEX palladium futures contract. Subsequently the futures and physical classes settled the action with the Moore Defendants and with the MF Global Defendants, and the Court granted final approval to the settlements. *Id.* at *6. The final settlement fund for the futures class was $72.5 million, and $12.1 million for the physical class. Counsel for both classes moved for award of attorneys' fees and costs, and the Court granted the physical class counsels' motion, and granted in part the futures class counsels' motion. The Court noted that both sets of class counsel faced significant risks in this complex litigation, as claims for manipulations in violation of the Commodity Exchange Act were notoriously difficult to prove and more difficult and risky than securities fraud cases. *Id.* at *8. Further, the futures class counsel spent about 13,300 hours on the litigation, and the physical class counsel spent 5,260 hours of professional time, and it was undisputed that the negotiations leading to the settlements were the exceptionally challenging even for highly experienced counsel. *Id* at *9-10. The Court remarked that the fact that class counsel had obtained a recovery for both classes higher than the average class recovery demonstrated the quality of class counsel. The Court noted that the billing rates of the physical class counsel, that ranged from $300 to $750 per hour, were reasonable and comported with the rates approved in Manhattan and that the lodestar multiplier of 1.4 fell within the range approved in the U.S. District Court for the Southern District of New York. *Id.* at *11-12. The futures class counsel's billing rates ranged from $250 to $950 per hour, generating a lodestar of $8,249,144 that yielded a multiplier of 2.6. *Id.* at *13. The futures class counsel's allocation of time was heavily weighted toward partners. The Court observed that at most firms, partners with the highest billing rates play a supervisory role, while attorneys who bill at lower rates perform more basic role, and here, the lodestar value reflected an over allocation of work to more experienced partners. *Id.* at *14. The Court also remarked that the futures class counsels' multiplier of 2.6 was higher than that awarded in other commodities and securities cases. *Id.* Thus, the Court opined that the percentage of the common fund awarded to the futures class counsel should be reduced, considering the large percentage of hours attributable to attorneys with the highest billing rates and the relatively early stage of the litigation in which the settlement was reached. The Court ruled that a 22.5% award of the common fund to futures class counsel was appropriate, which represented a multiplier of about 1.9. Accordingly, the Court awarded $16,312,500 in attorneys' fees to futures class counsel and $4,029,300 to the physical class counsel. Finally, the Court awarded $704,294 and $229,230.82 toward expenses to the futures and physical class counsel respectively.

***In Re Polyurethane Foam Antitrust Litigation,* 2015 U.S. Dist. LEXIS 23482 (N.D. Ohio Feb. 26, 2015).** Plaintiffs, a group of direct purchasers of flexible polyurethane foam, brought a putative class action alleging that Defendants conspired to fix, raise, stabilize, or maintain the prices and allocate territories or customers of the foam, in violation of antitrust laws. The parties reached a settlement under which two Defendants agreed to pay a total of $147.8 million to Plaintiffs. Following preliminary settlement approval and dissemination of class notice, Plaintiffs' counsel moved for an award of attorneys' fees of $44.34 million or 30% of the total settlement amount. *Id.* at *9. The Court granted the fee request. The Court acknowledged that the case was complex and that the value of class counsel's work to the class was

apparent from the outcome of the settlement. The Court noted that the settlement terms were the product of hard-fought, arms' length negotiation between experienced class action antitrust lawyers. *Id.* at *14. Even deducting fees from the settlement fund, Plaintiffs recovered more than $100 million from the settling Defendants. *Id.* at *22. Further, class counsel emphasized that they pursued this case on their own, and that the work in the case had caused them to turn away billable hours from other clients, who would have paid their full hourly rates on a rolling basis. *Id.* Defense counsel also agreed that the settlement result was impressive, given the substantial risk Plaintiffs faced in further litigation. *Id.* at *18. Although class counsel had received a 30% share toward attorneys' fees from an earlier settlement fund of another settling Defendant, the Court noted that the class counsel would still be substantially "under water" relative to their estimated lodestar. *Id.* at *22. The Court, however, cautioned that a 30% fee award for a second time was not "an indicator of future fee awards" and that it "may adjust fee awards downward to achieve a reasonable benchmark and prevent windfall." *Id.* at *24. Accordingly, the Court granted class counsel's fee request of $44.34 million.

***In Re Volkswagen & Audi Warranty Extension Litigation*, 2015 U.S. Dist. LEXIS 16646 (D. Mass. Feb. 10, 2015).** Plaintiffs, a group of consumers, brought several class actions alleging that Defendants defectively designed engines in certain Audi and Volkswagen automobiles that were unusually prone to the formation of oil sludge and coking deposits, even when maintained according to Defendants' recommendation. The cases were consolidated and later settled. Defendants did not admit of any liability or wrong-doing, but agreed to pay for engine repair and replacement costs, and among other things, created an "oil sludge settlement administrator" to oversee the claims process for class members. *Id*. at *15-16. Plaintiffs moved for an award of attorneys' fees and expenses pursuant to the settlement agreement, and the Court awarded $30 million in fees to lead counsel. On appeal, however, the award was reversed on the grounds that it was error to use the percentage of fund method for calculating fees, and that Massachusetts law must govern the appropriate attorneys' fee. *Id*. at *20. On remand, the Court awarded attorneys' fees based on Massachusetts law. At the outset, the Court noted that the previous presiding judge had awarded $7.7 million in fees and $1.1 million in costs in this case. *Id*. at *26. The Court remarked that it was required to determine whether, and by how much, class counsel's pre-award base lodestar figure ought to be enhanced. Class counsel requested a multiplier of 2.5 to 3.5, translating to a fee award of $19 to $27 million. Defendants countered that the base lodestar ought to be reduced, in effect applying a negative multiplier, to yield an amount that was proportionate to the value of the benefits that had actually been collected by class members. *Id*. at *27. The Court observed that the first factor for determining the reasonableness of attorneys' fees – the nature of the litigation favored class counsel – as Defendants had vigorously advocated their interests in this complicated lawsuit. *Id*. at *28. As to the value of benefits collected by class member, the Court observed that the settlement agreement provided four types of benefits, including (i) reimbursement of unpaid claims that were covered under warranty; (ii) a free 10 year warranty extension; (iii) revised literature on oil maintenance recommendations; and (iv) one-time oil change discount of $25. *Id*. at *30. Defendants valued the benefits at $12.7 million, whereas Plaintiffs' experts valued the benefits at $73.9 million. *Id*. at *32. Plaintiffs' expert pegged the cost of educating the class members alone at $56.2 million. *Id*. at *32-33. Plaintiffs also asserted that the oil sludge settlement administrator received $3 million in fees. *Id*. at *33. The Court made an independent evaluation and valued all four forms of relief at $101 million. The Court found that a multiplier of 2 was appropriate enhancement to the class counsel's pre-award base lodestar of $7.7 million. *Id*. at *41. The Court ordered Defendants to pay class counsel $15.4 million in fees and $1.19 million in costs and expenses. As to post award fees and expenses, the Court evaluated the class counsel's uncompensable pre-award time, and the time spent on internal disputes and agreements, travel time, appellate fees and costs, and found them to be excessive and ordered them to be deducted from the award. *Id*. at *58-60.

***In Re Weatherford International Securities Litigation,* Case No. 11-CV-1646 (S.D.N.Y. Jan. 5, 2015).** In this securities class action, Plaintiffs alleged that Defendant Weatherford International Limited and certain officers, as well as its auditor, Ernst & Young LLP, issued materially false statements regarding Weatherford's tax accounting and ignored facts necessary to make the statements not misleading, in violation of § 10(b) and 20(a) of the Securities Exchange Act of 1934. Plaintiffs alleged that Weatherford had understated its tax expenses from 2007 through 2010 by over $500 million. After the parties settled

the litigation, Plaintiffs moved for final approval of a $52.5 million class action settlement and plan of allocation, and for an award of attorneys' fees and reimbursement of litigation expenses. The Court approved the settlement, but reduced the attorneys' fee award. Plaintiffs sought awards of attorneys' fees and expenses in the aggregate amounts of $14,001,660.28 in favor of lead counsel, the Kessler Topaz firm, which was 24% of the total settlement amount, and $193,685.75 in favor of the Law Offices of Curtis V. Trinko. *Id*. at 1. First, the Court found misgivings about the lodestar and, both independent and in consideration of the lodestar, the size of the requested fee. *Id*. While the Court assumed that over 30,000 hours of time had been recorded, it had serious doubts whether this case, handled efficiently and especially for a paying client, would justify an expenditure of hours that great. *Id*. Second, the Court observed that Kessler Topaz unreasonably billed out its staff attorneys at rates ranging from $375 to $395 per hour, which were more than 600% of their direct cost to the firm. *Id*. at 2. The Court remarked that award of attorneys' fees based on the percentage-of-recovery model has the drawbacks of encouraging premature settlements, as well as settlements that serve the lawyers' interest and not the class members. The Court expressed its concern that the lodestar check does little to control excessive fee awards when there is no Defendant or objector participation. Thus, the Court adjusted the numbers based on the considerations such as the amount of time that should have been devoted to this case, the rates charged for the staff attorneys, and the average fee award in class action settlement of this size. *Id*. at 2-3. Accordingly, the Court reduced the compensable hours and the staff attorney hourly rates to the extent necessary to yield a lodestar for the Kessler Topaz firm of $9,450,000, and awarded it a fee in that amount plus expenses of $1,381,724.59. *Id*. at 3. The Court, however, granted the Trinko firm's application in its entirety. *Id*. The Court concluded that the overall fee award was between 18% and 19% of the settlement.

***Keller, et al. v. National Collegiate Athletic Association,* 2015 U.S. Dist. LEXIS 166546 (N.D. Cal. Dec. 10, 2015).** Plaintiffs, a group of student-athletes who played on men's football or basketball teams at Division I member schools and conferences, brought three related class actions alleging that Defendant, National Collegiate Athletic Association ("NCAA"), violated the Sherman Act by conspiring with licensing companies, Electronic Arts, Inc. ("EA") and Collegiate Licensing Co. ("CLC"), to restrain competition for the commercial use of their names, images, and likenesses in television broadcasts and Defendant's brand video games. *Id.* at *19. The Court earlier granted final approval of a class action settlement and allocated 29% of the NCAA settlement fund, or $5.8 million, and 30% of the EA settlement fund, or $13.2 million, for attorneys' fees. *Id.* at *29. While Plaintiffs in this action (the "Keller Plaintiffs") sought $8.58 million in fees from EA and $5.8 million in fees from the NCAA, counsel for the O'Bannon Plaintiffs in Case No. 09-3329 sought $8 million in fees from EA, and the current counsel for Plaintiff in *Hart v. EA,* Case No. 09-59990 (D.N.J. 2011) and their former counsel sought $883,177 and $4.62 million, respectively, in fees from EA. *Id.* at *30-31. The Court granted the Keller Plaintiffs' motion for fees of $5.8 million, finding that an allocation of the requested 29% of the common fund for attorneys' fees in the NCAA settlement was fair and reasonable, and they were the only law firm seeking fees under the NCAA settlement. *Id.* at *31. Further, the Court determined how to allocate fees between the O'Bannon Plaintiffs' counsel and counsel for the Keller Plaintiffs alleging right of publicity claims. Considering several factors in weighing the contribution of each set of Plaintiffs' counsel to the settlement, the Court concluded that $4 million in fees should be set aside for the O'Bannon Plaintiffs' counsel and that $2 million should be placed in escrow. *Id.* at *44. The Court opined that if the NCAA paid the fee award related to the O'Bannon trial, $2 million would be paid to the Keller Plaintiffs' counsel; otherwise, it would be paid to the O'Bannon Plaintiffs' counsel. *Id.* In reaching this conclusion, the Court considered: (i) the work that the O'Bannon Plaintiffs' counsel contributed to advance the *O'Bannon* case, while the *Keller* and *Hart* cases were stayed; (ii) the undisputed fact that the O'Bannon Plaintiffs' counsel spent many more hours prosecuting *O'Bannon* through the date of settlement than the Keller Plaintiffs' counsel spent in the other cases; and (iii) the Keller Plaintiffs' exposure to additional risk due to the mandatory fee-shifting under California's right of publicity and anti-SLAPP statutes. *Id.* at *37-42. Of the remaining $6 million in fees from the EA fund, the Court held that $5.721 million would be awarded to the Keller Plaintiffs' counsel because the right of publicity claims raised in this action exposed EA to the greatest liability and the substance and timing of the appeal in the case as it affected the settlement weighed in favor of finding that the Keller Plaintiffs' claims produced the greatest benefit to the settling class. *Id.* at *45-46. The Court reduced the lodestar claimed by the Hart plaintiffs' counsel by 60%, finding that the records were replete with excessive and vague

entries, including the use of block billing. *Id.* at *48-49. The Court further found that the Hart Plaintiffs' former counsel's time records were also replete with entries that were not reasonably related to the litigation or settlement of the case. Consequently, the Court granted the Hart Plaintiffs' current counsel $260,000, and adjusted the Hart former counsel's lodestar by 70%, granting $696,700 in fees. *Id.* at *53-73. Finally, the Court granted the Keller Plaintiffs' counsel $224,434.20 in costs from the NCAA fund and $224,434.20 in costs from the EA fund; the O'Bannon Plaintiffs' counsel over $1.8 million in costs from the EA fund; the Hart Plaintiffs' current counsel over $12,000 in costs from the EA fund; and former counsel for the Hart Plaintiffs nearly $23,000 in costs from the EA fund. *Id.* at *77.

***Levitt, et al. v. Southwest Airlines Co.,* 2015 U.S. App. LEXIS 14601 (7th Cir. Aug. 20, 2015).** Plaintiffs, a group of customers who bought "Business Select" tickets on Southwest Airlines, brought a class action alleging that Defendant breached a contract in August 2010 when it stopped honoring certain in-flight drink vouchers without a printed expiration date and announced that each voucher was good only on the flight covered by the accompanying ticket. *Id.* at *4. Plaintiffs brought the action on behalf of a putative class of customers holding unredeemed Business Select drink vouchers that became worthless. The parties subsequently agreed to settle the claim. As part of the settlement, Defendant agreed to issue replacement coupons to each class member valid for one year on any Southwest flight, to pay incentive awards to the two lead Plaintiffs of $15,000 each, and to pay attorneys' fees up to $3 million plus expenses up to $30,000. *Id*. at *5. The District Court approved the class settlement as fair and reasonable, focusing primarily on the fact that the settlement provided essentially complete relief to the class. *Id.* at *6. The District Court used the lodestar method, with a multiplier of 1.5 for good results, to calculate attorneys' fees of $1,332,206.25 plus $18,522.32 in expenses. *Id.* at *7. Following an evidentiary hearing, the District Court used higher hourly rates and increased the fee award to $1,649,118. *Id.* Class counsel appealed, arguing that they deserved the full $3 million in attorneys' fees. A group of objectors argued that class counsel was entitled to only a portion of the coupons actually redeemed. The Seventh Circuit rejected both arguments. First, the Seventh Circuit found that the settlement was subject to § 1712 of the Class Action Fairness Act ("CAFA"), which applies to class action settlements that provide for "a recovery of coupons." *Id.* at *9. The Seventh Circuit determined that § 1712 allowed the District Court to use the lodestar method to calculate the fee award for class counsel. The Seventh Circuit noted that a broader view of the text and structure of § 1712, along with its legislative history, showed that a District Court has discretion to use the lodestar method to calculate attorneys' fees even if it intended to compensate class counsel for the coupon relief obtained for the class. *Id.* at *10-11. The Seventh Circuit explained that § 1712 restricts attorneys' fees to a percentage of coupons redeemed when the settlement proposes attorneys' fees as a percentage of the recovery and that it allows for lodestar fees as an alternative. *Id.* at *16-20. The Seventh Circuit reviewed the District Court's order granting approval of the settlement for abuse of discretion and found that the District Court rightfully found the settlement to be fair and reasonable. According to the Seventh Circuit, the fact that the class members would receive essentially everything they could have hoped for made the settlement distinctive, and class counsel should be compensated accordingly for an exceptional settlement that actually made the class whole. *Id.* at *24. The Seventh Circuit, however, rejected class counsel's argument that the District Court abused its discretion by awarding the lower amount of $1.65 million rather than deferring to the amount agreed in the negotiations. The Seventh Circuit found that the District Court accommodated the most reasonable points raised by class counsel, and judicial deference to the results of private negotiations was not appropriate for class action settlements. *Id.* at *26-27. The Seventh Circuit also modified the settlement to remove one of the class representative's $15,000 incentive awards and to reduce the class counsel's share of the attorneys' fees by the same amount on the basis that the pair failed to disclose their relationship as co-counsel on another case. *Id.* at *33-35. Accordingly, the Seventh Circuit affirmed the District Court's order approving the settlement.

***MacDonald, et al. v. Ford Motor Co.,* 2015 U.S. Dist. LEXIS 151277 (N.D. Cal. Nov. 2, 2015).** Plaintiffs, a group of drivers who purchased or leased 2005-2008 Ford Escape Hybrid vehicles and/or 2006-2008 Mercury Mariner Hybrid vehicles, brought a putative class action alleging that the vehicles equipped with the Motor Electronic Cooling System contained defective coolant pumps, and that Defendant knowingly failed to inform the consumers about the defect. *Id.* at *2. On June 23, 2013, Plaintiffs served Defendant with a pre-litigation demand letter pursuant to the California Legal Remedies Act, and after filing of the

complaint, served a formal demand latter requesting that Defendant remedy the alleged defect. *Id.* While the parties exchanged initial disclosures and interrogatories, Defendant informed the National Highway Traffic Safety Administration ("NHTSA") of its intent to perform a voluntary safety recall of the vehicles. *Id.* at *6. Defendant also offered to replace all of the defective Motor Electronic Cooling Pumps free of charge and reimburse any out-of-pocket repairs for the same prior to the date of the safety recall notification. *Id.* Defendant's voluntary recall took place over fourteen months after Plaintiffs filed this action requesting the relief offered by the recall. *Id.* Because most of Plaintiffs' claims became moot due to Defendant's recall, Plaintiffs filed a motion seeking attorneys' fees under a catalyst theory. Plaintiffs argued that the chronology of events supported an inference that this action was a substantial factor in Defendant's decision to recall the vehicles. *Id.* at *9. Defendant responded that an internal Ford team monitoring the defect independently decided to recall the affected vehicles without considering this action. Defendant argued that Kenneth Lilly, the employee tasked with handling inquiries about vehicles problems, had been overwhelmed with work, and thus did not get around to the question of whether the class vehicles had defective cooling pumps until 2014. *Id.* Defendant also argued that the Plaintiffs' action did not provide any information about the defect that it did not already know based on its own investigation in 2009, and that an e-mail from Transport Canada about a stalled car prompted Lilly to re-analyze some data and uncover a larger problem, ultimately resulting in Defendant recalling the cars. The Court rejected Ford's position. It did not find enough convincing contemporaneous evidence to rebut the inference from the chronology of events to show that Plaintiffs' action did not serve as the catalyst for Defendant's recall decision. *Id.* at *21. The Court was not convinced with Defendant's argument that an e-mail inquiry about one car stalling in a parking lot triggered the recall actions despite several complaints to NHTSA and Plaintiffs' class action complaint. *Id.* at *13. Defendant offered nothing to explain why it took the Transport Canada inquiry more seriously than the several complaints to the NHTSA that described similar events and why, even if the industry view was "changing," Defendant waited until the Transport Canada incident to delve more deeply into the matter. *Id.* at *14. The Court thus found significant holes in Defendant's evidence as it pertained to the decision-making process behind the recall or to the complaint in this action. *Id*. at *15. Because the action had merit, Plaintiffs' claims were not frivolous, unreasonable, or groundless, and the action resulted in enforcement of an important right affecting the public interest, the Court determined that an award of attorneys' fees would be appropriate. Accordingly, the Court granted Plaintiffs' motion for entitlement to attorneys' fees.

***McGee, et al. v. Cole,* 2015 U.S. Dist. LEXIS 92315 (S.D. W. Va. July 16, 2015).** Plaintiffs brought a declaratory action alleging that West Virginia Code §§ 48-2-104, 48-2-401, and 48-2-603, and all other sources of West Virginia law prohibiting same-sex marriage were unconstitutional. After the Fourth Circuit, in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), held that Virginia's ban was unconstitutional, the District Court granted Plaintiffs' motion for summary judgment and declared § 48-2-104 and 48-2-401 unconstitutional insofar as they prohibited same-sex marriage. *Id.* at *4. Plaintiffs then moved for an award of attorneys' fees, which the District Court granted in part. Although Plaintiffs filed this action when same-sex marriage was a changing area of law, and Plaintiffs' counsel sought out Plaintiffs in West Virginia to file this action, the District Court noted that this action was a proper suit under § 1983 to vindicate Plaintiffs' civil rights and overturn unconstitutional legislation. *Id.* at *14. Because the fees requested were not so extreme to warrant the denial of attorneys' fees, the District Court opined that Plaintiffs were entitled to an award of fees and costs. Although each attorney provided some support for the hourly rates each sought, the District Court remarked that those rates were well above the relevant local market rates. *Id.* at *15. The Court recognized that while the law firms that initiated this civil rights litigation and brought to it a level of expertise and stature that may not have been available from in-state firms, it remarked that they sought out West Virginia Plaintiffs and a West Virginia forum. *Id.* Further, the Court reasoned that they should not expect hourly rates to be based upon rates from large metropolitan markets, such as their home cities. *Id.* at *15-16. The Court thus adjusted the hourly rate according to the local market rates, keeping in mind their length of experience and specific expertise, and the nature of their responsibilities in this action. *Id.* at *17. To justify their higher hourly rates, Plaintiffs' attorneys pointed out their experience with similar cases. The Court, however, noted that several of these lawyers worked on the same issues in parallel cases, and remarked that their prior knowledge should have helped them avoid inefficient or unnecessary work. *Id.* at *20. The Court thereby reduced the lodestar amounts for each attorney by two-thirds. *Id.* at

*21. Additionally, the Court subtracted 31 hours from Plaintiffs' total fee petition to account for Plaintiffs' unsuccessful non-recognition claim. Plaintiffs' counsel had sought $342,576 in attorneys' fees. *Id*. at *13. Accordingly, the Court awarded Plaintiffs $92,125 in attorneys' fees.

***Montgomery, et al. v. Kraft Foods Global, Inc.,* 2015 U.S. Dist. LEXIS 24533 (W.D. Mich. Mar. 2, 2015).** Plaintiff brought a consumer fraud class action alleging that Defendant violated the Michigan Consumer Protection Act ("MCPA") and breached warranties and contracts by deceiving customers about its products' compatibility. Plaintiff purchased a Kraft-Tassimo single serving coffee brewing system for the purpose of brewing Starbucks coffee using special cups called "T-discs." *Id*. at *2. Starbucks subsequently pulled its brands from Defendant's Tassimo, and it became increasingly difficult to find Starbucks T-discs. Plaintiff alleged that Defendant and Starbucks disseminated false and misleading information designed to lead consumers to believe that Starbucks T-discs would be available for a reasonable amount of time into the future, although Defendant knew that its business relationship with Starbucks soon would end. *Id.* at *2. Pursuant to Defendant's motions, the Court dismissed Plaintiff's claims for breach of express and implied warranties and breach of contract, leaving Plaintiff's individual claim under the MCPA. In light of the certainty that the amount of attorneys' fees that would be incurred to further litigate the case would dwarf any damages that Plaintiff might recover, the Court issued a show cause order as to why it should not order Defendant to submit an offer of judgment to Plaintiff in the amount of $250 plus costs and reasonable attorneys' fees. *Id.* at *4. In response, Defendant made an offer, and Plaintiff accepted. Plaintiff then filed a motion for attorneys' fees. Plaintiff sought an award of attorneys' fees in the amount of $174,786 based on 499.39 hours of work performed at an hourly rate of $350. *Id*. at *14. Plaintiff also submitted a supplemental fee request in the amount of $8,382.50 for 23.95 hours of work performed after accepting the offer of judgment. *Id.* The Court partly granted Plaintiff's motion, awarding her $6,417 in attorneys' fees. Based on the review of the pertinent information submitted by the parties, the Court found that $155 per hour would be the reasonable rate for the work performed by Plaintiff's attorney, a sole practitioner. The Court found that the attorney's proposed rate was significantly more than the mean rates for first-year sole practitioners, and the attorney showed no reason for such a significant departure. *Id.* at *19. Moreover, Plaintiff's claim was relatively straightforward and did not require any particular specialized experience. The Court, therefore, found that $155 per hour was the reasonable rate for Plaintiff's attorney. The Court opined that Plaintiff's request for 499.39 hours was unreasonable on its face because it included 330.83 hours for work spent on class discovery and class certification, which the Court had rejected. Accordingly, the Court excluded the 330.83 hours incurred during class discovery through the denial of class certification from the reasonable hour calculation. *Id.* at *23. The Court further excluded 59.80 hours that Plaintiff's attorney allegedly spent following the denial of class certification because such work did not contribute materially to the resolution of Plaintiff's claims; instead, the Court reasoned that one hour would have been more than reasonable to resolve the case. *Id*. at *25-26. The Court then deducted four hours from the 9.90 hours that the attorney spent on pre-complaint research to reflect the simplicity of the case as an individual claim under the MCPA and limited the hours spent by the attorney responding to motions to dismiss to 10 hours. *Id* .at *23-25. The Court, therefore, concluded that the number of hours reasonably spent by Plaintiff's attorney was 41.4, and multiplying that number by a rate of $155 resulted in a fee award of $6,417. Accordingly, the Court awarded Plaintiff $6,417 in attorneys' fees.

Editor's Note: The ruling in *Montgomery* is rare and decidedly favorable to the defense. It rejects wholesale the notion that fees can be recovered after a settlement where Plaintiffs' counsel loses a motion for class certification.

***O'Bannon, et al. v. National Collegiate Athletic Association,* 2015 U.S. Dist. LEXIS 91514 (N.D. Cal. July 13, 2015).** Plaintiffs, a group of current and former college student-athletes, alleged that Defendants violated federal antitrust laws by conspiring to prevent former collegiate athletes from receiving compensation for the use of their images. Before the Court ruled on class certification, Plaintiffs settled with two Defendants, Electronic Arts, Inc. ("EA") and Collegiate Licensing Company ("CLC"). As to Plaintiffs' antitrust claims against the remaining Defendant, National Collegiate Athletic Association ("NCAA"), the Court held a non-jury trial and found the NCAA liable for violating § 1 of the Sherman Act. The NCAA appealed to the Ninth Circuit. With the appeal pending, Plaintiffs filed a fee petition seeking in

excess of $4.5 million in attorneys' fees and over $5.2 million in costs and expenses under the Clayton Act. The Court referred the matter to a Magistrate Judge who granted Plaintiffs' motion with a reduction. The NCAA served Rule 72 objections to the fee award, and argued that Plaintiffs could not recover fees for time spent on ultimately unsuccessful claims, whether or not they were related or unrelated to Plaintiffs' successful claims. The Court found that a common core of facts underlay all of the claims Plaintiffs brought against the NCAA because all claims were premised on Defendants' exploitative use of Plaintiffs' names, images, and likenesses to generate revenue for Defendants. *Id*. at *20. Because all of Plaintiffs' unsuccessful claims were related to the successful claims, and contributed to the litigation of the successful antitrust claims, the Court found the NCAA's arguments unpersuasive. *Id*. at *24. The NCAA also claimed that Plaintiffs' counsel failed to submit adequate time records that featured block billing, vague entries, redactions, and improper time increments. The Court, however, found that Plaintiffs' counsel sufficiently had documented their hours and, therefore, no reduction was necessary because of block billing, vague entries, or redactions. *Id*. at *27-29. As to improper time increments, the NCAA requested the Court to reduce by 20% the fees for work identified in 5,191 of Plaintiffs' time entries because Plaintiffs' counsel recorded times in quarter-hour increments, as opposed to six-minute increments, for a total of $1.3 million. *Id*. at *29. After reviewing the disputed entries, the Court found that a small number of entries described tasks that likely took a fraction of the time recorded. The Court, nevertheless, remarked that it did not find the practice widespread and excessive and, therefore, imposed only a 5% reduction. *Id*. at *31. The NCAA further contended that the Court should not award fees to Plaintiffs based on work related to claims not subject to fee shifting, which included: (i) work against Defendants EA and CLC; (ii) work related to state law claims; (iii) work soliciting clients and competing to be lead counsel; and (iv) certain clerical work. The Court rejected the NCAA's request because Plaintiffs properly excluded work related to the EA/CLC settlement from the fee petition. *Id*. at *36. Likewise, the Court rejected the NCAA's other challenges against attorneys' fees. The Court noted that, although Plaintiffs were technically entitled to a $40 per day in expert witness fees, Plaintiffs failed to ask for this relief in their fee petition. Because Plaintiffs did not satisfy their burden, and because the Clayton Act does not provide explicit statutory authority for expert fee awards, the Court denied Plaintiffs' request of $3.6 million for expert fees. *Id*. at *48. Accordingly, the Court granted Plaintiffs' motion for attorneys' fees, directed the NCAA to pay $4.4 million as opposed to the $4.5 million sought by Plaintiffs, and ordered NCAA to pay Plaintiffs $1.5 million as opposed to the $5.2 million in costs sought by Plaintiffs under the Clayton Act.

***Reid, et al. v. Unilever United States, Inc.,* 2015 U.S. Dist. LEXIS 75383 (N.D. Ill. June 10, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant marketed and sold a hair care product that caused them hair loss and other injuries, in violation of the Magnuson-Moss Warranty Act ("MMA"), the Illinois Consumer Fraud and Deceptive Business Practices Act (the "ICFA"), and substantively similar laws of Alabama, Wisconsin, and Nevada. *Id.* at *2-3. Plaintiffs also alleged state common law claims for breach of warranty, negligence, strict liability, and unjust enrichment. The parties subsequently agreed to a settlement in which Defendant would provide $10,250,000 to the settlement administrator for the establishment of two settlement funds, including: (i) a reimbursement fund of $250,000; and (ii) an injury fund of $10 million. *Id.* at *5. Following final settlement approval, Plaintiffs filed a motion for an award of attorneys' fees in the amount of $3,416,632.50, which was roughly the equivalent one-third of the settlement fund. *Id.* at *7. In granting Plaintiffs' motion in part, the Court awarded attorneys' fees to Plaintiffs in the amount of $1,503,285.41. While Plaintiffs argued that the $10.25 million settlement amount created a common fund and that the Court should apply the percentage-of-the-fund method in determining an appropriate fee award, Defendants argued that the Court should apply the lodestar method because the settlement fund did not constitute a common fund. *Id.* at *12-13. The Court determined that it would apply the lodestar method to determine the reasonableness of the fees, since the settlement agreement and the subsequent briefs indicated that the parties agreed that the statutory fee-shifting provision contained in the MMA would control, and because common fund principles do not apply in a statutory fee-shifting case. *Id.* at *18. The Court analyzed the hours Plaintiffs' attorneys reasonably expended litigating the case, and struck certain disputed time entries on the basis that they were non-compensable, clerical in nature, excessive, redundant, unnecessary, or otherwise unrecoverable. *Id.* at *25-42. Further, the Court analyzed the reasonableness of the hourly rates that Plaintiffs' attorneys sought and determined a reasonable rate, ranging from $520 to $650 per hour, for each attorney based on their

experience, credentials, and contribution to the action. *Id.* at *50-74. The Court thus reached a lodestar figure of $1,503,285.41. *Id.* at *76. Because the MMA fee-shifting provision governed the analysis of fees, the Court declined to increase Plaintiffs' lodestar on the basis of the risk of non-payment involved in the case. *Id.* at *79. Accordingly, the Court awarded attorneys' fees to Plaintiffs in the amount of $1,503,285.41.

***Tait, et al. v. BSH Home Appliances Corp.,* 2015 U.S. Dist. LEXIS 98546 (C.D. Cal. July 27, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant designed, manufactured, marketed, and sold front-loading washing machines that had a propensity to develop bacteria, mold, and fungus, which produced foul odors. *Id.* at *5-6. Plaintiffs asserted violations of state consumer protection statutes, common law fraudulent concealment and non-disclosure breach of express and implied warranties, and unjust enrichment. Following extensive discovery, the parties agreed to a settlement. The settlement class consisted of all residents of the United States who purchased one or more Defendant's specified front-loading washers. *Id.* at *10. The settlement allowed each class member to be eligible for a $55 cash payment provided they submitted proof of ownership. *Id.* Defendant agreed not to oppose a request by class counsel for attorneys' fees and costs of $6.5 million, including expert fees and costs. *Id.* at *11. The Court granted final settlement approval. Considering the strength of Plaintiffs' case, risk, expense, complexity, the Court found that the settlement was fair, adequate, and reasonable. Although only about 19,500 people out of a class of up to 650,000 filed claims and it could not be considered to be an "excellent result" as class counsel described, the Court found that the settlement was reasonable in light of the risks Plaintiffs could face going forward in the case. *Id.* at *29. The risks included defending Defendant's appeal following certification of Plaintiffs' proposed class, as well its subsequent motion for reconsideration and an attempt to join Whirlpool Corp.'s appeal to the U.S. Supreme Court in a similar action. *Id.* at *4-5. Defendant had also filed a motion for summary judgment that remained pending prior to the settlement, which the Court identified as one of the serious obstacles to the victory Plaintiffs faced. *Id.* at *20. The Court found that the class counsel's requested amount of attorneys' fees was also reasonable in light of the circumstances of the case. Based on the class counsel's billing records, the Court calculated class counsel's lodestar to be $8,498,409.02. *Id.* at *41. While class counsel's lodestar with no multiplier would be 7.8 times the maximum amount that would be going to class members (*i.e.*, $1,090,795 or approximately $1.65 per class member), the Court remarked that the class counsel was wise to request a fee amounting to a significant reduction of their lodestar. *Id.* at *43-44. Class counsel requested a fee of $4,188,981.61, or a negative multiplier of approximately 0.5 of the unadjusted lodestar, or 3.8 times of the amount going to the class. *Id.* at *44. The Court found that this fee adequately took into account the results achieved for the class. Some of the objectors argued that the reasonableness of the fees should be determined by comparison to the actual amount that would be paid to class members, *i.e.*, $1,070,795 based on a 3% claims rate, and not to the "fictional" figure of $35,750,000 that assumed a 100% claims rate. *Id.* at *45. The Court, however, held that comparing the requested fee to the actual pay-out does not necessarily lead to the conclusion that the requested fee was unreasonable, and it found it appropriate to calculate fees using the lodestar method with a percentage of recovery cross-check. *Id.* The Court further reimbursed class counsel costs amounting to $2,311,018.39, finding the costs were reasonably incurred. Accordingly, the Court granted Plaintiffs' motion for final approval of the settlement, the motion as to attorneys' fees of $4,188,981.61, and reimbursement of costs totaling $2,311,018.39.

(xv) Intervention Rights In Class Actions

***CE Design Ltd., et al. v. King Supply Co., LLC,* 2015 U.S. App. LEXIS 11117 (7th Cir. June 29, 2015).** Plaintiffs brought a class action alleging that Defendant sent unsolicited faxes to them and to other persons in violation of the Telephone Consumer Protection Act ("TCPA"). Defendant issued commercial general liability and commercial umbrella policies by three insurance companies, but upon its request for coverage they disclaimed any obligation to defend or indemnify their insured against Plaintiffs' lawsuit. The insurers based their disclaimer primarily on provisions in the insurance policies that appeared to exempt liability under the TCPA from the policies' coverage. The District Court certified a class consisting of recipients of advertising faxes from Defendant, and the Seventh Circuit reversed the order on the basis of various irregularities. On remand, the parties settled for $20 million, the limit of the insurance policies with only 1% of the judgment ($200,000) executable against Defendant. When the insurers learned of the proposed

settlement, they filed a declaratory judgment action in Texas, disclaiming coverage. While that suit was dismissed for lack of jurisdiction, a similar suit was filed in an Illinois state court where the trial court ruled that the insurance policies did not cover Defendant's liability under the TCPA. Plaintiffs appealed that decision. Before the District Court approved the settlement agreement, the insurers moved to intervene in the case to persuade the District Court to delay approval of the settlement until there was a determination by the state court of whether they owed Defendant coverage, and also, if they failed to obtain a favorable determination in state court, that the settlement was collusive and unreasonable. The District Court denied the motion to intervene as untimely. On the insurers' appeal, the Seventh Circuit affirmed. The District Court ruled that the insurers should have moved to intervene in 2009, when they had disclaimed coverage of the claims that Defendant, their insured, had violated the TCPA. *Id*. at *4. The insurers argued that Defendant betrayed them by failing to defend against class counsel's $20 million settlement proposal. *Id*. at *5. The Seventh Circuit reasoned that although the insurers in this case were right to worry that class counsel in the TCPA class action and Defendant might collude for an excessive recovery, favorable to the class and to class counsel and harmless to Defendant, they should have taken action when the suit was filed rather than almost three years later. *Id*. at *7. The Seventh Circuit noted that almost all class actions settle, and those settlements might be the product of tacit collusion between class counsel and Defendant. *Id*. The Seventh Circuit held that the insurers' motion to intervene in the federal litigation was untimely and therefore denied because the insurers should have foreseen the danger of such a settlement from the outset, and had they wished to challenge it on the ground that class counsel and Defendant were conspiring to over-compensate the class, they should have moved to intervene at the outset of the litigation, not nearly three years later, when the settlement had been negotiated and was about to be presented to the District Court for approval. *Id*. at *9-10. Further, the Seventh Circuit opined that rather than intervene belatedly, the insurers could have exercised their right under the insurance policies from the outset of the class action to control and conduct Defendant's defense. *Id*. at *10. The insurers then could have refused to agree to a settlement that cost them $20 million (minus $200,000). *Id*. Accordingly, the Seventh Circuit affirmed the District Court's judgment.

***In Re 650 Fifth Avenue And Related Properties*, Case No. 08-CV-10934 (S.D.N.Y. April 17, 2015).** Three movants sought to intervene individually and on behalf of a "limited fund" class under Rule 23(b)(1)(B) in order to have the assets at issue in the actions – *In Re 650 Fifth Avenue And Related Properties* and *Peterson v. Islamic Republic of Iran* – distributed *pro rata* among all victims of Iran-sponsored terrorism. *Id.* at 1-2. The District Court denied the motion. First, the Court found that it lacked jurisdiction because its summary judgment orders in *650 Fifth Avenue* were on appeal before the Second Circuit, and a petition for *certiorari* was pending before the U.S. Supreme Court in the *Peterson* action. *Id.* at 2. Because the movants sought to intervene in order to seek substantially the same relief that was the subject of the pending appeals, the District Court remarked that if it were to grant the motion, it would disrupt the on-going proceedings in the Second Circuit and the Supreme Court. *Id*. Second, the District Court found that even if it had jurisdiction, it must deny the motion as untimely because the movants knew or should have known for many years of their interest in the assets at issue in *650 Fifth Avenue* and *Peterson*. The District Court noted that those actions were filed in 2008 (*650 Fifth Avenue*) and 2010 (*Peterson*), yet the movants did not seek to intervene until March 2015, one day before the appeal in *650 Fifth Avenue* became fully briefed and two months after the filing of the *certiorari* petition in *Peterson*. *Id.* at 3-4. Moreover, the District Court pointed out that while other terrorism victims had been pursuing recoveries against Iran for over a decade, the movants filed a liability action against Iran only six months ago. *Id.* at 4. The District Court maintained that the movants' intervention would prejudice Plaintiffs in the *650 Fifth Avenue* and *Peterson* actions by interfering with multiple settlement agreements that were entered into in these two actions. The Court found that intervention also would undermine the extensive efforts that Plaintiffs had undertaken in the *650 Fifth Avenue* and *Peterson* actions. The District Court noted that unlike the movants, the judgment creditors in both actions had diligently pursued their claims and the enforcement of their judgments over many years, and they would be substantially prejudiced by intervention at that advanced stage of the proceedings. *Id.* at 4-5. Further, the District Court found that the motion should be denied because the movants had failed to show a direct, substantial, and legally protectable interest in the assets at issue in the *650 Fifth Avenue* and *Peterson* actions. The District Court pointed out that the movants had not obtained a liability judgment against Iran, much less demonstrated

any cognizable interest in the specific assets at issue in those actions. *Id.* at 6. Notwithstanding those issues, the District Court found that a limited fund class action was inappropriate because the fund for satisfying judgments against Iran was not limited to the assets at issue in *650 Fifth Avenue* and *Peterson*. *Id.* at 6-7. Finally, the District Court rejected the argument that any victim had the right to claim compensation from a government forfeiture action at any time until the funds at issue had been distributed, because the Government has discretion in deciding whether and how to remit forfeited assets. *Id*. at 7. Accordingly, the District Court denied the motion to intervene.

***Love, et al. v. Wal-Mart Stores, Inc.,* Case No. 12-CV-61959 (S.D. Fla. Nov. 18, 2015).** Plaintiffs, a group of female employees, brought a putative class action against Defendant alleging nationwide sex discrimination under Title VII of the Civil Rights Act. In 2015, the parties settled and dismissed the action, and several other employees subsequently asked the Court to allow them to intervene to appeal the order dismissing Plaintiffs' class claims as time-barred. *Id.* at 1. The Interveners argued that because Plaintiffs settled their case, they could no longer appeal the Court's order and therefore, they must be permitted to intervene to protect their interests and appeal. *Id.* At the outset, the Court noted that the case was voluntarily dismissed with prejudice consistent with Rule 41(a)(1)(A)(ii) before the Interveners sought to intervene. *Id.* The Court noted that pursuant to Rule 41(a)(1)(A)(ii), a Plaintiff may voluntarily dismiss an action without a Court's order by filing a stipulation of dismissal signed by all parties who have appeared; in that instance, the stipulation dismisses the case and divests the Court of jurisdiction. *Id.* at 1-2. Consequently, the Court held that given the jurisdictional effect of a Rule 41(a)(1)(A)(ii) dismissal, the parties' stipulation of dismissal meant that the Court could not make legal determinations on the merits. *Id.* The Court further noted that case law authorities routinely find that once the parties filed a stipulation of dismissal, there was no longer a pending case or controversy into which a non-party may intervene. *Id.* The Court, therefore, concluded that because the stipulation of dismissal divested the Court of jurisdiction, there was no live case or controversy into which the Interveners might intervene. Accordingly, the Court denied the motion to intervene.

***Melendres, et al. v. Arpaio,* Case No. 07-CV-2513 (D. Ariz. Aug. 13, 2015).** Plaintiffs brought an action alleging that Defendants maintained a custom, policy, and practice of racially profiling Latino drivers and passengers, and of stopping them pre-textually under the auspices of enforcing federal immigration laws and/or Arizona state immigration-related laws. The U.S. Department of Justice moved to intervene under Rule 24(a)(1) and Title IX of the Civil Rights Act of 1964, which the Court granted. As a rule, the U.S. Attorney General has an unconditional right to intervene in cases that are of general public importance, and the United States also has an unconditional statutory right to intervene in actions seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution on account of race, color, religion, or national origin. *Id.* at *2. The Court remarked that this case involved Defendants' alleged denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution on account of individuals' race or national origin. Further, the Attorney General had certified that this case was of general public importance. *Id.* In addition, no parties raised objections to the intervention. *Id*. Accordingly, the Court granted the United States' motion to intervene.

(xvi) Collateral Estoppel, *Res Judicata*, And Settlement Bar Concepts Under Rule 23

***Amalfitano, et al. v. Google Inc.*, 2015 U.S. Dist. LEXIS 12096 (N.D. Cal. Feb. 2, 2015).** Plaintiff, a Gmail user, brought a putative class action under the Stored Communications Act ("SCA") seeking to represent a class of individuals who attempted to but were unable to opt-out of a 2010 class action lawsuit concerning Defendant's Google Buzz application. In 2010, when Google launched the Google Buzz program, it automatically enrolled Gmail users into the program. Plaintiff alleged that the automatic enrollment in Buzz caused the public disclosure of Gmail users' information, such as contact lists, profile information, and Picasa and YouTube postings. *Id*. at *1-2. Defendant moved to dismiss the complaint, arguing that *res judicata* barred Plaintiff's claim because he was a member of the class action settlement in *In Re Google Buzz Privacy Litigation*, Case No. 10-CV-672 (N.D. Cal. 2010) (the "Buzz Class Action"), which involved the same SCA claim concerning Buzz. The Court granted Google's motion. The Court found that Plaintiff's SCA claim was identical to the claim raised in the Buzz Class Action, which concluded with a Court-approved class settlement that constituted a final judgment on the merits. *Id*. at *7. Although

Plaintiff attempted to opt-out of the Buzz Class Action, his opt-out notice was deemed untimely. Plaintiff challenged the legal effect of the facts surrounding the timeliness of his opt-out notice on the basis that the "key element" of whether he was a party to the Buzz Class Action was "in dispute." *Id*. The Court perceived no such dispute because the final approval and judgment was binding "upon all Class Members who had not timely opted-out." *Id*. The Court held that, as a class member who did not timely opt-out, Plaintiff was bound by the class settlement and his action was barred by *res judicata*. *Id*. at *8. Accordingly, the Court dismissed Plaintiff's complaint.

***ATD Group, et al. v. Citigroup, Inc.,* 2015 U.S. App. LEXIS 16289 (2d Cir. Sept. 14, 2015).** Plaintiffs, a group of stockholders, brought a class action alleging that Defendant and several of its directors, officers, and agents fraudulently misled investors by materially understating the value of collateralized debt obligations backed by sub-prime mortgages. The parties reached a settlement, and the District Court granted preliminary approval. After the District Court approved the class settlement and dismissed the action, Burgess and Icon ("Appellants"), former employees of Defendant who acquired and held Defendant's common stock, commenced an arbitration before the Financial Industry Regulatory Authority ("FINRA"). On Defendant's motion, the District Court permanently enjoined the Appellants from pursuing arbitration. On appeal, the Appellants contended that the District Court abused its discretion in enjoining the FINRA proceeding. The Second Circuit affirmed the District Court's order. *Id.* at *2. First, the Second Circuit found that the District Court did not abuse its discretion in determining that the Appellants failed to exclude themselves from the prior securities class action settlement because Icon did not file any request for exclusion but rather participated in the settlement, and Burgess failed to timely opt-out. *Id.* at *3-4. Second, the Second Circuit found that the District Court correctly determined that the claims asserted in the FINRA proceeding arose out of the identical facts as the claims asserted in the settled securities class action. *Id.* at *5. Third, the Second Circuit found that the interests of Plaintiffs and the Appellants were aligned because both were interested in recovery from losses due to Defendant's investments. Further, the Second Circuit found it insignificant that the Appellants' acquisition of stock resulted from equity compensation for employment, whereas Plaintiffs acquired their shares independently from an employment relationship, because such variation between their interests did not render Plaintiffs inadequate class representatives. *Id.* at *6-7. Fourth, the Appellants contended that the class notice failed to comport with due process because it failed adequately to inform class members that pre-class period claims would be released. The Second Circuit found that the language of the class notice clearly stated that the scope of the release related to investments in Citigroup common stock through April 18, 2008, inclusive. *Id.* at *7. Fifth, the Second Circuit found that the securities class action settlement superseded any prior existing agreement to arbitrate claims because, if a party initially consented to arbitrate claims, but later entered into a settlement agreement, the claims that had been released would no longer be subject to arbitration. *Id.* at *8. Accordingly, the Second Circuit found that the Appellants were bound by the class settlement and release, and it affirmed the order of the District Court.

***Covert, et al. v. LVNV Funding LLC,* 2015 U.S. App. LEXIS 3278 (4th Cir. Mar. 3, 2015).** Plaintiffs, a group of bankruptcy debtors, brought a putative class action alleging that Defendants violated the FDCPA and various Maryland laws by filing proofs of claim without a Maryland debt collection license. In 2008, each Plaintiff filed an individual petition for Chapter 13 bankruptcy in the U.S. District Court for the District of Maryland. Defendants acquired defaulted debt against each Plaintiff and filed proofs of claim in each bankruptcy proceeding. The Bankruptcy Court approved each Chapter 13 plan, allowed Defendants' claims, and each Plaintiff made payments on the claims. Plaintiffs subsequently brought this action alleging that Defendants were not legally entitled to collect those debts because Defendants did not have a debt collection license at the time they filed proofs of claim in the Bankruptcy Court. *Id.* at *3-4. Plaintiffs requested injunctive relief and an instruction requiring Defendants to return to Plaintiffs all the money paid pursuant to the proofs of claim. *Id.* at *4. Defendants moved to dismiss, and the District Court granted the motion finding that the doctrine of *res judicata* barred Plaintiffs' unjust enrichment claim. The District Court also dismissed Plaintiffs' FDCPA claims and Maryland consumer protection law claims, finding that a proof of claim was not a "collection action" under these statutes. *Id.* at *5. On appeal, the Fourth Circuit affirmed the dismissal on *res judicata* grounds. The Fourth Circuit reasoned that in bankruptcy cases, prior bankruptcy judgments have *res judicata* effect when three conditions are met, including: "(i) the prior

judgment was final and on the merits, and rendered by a Court of competent jurisdiction in accordance with the requirements of due process; (ii) the parties are identical, or in privity, in the two actions; and (iii) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding." *Id.* at *6. The Fourth Circuit found that the bankruptcy judgment met the first and second elements because the confirmation of a bankruptcy plan was a final judgment on the merits, and both Plaintiffs and Defendants were parties to the proceedings in the Bankruptcy Court. *Id.* at *6-7. The judgment met the third element because Plaintiffs' claims were based on the same cause of action as Defendants' claims in the confirmed bankruptcy plan. *Id.* According to the Fourth Circuit, even claims that do not directly contradict confirmed orders but merely assert rights inconsistent with those orders are sufficient to meet the third *res judicata* requirement. *Id.* at *8. Because all of Plaintiffs' claims implicitly required reconsideration of the provisions of the confirmed plans, the Fourth Circuit concluded that they were based on the same cause of action as the plan confirmation orders and, accordingly, barred by *res judicata*. *Id.* at *10. The Fourth Circuit also clarified that *res judicata* bars not only the claims actually raised during prior litigation, but also those claims that could have been raised, provided that the information needed to raise those claims was available to Plaintiffs. *Id*. Plaintiffs could have objected to Defendants' proofs of claim at the time Defendants filed them during the bankruptcy proceedings, and they "were not free to raise statutory objections after the Court had entered its confirmation order when those objections were known or should have known to them." *Id.* Thus, because Plaintiffs did not assert that information necessary to make out their claims was unavailable to them at the time their plans were confirmed, the Fourth Circuit concluded that *res judicata* barred all of their claims, including the statutory claims. Accordingly, the Fourth Circuit affirmed the dismissal of Plaintiffs' action.

(xvii) Notice Issues In Class Actions

***Brown, et al. v. Sega Amusements, USA, Inc.,* 2015 U.S. Dist. LEXIS 28442 (S.D.N.Y. Mar. 9, 2015).** Plaintiff brought a putative class action alleging that Defendants' marketing and sale of the Key Master amusement game were false, deceptive, and likely to mislead consumers because Defendants pre-programmed the machines to prevent players from winning a prize. Subsequently, the parties settled the action for $650,000 to be distributed to the class members, and moved for preliminary approval of class action settlement, and approval of class notices. The Court denied the motion without prejudice. The parties proposed a lengthy notice of settlement to class members describing the proposed settlement agreement. In order to distribute this notice to potential class members, the parties proposed a notice-by-publication plan consisting of advertisements which would be published in sources specifically targeting settlement class members, including internet and mobile phone banner ads and press releases. *Id*. at *5-6. Those on-line and mobile phone advertisements would provide digital links to an administration website which, in turn, would contain information about the nature of the action and the settlement agreement. *Id*. at *6. The Court, however, found problematic the notification of prospective class members at video game arcades or other amusement centers throughout the United States between November 1, 2010 and the present. *Id*. at *5-6. Further, the Court determined that the notice-by-publication plan was unclear because Plaintiff provided no factual basis for his assertion that any Key Master players would likely view the proposed banner ads and, even if they did so, how likely they would subsequently follow the links to the administration website, view the notice of settlement, understand it, and file a claim form. *Id*. at *8. In addition, the settlement agreement also required Defendants to send a proposed "Player Notice" to all distributors and owners of a Key Master machine to be prominently displayed on each of the machine's front pane of glass so they would be easily visible to the player and which described elements of the game and the circumstances in which a player may obtain a prize. *Id*. at *4. The parties informed the Court that: (i) the difficulty level to win the game may vary within a single machine; (ii) an operator can change the difficulty level at any time; and (iii) the likelihood of winning also depends on the skill of each individual player, and there is no way of specifying the likelihood of winning or specific difficulty level on the Player Notice. *Id*. at *5. The Court found that the Player Notice was confusing because it stated that "if you get the key into the hole, the Key Master will vend a prize," but, at the same time, it stated that the game "may currently be set in a mode where prizes may be more difficult to win for a certain number of plays." *Id*. at *14. The Player Notice also was unrealistic, insofar as it suggested to players to contact the operator if they had questions regarding how frequently the difficulty changed for each row. Thus, Court concluded

that because the Player Notice was not providing useful information to players, they were likely to ignore it. *Id*. at *14-15. Accordingly, the Court denied settlement approval without prejudice.

***Nieberding, et al. v. Barrette Outdoor Living, Inc.,* 2015 U.S. Dist. LEXIS 121447 (D. Kan. Sept. 11, 2015).** Plaintiff brought an action on behalf of himself and others alleging that Defendant violated the Kansas Consumer Protection Act by supplying defective plastic bracket used to connect vinyl guardrails on residential decks and porches. *Id.* at *1-2. Plaintiff also asserted claims for breach of warranty and unjust enrichment. On September 8, 2014, the Court certified a liability-only class of individuals, corporations, and other entities who purchased the plastic brackets supplied by Defendant during a defined period. *Id.* at *2. On March 25, 2015, the parties advised the Court that they reached a settlement and sought certification of a slightly different class for settlement purposes. *Id.* at *4. The Court granted the motion and the class action administrator mailed a long form notice and claim form to 223 individuals identified as potential class members. The class action administrator also published notice, as directed by the Court-approved notice plan, in the newspapers, and received no opt-out requests or objections to the settlement. *Id.* at *5-6. Plaintiff subsequently moved for final approval of the class action settlement and application for award of attorneys' fees and expenses. The settlement agreement required Defendant to pay $350,000 into a common fund, which would be used to pay all costs of notice and administration, any fees and costs awarded to Plaintiff's counsel, any incentive award to Plaintiff, and all claims by class members. *Id.* at *16. Plaintiff requested the Court to approve deductions of: (i) $73,899.25 to pay the claims administrator for the administrative costs of the settlement; (ii) $125,829.42 in attorneys' fees and $35,426.26 in expenses; and (iii) $7,000 as an incentive award payable to Plaintiff. *Id.* at *17. The Court granted Plaintiff's motion in part. The Court approved the amounts requested by Plaintiff to pay the claims administrator and to reimburse class counsel for expenses, but reduced the amount requested for attorneys' fees to $118,587.24 and the incentive award to $3,500, leaving $118,587.25 remaining in the settlement fund for distribution to the class. *Id*. at *18. While the Court acknowledged that the parties fairly and honestly negotiated the settlement, it raised a concern that the $125,829.42 sought by class counsel actually exceeded the $107,845.07 that remained in the settlement fund for distribution to the class. *Id.* at *31. The Court determined that its duty to award a reasonable fee required it to equalize the amount of the fee award with the amount left for distribution to class members, and therefore, approved an attorneys' fee award of $118,587.24, leaving $118,587.25 remaining in the settlement fund for distribution to the class. *Id*. at *31-32. The Court also found that an award of $3,500, or 1% of the common fund was a more appropriate measure of Plaintiff's effort for the class, and a reduction was appropriate because it made available additional funds to the class members and provided a greater level of benefit to the class as a whole. *Id.* at *34-35. The Court, otherwise, found the settlement fair, reasonable and adequate, and held that a typographical error in the long form notice's description of the location for settlement approval hearing did not render the notice insufficient. *Id.* at *21-23. The Court explained that, to the extent any class member was confused by the incorrect address, that person could have called the toll-free number listed on the notice or contacted the claims administrator, any of the counsel listed in the notice, or even the Court to confirm the location of the final approval hearing, and thus, the error did not materially reduce the quality of the notice received by the class members or warranted the cost of an additional round of notice to the class members. *Id.* at *25-26. Accordingly, the Court granted in part Plaintiff's motion for final approval of class action settlement and application for award of attorneys' fees and expenses.

(xviii) Multi-Party Litigation Over Modification Of Employee/Retirement Benefits

***Buchanan, et al. v. General Motors, LLC*, 2015 U.S. App. LEXIS 405 (6th Cir. Jan. 7, 2015).** Plaintiffs, a group of retired autoworkers, brought an action challenging the reduction in their pension benefits. Plaintiffs were initially employed by General Motors ("GM") and when GM sold part of its business to Bosch LLC, they worked at Bosch till 2003. From 2003 to 2006, Plaintiffs worked for Delphi Corp. and participated in a special attrition program ("SAP") under which participants would receive wages and accumulate credited service toward their pensions when they received 30 years of credited service under the Delphi Hourly-Rate Employees' Pension Plan. *Id.* at *2. In 2008, Delphi wrote to Plaintiffs stating that they would receive a portion of their "30 and out" pension from both Delphi and GM, but that Bosch would likely consider Plaintiffs eligible for a deferred vested benefit rather than a portion of a "30 and out" pension. *Id.* at *4. In 2009, GM sent a letter to Plaintiffs explaining that pension benefits would be paid

entirely from the GM Pension Plan. *Id.* In 2010 Plaintiffs again received letters from GM indicating that the amount of their pension benefits would be reduced to reflect the years worked at Delphi and GM but not at Bosch, and that the assets and liabilities from the Delphi Pension Plan were transferred to the GM Pension Plan, but that the transfer did not include the additional monies that Delphi was paying to cover Bosch's portion of Plaintiffs' benefits. *Id.* at *5. GM determined that it would count Plaintiffs' time employed at Bosch toward their eligibility for pension benefits, but it would not count that time in calculating the amount of the benefits due, and that it had revised Plaintiffs' pension benefits downward. Plaintiffs alleged that this reduction violated the SAP. The District Court granted GM's motion for judgment on the pleadings. On Plaintiffs' appeal, the Sixth Circuit affirmed. At the outset, the Sixth Circuit noted that Plaintiffs were not making any claim against GM under the GM Pension Plan. Plaintiffs claimed that the reduction of their pension benefits violated the plan terms under the SAP, and that as a fiduciary, GM had a duty to discharge its duties with respect to the SAP solely in the interest of the participants and beneficiaries. Further, the Sixth Circuit observed that when Plaintiffs mentioned the Plan, they always referred to the SAP. Throughout the operative complaint, Plaintiffs alleged various ways in which GM violated provisions of the SAP, but they did not allege that GM violated any provision of its own pension plan. Accordingly, the Sixth Circuit opined that Plaintiffs' claims were rooted in the SAP, which they asserted was a free-standing pension plan subject to the ERISA. At issue was whether the SAP was an ERISA plan. To determine whether a plan, fund, or program qualifies as an ERISA employee benefit plan, the Sixth Circuit determined whether a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits. *Id.* at *10. The SAP was a self-described pre-retirement program that incentivized retirement by providing certain monthly wages for participating employees with at least 27 but less than 30 years of service. Participants in the SAP had to retire when they first accrued 30 years of service, and the SAP payments ended upon retirement, and the former employee received pension benefits pursuant to the Delphi or GM Pension Plan. *Id.* The Sixth Circuit agreed with the District Court that the SAP did not provide for pension benefits separate from or in addition to those provided by Delphi or GM. Additionally, the 2008 letter referred to the SAP as a pre-retirement program, did not indicate that the SAP itself provided for any pension benefits, and delineated between the monthly wage payments made under the SAP and pension benefits paid upon retirement. Further, the 2008 letter did not mention pension benefits being due or available under the SAP. Thus, the Sixth Circuit opined that because the SAP did not provide retirement income, it was not an ERISA pension benefits plan. For this reason, Plaintiffs' various claims alleging ERISA violations with respect to the SAP failed. *Id.* at *12.

***Bunn Enterprises, Inc., et al. v. Ohio Operating Engineers Fringe Benefit Programs,* 2015 U.S. App. LEXIS 5425 (6th Cir. April 1, 2015).** Plaintiff, an employer, brought a declaratory judgment suit claiming that a collective bargaining agreement (the "CBA") required Plaintiff to contribute to a benefits fund only for hours during which employees performed work "covered" under its terms, rather than for all hours worked. *Id.* at *2-3. In 2012, Defendant conducted an audit of Plaintiff's payroll records and found that Plaintiff had not contributed to the Fund for a significant number of hours worked by certain employees. Plaintiff refused to make payment, stating that employees had not performed "covered" work under the CBA during the disputed hours. *Id.* at *3. Consequently, Defendant implemented its outstanding balance policy, applied all of Plaintiff's contributions to the alleged deficiency, and sent letters to Defendant's employees stating that their benefits would be discontinued due to insufficient employer contributions. *Id.* at *4. Plaintiff then brought this action seeking a declaratory judgment that the CBA did not require contributions for all hours worked and that Defendant could not withhold coverage by crediting its contributions to a deficiency. *Id.* at *4-5. Defendant moved for summary judgment on the grounds that the CBA required Plaintiff to make benefit contributions for all hours worked, regardless of whether the CBA covered such work. The District Court granted Defendant's motion. On Plaintiff's appeal, the Sixth Circuit affirmed. The Sixth Circuit held that the CBA unambiguously required employer signatories to contribute the appropriate benefits contributions for all hours worked by their employees, regardless of whether the contract "covered" those hours. *Id.* at *15. Specifically, the Sixth Circuit noted that the language of the CBA was not ambiguous because the provision at issue explicitly required employers to make contributions for all hours paid to each employee. According to the Sixth Circuit, had the drafters wanted to limit benefits contributions solely to "covered" work hours, they could have stated so, either plainly or through reference. *Id.* at *9. Moreover, the concept of "covered" work appeared nowhere in the CBA provisions, and Plaintiff

offered no arguments to support a different interpretation of the explicit, unambiguous CBA provisions. *Id.* at *10-15. Accordingly, the Sixth Circuit concluded that the District Court did not err and affirmed the District Court's order granting summary judgment.

***Di Biase, et al. v. SPX Corp.,* 2015 U.S. Dist. LEXIS 131262 (W.D.N.C. Sept. 29, 2015).** Plaintiffs brought a class action for declaratory relief against Defendant alleging violation of the settlement agreements regarding health benefits. As a result of two class action lawsuits filed by the union alleging that Defendant violated its members' right to lifetime health benefits, Defendant and the union executed two settlement agreements. *Id*. at *2. Pursuant to the settlement agreements, Defendant agreed to provide health care benefits to retirees and surviving spouses for life. *Id*. Subsequently, Defendant changed the structure of the benefits, and decided to fund a Health Retirement Account ("HRA") for each member, in which Defendant would place $5,000 each year to pay for that individual's health and prescribing drug coverage. *Id*. at *5. Each individual would then use his or her HRA to buy their own insurance policy in the individual Medicare market. *Id*. In this action, Plaintiffs sought a preliminary injunction restraining Defendant from terminating the group plan and instituting the HRA structure, which the Court denied. The Court observed that here, the changeover to the HRA structure took effect on January 1, 2015; therefore, the change that Plaintiffs sought to prohibit had already occurred. *Id*. at *9. The Court remarked that any injunction would have to order Defendant to revert to the group plan in order to return to the last uncontested status between the parties. *Id*. at *10. Therefore, the Court concluded that the preliminary injunction was moot. Moreover, the Court remarked that Plaintiffs did not show a likelihood of success on the merits because they failed to address Defendant's challenge on threshold issues of jurisdiction under the Labor-Management Relations Act, and the ERISA, as well as the appropriateness of class certification in this case. *Id*. Accordingly, the Court concluded that Plaintiffs' motion for a preliminary injunction failed because they did not show that they could succeed on merits.

***International Union, United Automobile, Aerospace & Agricultural Implement Workers Of America, et al. v. General Motors, LLC,* 2015 U.S. App. LEXIS 8074 (6th Cir. May 14, 2015).** Plaintiffs brought an action asserting that Defendant General Motors ("GM") assumed a $450 million obligation for retiree benefits from its pre-bankruptcy predecessor General Motors Co. ("Old GM"), when it agreed to purchase Old GM's assets out of bankruptcy. The $450 million obligation originated from a deal that Plaintiffs and Old GM made in 2007 as part of the restructuring of GM's former auto parts subsidiary Delphi Corp. *Id.* at *4-5. In response to an earlier litigation between Plaintiffs against Old GM to recover retiree health benefits, Old GM established a trust to fund retiree health benefits and agreed to make a one-time $450 million payment to the trust. *Id.* at *5-6. Thereafter, Old GM filed for Chapter 11 bankruptcy and sold all of its assets and liabilities to GM. Days after the sale, GM and Plaintiffs entered into a new settlement that failed to mention the $450 million payment and established a new benefits agreement. *Id.* at *8. When Plaintiffs sought the $450 million payment, GM refused to pay, arguing, among other things, that the settlement agreement did not require such a contribution. *Id.* at *9. The District Court granted summary judgment in favor of GM, finding that the $450 million contribution obligation did not survive GM's reorganization. *Id.* at *11. The District Court also ruled that Plaintiffs had waived and released all claims against GM concerning retiree medical benefits in the settlement agreement. On appeal, the Sixth Circuit affirmed the District Court on different grounds. *Id.* at *13. Disagreeing with the District Court, the Sixth Circuit found that Old GM's obligation survived because, in the purchase agreement, Old GM passed on all liabilities arising under the union collective bargaining agreement, which included the obligation to make the $450 million contribution. *Id.* at *11-12. The Sixth Circuit, however, agreed that GM was not obligated to pay because the District Court properly construed the subsequent settlement agreement as having extinguished GM's obligation. *Id.* at *13. The Sixth Circuit reasoned that the settlement agreement did not mention the obligation and made clear that it superseded, extinguished, and released GM from all obligations concerning retiree health benefits arising from the prior litigation, settlement, and all GM bankruptcy proceedings. *Id.* at *13-14. Accordingly, the Sixth Circuit held that GM was not bound to make the $450 million contribution and affirmed the District Court's order granting summary judgment.

***International Union, United Automobile, Aerospace & Agricultural Implement Workers Of America, et al. v. Kelsey-Hayes Co.,* 2015 U.S. Dist. LEXIS 124411 (E.D. Mich. Sept. 17, 2015).** Plaintiffs, a

group of retirees, brought a putative class action alleging breach of a collective bargaining agreement ("CBA") under § 301 of the Labor-Management Relations Act ("LMRA"), violation of an ERISA-covered benefit plan, and breach of fiduciary duty in violation of the ERISA. In 1998, Defendant Kelsey-Hayes entered into a CBA with unions that represented the employees of its Detroit manufacturing plant. The CBA provided comprehensive healthcare coverage to retirees and their surviving spouses. *Id.* at *2. Kelsey-Hayes closed its Detroit plant in 2001, negotiated a plant closing agreement with the Unions, and continued to provide healthcare benefits under the 1998 CBA for ten years after the closure. *Id*. In September 2011, Kelsey-Hayes announced plans to terminate retiree participation in the retiree healthcare plan and required retirees to purchase individual plans for Medicare Supplemental insurance paid for out of company-funded Health Reimbursement Accounts ("HRA"). *Id.* Plaintiffs then brought this action alleging that the 1998 CBA provided them with a vested, lifetime right to unalterable retiree health insurance. Plaintiffs sought to hold Northrop Grumman liable for damages as the successor to TRW, Inc., who was party to the plant closing agreement, as Kelsey-Hayes' parent company. *Id.* at *3. Kelsey-Hayes and TRW moved for an order to compel arbitration, relying on a general arbitration clause in the plant closing agreement. The Court initially granted the motion, but later reversed itself finding that a sub-set of Plaintiffs – those who had retired prior to the plant closing in 2001 – could not be bound by the terms of the plant closing agreement because their rights already had vested under the 1998 CBA. *Id.* at *3. Defendants then moved to stay the action pending the U.S. Supreme Court's ruling in *M&G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015), wherein the Supreme Court took up the issue of how to interpret silence concerning the duration of retiree healthcare benefits when construing CBAs. *Id.* Following the stay and the subsequent Supreme Court ruling, the parties re-filed their motions for summary judgment. The Court entered judgment for Plaintiffs. The Court noted that, whereas the plant closing agreement terminated the 1998 CBA as of the plant closing, it also provided that employees eligible to retire as of the closing would participate in and be eligible to receive retiree medical benefits. *Id.* at *21. According to the Court, it would be illogical to interpret the plant closing agreement as ending the obligation to provide retirees healthcare benefits because some employees only became eligible for such benefits by retiring at the plant closing, and this negotiated promise of future retiree healthcare was contractual proof that the parties specifically intended that retiree healthcare benefits would survive the 1998 CBA expiration and the plant closing. *Id.* at *21-22. Accordingly, the Court granted Plaintiffs' motion for summary judgment and entered a permanent injunction ordering Defendants to comply with their 1998 and 2001 CBA retiree healthcare obligations.

***Kauffman, et al. v. General Electric Co.,* 2015 U.S. Dist. LEXIS 73156 (E.D. Wis. June 5, 2015).** Plaintiffs brought an action under ERISA challenging Defendant's actions relating to its retiree health insurance plans (the "Plans"). The Summary Plan Description ("SPD") provided that Defendant "expects and intends" to continue the Plans indefinitely, but reserved the right to terminate, amend, or replace the programs or plans, in whole or in part, at any time and for any reason. *Id.* at *1-2. Defendant terminated the Plans. Plaintiffs alleged that Defendant breached its obligations to Plaintiffs because the SPD obliged Defendant to provide benefits in the absence of a compelling reason to reduce or terminate them. *Id.* at *3. Plaintiffs also alleged that Defendant misrepresented its intent and breached its fiduciary duty because, in July 2012 when Defendant re-issued the "expects and intends" language, it planned to modify benefits. *Id.* Defendant moved to dismiss the complaint. The Court granted the motion with respect to Plaintiffs' breach of obligation claim, but denied the motion with respect to Plaintiffs' breach of fiduciary duty claim. First, the Court found that Plaintiffs did not sufficiently allege that Defendant violated any statutory provision or Plan term when Defendant terminated or modified the Plans because the "expects and intends" language on which Plaintiffs relied was not a term of the Plan. *Id.* at *4-5. Second, the Court found that Plaintiffs sufficiently alleged that Defendant breached its fiduciary duty because Plaintiffs alleged that, when it re-issued the SPD, Defendant knew or should have known that alleged misrepresentations in the SPD would confuse or mislead the average participant as to when his or her coverage would terminate. *Id.* at *5-6. Defendant argued that the SPD was not misleading because it contained a clear reservation of rights. The Court, however, noted that the "expects and intends" language, coupled with a paragraph that listed reasons why Defendant might modify benefits under the Plans, such as changes in federal law or state laws governing qualified retirement or welfare benefits, could be regarded as misleading to the average

participant. *Id.* at *9. Accordingly, the Court granted Defendant's motion to dismiss in part and denied it in part.

***Merrill, et al. v. Briggs & Stratton Corp.,* 2015 U.S. Dist. LEXIS 117677 (E.D. Wis. Sept. 2, 2015).** Plaintiffs, a group of retired employees, brought a putative class action under the Labor-Management Relations Act ("LMRA") and the ERISA alleging that Defendants violated their collective bargaining agreement ("CBA") by reducing health benefits of employees who retired before August 1, 2006. *Id.* at *2. Before August 1, 2006, the CBAs provided certain retirees with fully-paid health benefits for a certain time. However, when the parties started negotiating a renewed CBA to take effect in 2006, Defendants proposed language changing all retiree coverage to be "the same coverages offered active employees." *Id.* at *3. Then, in 2010, Defendants notified all retirees that it had made unilateral changes to their health benefits, including the introduction of a $12,000 cap on company contributions for individual coverage and a $24,000 cap for family coverage, the elimination of some retiree plans, and switching employees exclusively to PPO plans. *Id*. Subsequent changes in 2011, 2012, and 2013 further reduced the number of plan options, increased deductibles, and increased out-of-pocket maximums. *Id.* In moving for summary judgment, Plaintiffs argued that these changes violated the parties' CBAs' promise of long-term benefits, and that Defendants' unilateral changes to retiree benefits violated the ERISA. *Id.* at *17. The Court denied Plaintiffs' motion, finding that the analysis of extrinsic evidence led to fact issues that precluded summary judgment. The Court noted that the language of § 8 of the 1998 and 2002 CBAs regarding duration of benefits defeated the presumption against vesting of health benefits because it promised that company-paid coverage would continue and the employees would be eligible for benefits for a period that outlived the 4-year term of the CBAs. *Id.* at *21-22. The Court found that the CBAs appeared to unambiguously limit the duration of retiree benefits to the terms of the CBA. Plaintiffs submitted declarations, affidavits, and deposition testimony to claim that a change in the language of CBAs created a latent ambiguity as to vesting. The Court declined to consider Plaintiffs' evidence, but relied on § 8(e) of the 2006-2010 CBA to conclude that the parties intended pre-2006 retiree benefits to vest despite the seemingly clear language of the 1998 and 2002 CBA language that created a latent ambiguity in the 1998 and 2002 CBAs. *Id.* at *24-25. The Court explained that § 8(e) of the 2006 CBA distinguished between retirees who retired before the 2006 CBA and those who retired after it went into effect in 2006, and such a provision, which did not exist in previous CBAs, provided that retiree benefits for those retiring under the 2006 CBA were subject to change and thus not vested; further, this implied that at least some retiree benefits under previous CBAs were vested. *Id.* The Court rejected Defendants' argument that its inclusion of reservation of rights language in several documents sent to retirees defeated the conclusion that the CBA was latently ambiguous as to vesting, as there was no evidence that the CBA incorporated the "wrap" plan document upon which Defendants relied to assert the reservation-of-rights language. *Id.* at *25-26. The Court thus found ambiguity in whether or not Plaintiffs' health benefits vested under the 1998 and 2002s CBAs. Although both the parties submitted extrinsic evidences to conclusively prove their interpretation of the CBAs, the Court opined that much of the evidence revolved around the past bargaining history and changes to retiree benefits, and the resulting types of factual disputes precluded summary judgment. *Id.* at *27-28. The Court therefore concluded that Plaintiffs were entitled to a trial on the question of whether or not their benefits vested under the CBAs. *Id.* at *28. Because the 1998 and 2002 CBAs were vague as to exactly what benefits were vested, and because the Court denied both sides' motions to exclude the other's expert evidence relating to whether or not the current benefits were reasonable commensurate with the benefits they received before the 2010 changes, the Court also concluded that Plaintiffs were entitled to a trial on the issue of whether the 2010 and subsequent changes were reasonably commensurate with the pre-2006 benefits. *Id.* at *29-30. Accordingly, the Court denied Plaintiffs' motion for summary judgment.

***Reese, et al. v. CNH Industrial N.V.,* 2015 U.S. Dist. LEXIS 129932 (E.D. Mich. Sept. 28, 2015).** Plaintiffs brought a class action claiming that they were entitled to irreducible retiree healthcare benefits from Defendants that survived the expiration of the collective bargaining agreement (the "CBA") in effect at the time of their retirement. In August 2007, the District Court granted summary judgment in Plaintiffs' favor. On appeal, the Sixth Circuit affirmed summary judgment, holding that Plaintiffs were entitled to lifetime healthcare benefits under the CBA. *Id.* at *5. The Sixth Circuit found nothing in the CBA that prevented Defendants from altering benefits, so long as Defendants did not entirely eliminate them, and it

remanded the matter to the District Court to decide how and under what circumstances Defendants might alter such benefits and whether Defendants satisfied the reasonable criteria for the proposed changes. Thereafter, on remand, the District Court held that Defendants could not unilaterally reduce the healthcare benefits conferred to Plaintiffs under the CBA. *Id.* at *12. Defendants appealed again, and following a second remand, the parties filed cross-motions for summary judgment on the reasonableness of Defendants' proposed changes. Before the District Court could rule on the motions, the Supreme Court held in *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), that District Courts must apply ordinary contract principles to determine whether retiree healthcare benefits survive the expiration of a collective bargaining agreement. *Id.* at *16. Defendants then filed a second motion for summary judgment arguing that the reasons underlying the conclusion that Plaintiffs were entitled to lifetime healthcare benefits were no longer viable after *Tackett. Id.* Specifically, Defendants argued that *Tackett* mandated the conclusion that retiree healthcare benefits did not survive the expiration of the CBA because the District Court's contrary conclusion rested on the legal principles grounded in *International Union v. Yard-Man, Inc*., 716 F.2d 1476 (6th Cir. 1983), that *Tackett* abrogated. *Id.* at *18. Although Plaintiffs contended that the District Court relied only on the aspects of the *Yard-Man* framework that remained viable after *Tackett,* the District Court found Defendants' argument more persuasive and granted Defendants' second motion for summary judgment. Under the *Yard-Man* framework, if a CBA was silent regarding the duration of benefits, the reasonable inference is that the parties intended the benefits to last for life based on the context of labor-management negotiations. *Id.* at *19-20. In *Tackett*, however, the Supreme Court concluded that such an inference conflicted with ordinary principles of contract interpretation and it criticized *Yard-Man* for ignoring the traditional principle that, in the ordinary course, contractual obligations ceased upon termination of the collective bargaining agreement. *Id.* at *20-21. In concluding that the parties intended to confer lifetime benefits to the retirees, the District Court had relied heavily on contract language tying eligibility for contribution-free healthcare benefits to eligibility for pension benefits. *Id.* at *26. Because pension benefits were presumed to last for life, and because eligibility for healthcare benefits was linked to eligibility for pension benefits, the District Court had concluded that healthcare benefits, like pension benefits, were intended to last for life. *Id*. The District Court, however, found that *Tackett* now foreclosed reliance on such a rationale. The pertinent contract language tied eligibility for contribution-free healthcare benefits to the receipt of pension benefits. In light of *Tackett*, the District Court re-interpreted the provisions addressing how retirees and their spouses become eligible to start receiving free healthcare benefits, not the amount of time that retirees and their spouses remained entitled to those benefits. The District Court, therefore, concluded that the tying language no longer supported its determination that the parties intended to confer lifetime benefits. *Id.* at *30. Accordingly, the District Court held that its prior determination that the parties intended to confer lifetime healthcare benefits was not viable in light of *Tackett* and granted Defendants' motion for summary judgment.

***Zanghi, et al. v. FreightCar America, Inc.,* 2015 U.S. Dist. LEXIS 41810 (W.D. Pa. Mar. 30, 2015).** Plaintiffs, a group of retirees, brought an action alleging that Defendant's unilateral termination of retirees' health and life insurance benefits violated the Labor-Management Relations Act and the ERISA. Plaintiffs worked at a facility producing railroad freight cars owned by Bethlehem Steel Corp. In 1991, Bethlehem sold the assets of its freight car division to Defendant's predecessor, Johnstown American Corp. Under the purchase agreement, Bethlehem agreed to reimburse Defendant for retirees' insurance costs. In mid-October 1991, Defendant and the union representing Plaintiffs reached an agreement that covered the benefit plans and memorialized their understanding in a collective bargaining agreement (the "1991 CBA") and 27 "side letters." *Id.* at *6. One of the side letters, entitled the "Mirroring Agreement," required Defendant to create bargaining unit employee benefit plans identical to the Bethlehem plans. Defendant and the union entered into another collective bargaining agreement in 1997 (the "1997 CBA") and removed the side letters that dealt with issues related to the 1991 sale. *Id*. at *12. In 2001, Bethlehem fell behind in its reimbursements to Defendant for the cost of retiree benefits, and Defendant announced that it would cease paying for retirees' medical coverage. Defendant also eliminated the monthly pension supplement and the health and life insurance benefits that it previously had provided to retired employees. *Id.* at *18. In April 2002, the union and a putative class consisting of reimbursable retirees and their dependents filed an action challenging Defendant's decision to terminate their welfare benefits (the "*Deemer* action"). In August 2003, another putative class of pension employees brought an action challenging the unilateral

elimination of the health and life insurance (the "*Britt* action"). The parties eventually settled the *Deemer* and *Britt* actions. In 2005, Defendant and the union entered into a collective bargaining agreement incorporating the *Deemer* and *Britt* settlements (the "2005 CBA"). In addition to addressing retirees' medical benefits, the 2005 CBA provided that, if Defendant ceased its contributions at any point thereafter, retirees could re-file their lawsuits and reassert that the CBAs required the continuation of the negotiated levels of benefits provided under the 1997 CBA. *Id.* at *19-20. In 2013, Defendant filed suit seeking a declaratory judgment that it had the legal right to terminate retiree welfare benefits. Defendant also sent the union a letter stating that, effective October 1, 2013, it would cease all company contributions provided under the 2005 CBA for retiree medical coverage. *Id.* at *22. Plaintiffs thereafter initiated this action. Defendant moved for summary judgment, arguing that the undisputed material facts demonstrated a lack of any clear and express agreement to provide vested medical and life insurance benefits to the retirees. *Id.* at *3. The Court denied Defendant's motion. At the outset, the Court found that the Mirroring Agreement was incorporated in and made a part of the 1991 CBA and that Defendant had agreed to create benefit plans that continued health and life insurance benefits because, in the side letter, Defendant had agreed to create benefits plans "identical in all material respects" to the Bethlehem plans they replaced. *Id.* at *38-39. Defendant argued that the continuation of coverage language did not provide Plaintiffs vested benefits. Plaintiffs responded that the retiree benefits were "vested" in the sense that Defendant could not eliminate them unless the union expressly agreed to reduce or terminate them. *Id.* at *42. The Court agreed. Although the continuation of coverage language in the Bethlehem plan was not sufficiently clear to create vested benefits in the sense of being forever unalterable, the Court found that the plan that Defendant had agreed to mirror required agreement between the union and the company before such benefits could be terminated or altered. *Id.* at *48. The Court found no evidence that the union explicitly had agreed to give up such rights. *Id.* at *52. The issue then remained as to whether the parties had agreed that Defendant satisfied its obligations under the Mirroring Agreement when going into the 1997 CBA negotiations. Although Defendant asserted that the parties had agreed in 1994 to discontinue its mirror obligations, the Court noted that, in its preliminary injunction brief, Defendant recognized "the undisputed fact that before its abrogation in 1997, [Defendant] had continuing obligations." *Id.* at *55. The Court, therefore, found genuine issues of disputed fact for resolution at trial. *Id.* at *57-58. Accordingly, the Court denied Defendant's motion for summary judgment.

***Zino, Jr., et al. v. Whirlpool Corp.,* 2015 U.S. Dist. LEXIS 147614 (N.D. Ohio. Oct. 30, 2015).** Plaintiffs, a group of retirees, brought a putative class action under the Labor-Management Relations Act ("LMRA") and the ERISA alleging that the collective bargaining agreements ("CBAs") negotiated between Defendants and the employees' union entitled them to retiree health benefits for life. Plaintiffs, a group of hourly employees of the Hoover Co. and its successor entities, Maytag Corp. and Whirlpool Corp., received notices that Whirlpool planned to reduce their health benefits effective January 1, 2013. Plaintiffs alleged that the applicable CBAs entitled them to receive specified retiree health benefits that were not subject to unilateral reduction of termination during retirement. Plaintiffs also alleged that the reductions violated the relevant CBAs and welfare benefits plans and, as a result, were actionable under § 301 of the LMRA and § 502(a)(1) of the ERISA. Following class certification, the Court ordered the creation of four sub-classes distinguished by time periods under which the employees retired, *i.e.*, sub-classes A, B, C, and D. Each sub-class shared the same core characteristic in that they comprised of former employees of Hoover, Maytag, and Whirlpool represented by the union in collective bargaining and who received health care benefits for themselves and their spouses after retirement. After the phase one of the trial, the Court found that members of sub-class C were promised lifetime, company-paid health benefits under the 1992-1995, 1995-2000 and 2000-2003 CBAs. *Id.* at *5. As to sub-class D, the Court found that groups one and two were promised lifetime, company-paid health benefits under the same rules that applied to the members of sub-class C. *Id.* As to some members of group three and all members of group four, the Court found that they were promised lifetime health benefits but they were entitled to company-paid health benefits up to age 65. *Id.* Regarding group three members who were not entitled to company-paid health benefits, the Court ruled that they were entitled to participate in the "retiree healthcare" program until age 65 but responsible for paying the full costs of the premiums. *Id.* The Court also determined that the members of groups five and six were neither entitled to lifetime retiree health benefits nor were guaranteed "access" to them beyond the expiration of the 2003-2007 CBA. *Id.* at *6. In addition, the Court found that the

ambiguity regarding the duration for which the company agreed to fund retiree health benefits was resolved by the evidence presented at trial proving that the company and union intended for the members of sub-class A to receive retiree health benefits for life, and that the applicable sub-agreement provisions carried the 1980 contract settlement through to the 1983-1986, 1986-1988 and 1988-1992 CBAs, entitling the members of sub-class B to retiree health benefits for life. *Id.* Defendants subsequently moved for reconsideration following the U.S. Supreme Court's decision in *Polymers USA, LLC v. Tackett,* 135 S. Ct. 626 (2015), which ordered use of ordinary principles of contract law and to first look to the language of CBAs to ascertain the intention of the parties and to consider general durational clauses when construing CBAs. *Id.* at *7. The Court granted the motion in part and denied it in part. The Court maintained its ruling as to sub-classes A, C, and D, but reversed as to sub-class B. *Id.* at *13. As to sub-class B, the Court had determined that the 1980 contract settlement was a sub-agreement that was carried forward and relied on testimony of strong extrinsic evidence of the parties' understanding of the term. *Id.* at *17. The Court reasoned that, unlike with sub-class A, there was ambiguity on the face of any of the welfare plans that could permit the use of extrinsic evidence. *Id.* at *17-18. Thus, given the lack of ambiguity on the face of the relevant welfare plans, the Court concluded that its bench trial ruling in favor of Plaintiffs became untenable. *Id.* at *18. The Court therefore returned to its initial finding and granted summary judgment to Defendants with respect to sub-class B, and maintained its earlier rulings as to other sub-classes. Accordingly, the Court granted Defendants' motion to reconsider in part, and denied it in part.

(xix) Civil Rights Class Actions

***Betances, et al. v. Fischer,* 2015 U.S. Dist. LEXIS 9976 (S.D.N.Y. Jan. 28, 2015).** Plaintiffs, a group of prison inmates, brought a putative class action alleging that Defendants, the New York State Department of Correctional Services ("DOCS") and the Department of Parole ("DOP"), violated their constitutional rights to due process by subjecting them to various unlawful conditions and custody by continuing to impose the terms of post-release supervision ("PRS") that had been declared unlawful in *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006). Defendants moved to dismiss the complaint on the grounds that Plaintiffs' constitutional rights were not "clearly established" at the time that Defendants allegedly violated those rights, and state officials were entitled to qualified immunity for their actions. *Id*. at *2. The Court rejected those arguments in 2012, stating that New York courts might disagree over the scope of *Earley*, but "there was never any disagreement or confusion about the core constitutional holding announced by *Earley.*" *Id*. Plaintiffs subsequently moved to certify a class consisting of "all individuals who were convicted of various crimes in New York State Courts on or after September 1, 1998; were sentenced to terms of incarceration but not to terms of PRS; but were nonetheless subjected to enforcement by Defendants of PRS terms after the maximum expiration dates of their determinate sentences after June 9, 2006." *Id*. at *3. The Court granted Plaintiffs' motion. First, the Court found that Plaintiffs satisfied the numerosity requirement, as the proposed class consisted of thousands of individuals, thereby making joinder impracticable. Second, the Court ruled that Plaintiffs satisfied the commonality requirement as a single common question united all purported class members. *Id.* at *19. Third, the Court determined that Plaintiffs satisfied the typicality requirement as the named Plaintiffs all suffered injuries based on Defendants' policy of imposing and enforcing PRS on individuals whose sentences did not include a term of PRS. *Id.* at *20. Fourth, the Court held that Plaintiffs satisfied the adequacy requirement as the three named Plaintiffs suffered injuries from the same course of conduct as all other class members, and had no conflict with other members of the class. *Id.* at *22. Finally, the Court found that Plaintiffs satisfied the predominance requirement as the common question of Defendants' liability for the enforcement of administratively-imposed PRS predominated over individual issues. Because *Earley* established that the practice of imposing PRS administratively where it was not part of a judicially-imposed sentence is unconstitutional, and because Defendants were not entitled to qualified immunity, the Court found that the common question was whether the individual Defendants should be liable for the alleged violations. *Id.* at *24-25. Defendants argued that the question of liability would turn on each Plaintiff's individualized facts and circumstances. The Court disagreed, and found that *Earley* clearly established that administratively-imposed PRS terms were "a nullity" and Defendants knew of this in 2006. *Id.* at *25. Because Plaintiffs alleged a single, uniform unconstitutional policy, the Court concluded that a common question predominated even though the action would require individual determination of damages. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Faith Action For Community Equity, et al. v. State Of Hawaii,* 2015 U.S. Dist. LEXIS 51736 (D. Haw. April 20, 2015).** Plaintiffs brought a class action alleging that Defendant violated the Fourteenth Amendment's guarantee of equal protection and Title VII's prohibition against national origin discrimination in federally funded programs by failing to offer Hawaii's driver's license examination in languages other than English. According to the complaint, over ten years ago, Plaintiffs successfully advocated to get translations in place for nine different languages. However, approximately two to three years ago, Defendant ceased the use of the translations and added three new questions to the exams. Although Defendant later offered translated versions, Plaintiffs contended that the risk remained that Defendant might once again limit the exam to English. *Id*. at *1. Seeking certification of a class for injunctive relief, Plaintiffs moved for class certification. The Court denied certification on the basis that Plaintiffs' class definition was overly broad. Particularly, the Court noted that the class definition included claims that were not included in the complaint, and did not limit to the timeframe applicable as it included persons who fell outside the scope of the assertions in the complaint. *Id.* at *4. Although the Court acknowledged that it could suggest an administratively feasible definition of the class, it did not do so because Plaintiffs also failed to meet other Rule 23 requirements. Notwithstanding the general assertion that Defendant intentionally discriminated against limited English proficiency individuals based on their national origin by failing to provide translated driver's license exams, the Court ruled that the named Plaintiffs' claims were not sufficiently similar to the claims of other purported class members. *Id.* at *11-12. The Court noted that any claim of discrimination by the named Plaintiffs relating to a delay of more than five years would require an examination of whether the exam should have been translated to his or her language even before the adding of the questions. According to the Court, the named Plaintiffs' need to demonstrate entitlement to a translated exam concerned a matter not applicable to numerous other purported class members because they spoke a language that the exam was not originally translated into. *Id.* at *12. Further, to the extent the complaint purported to encompass a claim that Defendant intentionally discriminated against individuals taking the practical driver's license exam by failing to allow them to have a translator present during the road test, Plaintiffs lacked standing because they never attempted to take the practical portion or road test. *Id.* at *13. Thus, Plaintiffs' unique backgrounds and factual situations made them atypical and inadequate class representatives. Under these circumstances, the Court determined that class-wide injunctive relief would not be appropriate. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Jacoby & Meyers, LLP, et al. v. Presiding Justices Of The First, Second, Third, & Fourth Departments, Appellate Division Of The Supreme Court Of The State Of New York*, 2015 U.S. Dist. LEXIS 92041 (S.D.N.Y. July 15, 2015).** Plaintiffs, a group of law offices, brought a class action against the presiding justices of the four appellate divisions of the New York Supreme Court, and sought a declaration that New York Rule of Professional Conduct 5.4 ("New York Rule 5.4") violated the First and Fourteenth Amendments and the commerce clause of the U.S. Constitution. Plaintiff Jacoby & Meyers, LLP formed a limited liability company Jacoby & Meyers USA, LLC ("J&M LLC"), allegedly to receive non-lawyer equity investment and to conduct J&M's practice following a proposed transfer to it of J&M's assets. *Id.* at *3. New York Rule 5.4 and comparable provisions in effect across the country prohibit lawyers to obtain equity investments in their practices from non-lawyers, which precludes them from, among other things, selling stock in their practices to the public. *Id.* at *2. The Court dismissed the complaint for lack of subject-matter jurisdiction, and on appeal, the case was remanded, granting Plaintiffs leave to amend their complaint. After Plaintiffs amended the complaint, Defendants once again moved to dismiss, and the Court granted the motion At the outset, the Court noted that the judicial power extends only to cases and controversies. *Id.* at *12. The remand was based on a conclusion that J&M's amended complaint would contain allegations, that, if proved, would establish J&M's standing to bring constitutional claims under New York Rule 5.4, § 495 of the Judiciary Law, and the additional state statutes. *Id.* As to the constitutional claims, J&M argued that New York laws it challenged violated the First and Fourteenth Amendments and the commerce clause by prohibiting it, and other firms like it, from practicing law if they accept non-lawyer equity investment. The Court remarked that it is true that First amendment protection extends to corporations, that "speech that otherwise would be within protection of First Amendment" does not "lose that protection simply because its source is a corporation." *Id.* at *21. The Court, however, observed that whatever reach those principles may be, J&M's argument that lawyers had a constitutional right to

associate with non-lawyers in the practice of law was not within it. *Id.* The Court explained that this case had nothing to do with speech, *i.e.*, the transaction that J&M proposed to undertake was neither an advertisement, nor a solicitation of money or business, but it was a conduct. *Id.* at *21-22. The Court further explained that the First Amendment protects, among other things, freedom of "speech;" it says nothing about the "conduct." *Id.* at *25. The Court remarked that the First Amendment rights were not confined to verbal expressions, and the U.S. Supreme Court had extended constitutional protections to some forms of particularly expressive conduct and to conduct that is sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. The proposed conduct here, the Court observed, lacked the expressive, over political nature of flag burning or the moral gravitas of a peaceable and orderly sit-in to protest the unconstitutional segregation of public facilities. Rather, J&M sought non-lawyer equity investors as a means to commercial end, without which J&M claimed that it would not be able to expand its operations, and hire additional attorneys and staff. The Court opined that the New York laws that prevented J&M from accomplishing its commercial goals thus merely restricted its commercial practices, and such laws fell outside the purview of the First Amendment even if they imposed incidental burdens on speech. *Id.* at *27. The Court observed that the First Amendment also protects a right to expressive association, and protects, among other things, the freedom of individuals to associate for the purpose of engaging in protected speech. *Id.* at *30. J&M contended that its primary purpose to accept non-lawyer equity investors was to expand operations and to improve its physical offices and infrastructure to increase its ability to serve its existing clients and to attract and retain new clients and qualified attorneys. *Id.* at *32. The Court, however, ruled that the demographic and socio-economic characteristics of J&M's clientele were not constitutionally relevant to the question of whether the New York laws abridged law firms' expressive associational rights. *Id.* at *33. The Court reasoned that New York passed the laws to serve its extremely important interest in maintaining and assuring the professional conduct of attorneys it licensed, and the laws in question were not aimed at suppressing speech. *Id.* at *36. The Court, accordingly, found that J&M failed to sufficiently allege that the laws actually imposed any serious burdens on it constitutionally protected associational freedoms. *Id.* at *37. J&M also argued that the New York laws violated the commerce clause because they substantially dampened the flow of capital, goods, services, lawyers, and employees across state lines, thereby burdening interstate commerce in a way that it was clearly excessive relative to any putative local benefit that laws might otherwise advance. The Court remarked that J&M's commerce clause claim relied on the misguided premise that the laws were facially discriminatory. The Court ruled that they were not, as they provided no special or beneficial treatment to New York lawyers or law firms; instead, they treated both in-and-out-of-state interests identically. *Id.* at *42. The Court therefore ruled that the amended complaint failed to state sufficient facts that the laws violated the commerce clause. Similarly, the Court therefore dismissed the amended complaint.

***Lacy, et al. v. Sheriff Of Cook County,* 2015 U.S. Dist. LEXIS 56625 (N.D. Ill. April 30, 2015).** Plaintiffs, five detainees at the Cook County Jail who required wheelchairs, brought a putative class action against Defendants alleging violations of the ADA and the Rehabilitation Act. Specifically, Plaintiffs alleged that the courthouse ramps, holding cells, and transport vans did not comply with the ADA or the Rehabilitation Act and that Defendants did not provide adequate accommodations to overcome this non-compliance. Plaintiffs sought preliminary injunctive relief to prevent Defendants from continuing to deprive Plaintiffs of their rights and moved to certify a class comprised of all individuals who received a wheelchair upon entry to the jail. The Court granted Plaintiffs' motion. Defendants argued that class certification was not appropriate because the putative class was not clearly ascertainable. *Id*. at *6. According to Defendants, the proposed class definition improperly would include individuals who did not medically require a wheelchair, along with individuals who were not qualified individuals under the ADA. *Id*. at *7. The Court disagreed and found that Plaintiffs' proposed class was ascertainable and definite. The Court found that class members were easily identifiable through Defendants' "CCOMS" computer system, which kept track of each detainee to whom the jail had assigned a wheelchair. *Id*. at *8. Further, the Court found that the proposed class satisfied all of the requirements of Rule 23(a). The putative class consisted of 60 detainees and involved common questions of law and fact such as whether the ramps and holding cells at six county courthouses were compliant with the ADA and Rehabilitation Act's structural requirements and whether Defendants' policies and actions provided adequate accommodation to sufficiently overcome structural

barriers. *Id*. at *10-11. In addition, the Court found that Plaintiffs were adequate representatives of the putative class because they used wheelchairs during court appearances and faced the same structural barriers as other wheelchair-using detainees. *Id*. at *16-17. Contrary to Defendants' arguments, the Court determined that the instant action did not require a factual inquiry into each potential class member's individual need for or receipt of accommodation. *Id*. at *18. The Court observed that the injunctive relief that Plaintiffs sought as a class would resolve their alleged injuries at one time, regardless of the level of accommodation individual class members required. For example, toilet facilities that comply with the ADA's structural requirements would be accessible for all wheelchair-using detainees (and non-wheelchair-using detainees), even if a particular class member could transfer to a commode chair. *Id*. Thus, the Court held that, consistent with Rule 23(b)(2), a single injunction would provide relief to each member of the class. *Id*. at *18-19. The Court, therefore, concluded that the proposed class satisfied the requirements of Rule 23(b)(2). *Id*. Finally, although Defendants argued that class treatment was inappropriate because it would deprive them of their statutory right to assert an exhaustion defense, the Court disagreed and found that each member of the class need not have exhausted administrative remedies for the case to proceed as a class action. *Id*. Accordingly, the Court certified a redefined class of "all Cook County Jail detainees who had been assigned and currently use a wheelchair." *Id*. at *20.

***Moss, et al. v. U.S. Department Of Homeland Security,* 2015 U.S. Dist. LEXIS 131260 (D. Ore. Aug. 6, 2015).** Plaintiffs, a group of demonstrators, brought a class action alleging that Defendants used force to disrupt their lawful assembly and protest demonstration in Jacksonville, Oregon in violation of the Fourth and the Fourteenth Amendments and Oregon common law. Plaintiffs alleged that Defendants and law enforcement officers forcefully moved them from their location. *Id.* at *6. Plaintiffs sought to certify a class consisting of protestors who assembled on the evening of October 14, 2004 in Jacksonville, Oregon, which the Court granted in part. At the outset, the Court found that Plaintiffs satisfied Rule 23(a)'s numerosity and commonality requirements. Defendants argued that the typicality requirement was not satisfied because the different types of force each individual Plaintiff experienced during the events in question made them unsuitable as class representatives. The Court found this argument unpersuasive, holding that while claims of the named Plaintiffs were not identical, each was typical to the class as a whole as they were part of the same course of events, and were stating the same legal claims, and made the same legal arguments as the rest of the class. Further, the Court observed that only Plaintiffs' claims of unlawful arrest met the Rule 23(b)(3)'s requirement, while claims as to excessive force and assault fell short of the predominance requirement. The Court opined that Plaintiffs alleged that Defendants encircled demonstrators and restricted their movement in violation of their right to be free from unlawful arrest under the U.S. Constitution and Oregon law. *Id*. at *14. The Court observed that both claims met the predominance requirement, as such claims were certified as class actions in various case law precedents. *Id*. In contrast, the Court observed that Plaintiffs' claims of excessive force and assault were not appropriate for certification because individual questions predominated over the questions of law and fact common to the class. *Id*. at *16. Accordingly, the Court concluded that Plaintiffs' claims for use of excessive force fell short of the predominance requirement. The Court, likewise, found that Plaintiffs' claims for unlawful arrest met the superiority requirement. Accordingly, the Court granted Plaintiffs' motion for class certification in part.

***Secreti, et al. v. PTS Of America, LLC*, 2015 U.S. Dist. LEXIS 71752 (M.D. Tenn. June 3, 2015).** Plaintiff, an inmate, brought a civil rights class action alleging that Defendant used excessive force in transporting him and other inmates in full restraints for more than 48 continuous hours. Plaintiff also alleged that Defendant failed to provide him adequate access to toilet facilities and personal hygiene items, deprived him access to prescribed medication and medical staff, and deprived him of adequate sleep and exercise while being transported. Plaintiff asserted violations of his Fourth, Eighth, and Fourteenth Amendment rights. Plaintiff moved for class certification, and the Court denied the motion. Plaintiff sought to certify a class of all inmates – including without limitation, adults and juveniles, males and females, pre-trial detainees, sentenced prisoners, state mental hospital inmates, and immigration detainees – who were transported by Defendant on behalf of local or state governments or the federal government in full restraints, including handcuffs, leg irons, and/or waist chains, for more than 48 continuous hours. *Id.* at *1. At the outset, the Court noted that it would have to exclude from any potential class inmates who were

transported by Defendant but not subject to the alleged misconduct, and inmates who were transported by Defendant but suffered no injury. Excluding such inmates from the class would require individual determinations. Further, to determine whether individuals fit the class definition, the Court would have to determine whether inmates were in full restraints as opposed to some lesser type of restraints and whether the inmates' restraints were continuous for 48 hours, which again required looking at each individual's circumstances. *Id.* at *5. Additionally, the Court observed that the length of transport and also the type and frequency of food and drink provided, the number and nature of bathroom breaks provided, and the specific type of restraints used would vary among putative class members. Because the class definition proposed by Plaintiff covered different classifications of inmates, different circumstances, and different interests, the Court opined that ascertaining the class members would require making individual factual inquiries about the circumstances surrounding each potential class member's transportation and would result in numerous mini-trials. *Id.* at *6. Further, the Court noted that it must uphold any policy, practice, or custom that is reasonably related to legitimate penological interests. Therefore, before determining whether a class member's constitutional rights had been violated by any policy, practice, or custom, it would have to determine if there was a legitimate penological justification for the policy. *Id.* at *7. The Court found that the required balance of interests undoubtedly would differ between an adult and a juvenile, between a pre-trial detainee and a convicted and sentenced prisoner, or between a state mental hospital inmate and an immigration detainee, such that it would have to balance the interests as to each individual, not as to the class as a whole. *Id.* at *7-8. Moreover, although Plaintiff claimed that Defendant did not show a legitimate penological interest for its allegedly unconstitutional misconduct or that an administrative remedy was available, the Court stated that it was Plaintiff – and not Defendant – who had the burden of proof on this class certification issue. *Id.* at *8. The Court found that whether Defendant's alleged policy, practice, or custom served a legitimate penological purpose would depend on individualized factors and that such issues – that were central to the validity of each one of the claims – could not be resolved in one stroke. The Court, therefore, found that Plaintiff failed to demonstrate commonality. The Court also found typicality lacking because Plaintiff's claims depended upon his unique interactions with Defendant. Accordingly, the Court denied Plaintiff's motion for class certification.

(xx) Class Action Discovery Issues

***Barreras, et al. v. Michaels Stores, Inc.*, 2015 U.S. Dist. LEXIS 54166 (N.D. Cal. April 24, 2015).** Plaintiff, a former part-time sales associate, brought a putative class action for disability discrimination under various California employment laws. Plaintiff claimed that in 2010 when she requested a medical leave of absence, Defendant sent her a letter explaining that because she was unable to return to work, Defendant terminated her employment. *Id.* at *2. Plaintiff asserted that Defendant enforced a policy of wrongfully terminating the class members' employment due to their actual and perceived disabilities, and failing to offer reasonable accommodations or to engage in a good faith interactive process to determine what reasonable accommodations could be provided. *Id.* at *2-3. Plaintiff sought to certify a class consisting of all California employees to whom Defendant sent a letter similar to that received by Plaintiff regarding termination of employment during the proposed class period. *Id.* at *3. During pre-certification discovery, Defendant objected to an interrogatory from Plaintiff seeking the names, addresses, and telephone numbers of the proposed class members, and contended that pre-certification discovery was prohibited until Plaintiff had presented evidence showing that she had satisfied the class action requirements or that the discovery was likely to produce substantiation of the class allegations. *Id.* at *7-8. In rejecting Defendant's argument, the Magistrate Judge opined that pre-certification discovery was largely within the discretion of the Court. Further, the Magistrate Judge noted that numerous case law precedents had reiterated that the disclosure of class members' contact information was a common practice in the pre-certification context. *Id.* at *8. Additionally, the Magistrate Judge found that Plaintiff in fact had made a *prima facie* showing that she met the class action requirements of Rule 23, at least for the purposes of pre-certification discovery. *Id.* at *9. Defendant further argued that the requested discovery would reveal confidential medical information about those individuals, *i.e.*, namely that they requested statutory leaves of absence for personal reasons. The Magistrate Judge remarked that Defendant's argument was unpersuasive because all that would be revealed in this case was that the individuals sought a medical leave of absence and not the underlying condition that prompted the request. *Id.* at *10-11. Additionally, the Magistrate Judge reasoned that denying the requested discovery would essentially conclude Plaintiff's

class claims before she had had any real chance to pursue them and would be tantamount to a merits determination. *Id.* at *11. The Magistrate Judge pointed out that the opt-out method that would be used would allow individuals to refuse to have their contact information disclosed, should any of them be particularly concerned about the revelation that they requested a medical leave of absence. *Id.* Finally, Defendant argued that Plaintiff's request was vague and ambiguous. The Magistrate Judge, however, found that disclosing the requested contact information was the only way of determining class members, and that the proposed class list of 253 individuals was not so substantial that it posed a burden. *Id.* at *11-12. To avoid discovery from being overbroad, the Magistrate Judge limited the requested discovery to those individuals who received a letter similar to that received by Plaintiff where the letter related to their own serious health conditions only. *Id.* at *13-14. The Magistrate Judge also directed the parties to discuss the option of a protective order regarding any privacy concerns about the contact information.

***Campbell, et al. v. Facebook, Inc.*, 2015 U.S. Dist. LEXIS 71961 (N.D. Cal. June 3, 2015).** Plaintiffs brought a class action alleging that Defendant scanned the content of their messages and putative class members' messages without their consent for use in connection with its "social plugin" functionality. *Id.* at *3. Defendant identified several deficiencies in Plaintiffs' responses to interrogatories, and moved to compel full and complete responses. The Court denied the motion. Defendant's interrogatories had asked Plaintiffs to identify all facts regarding the exact practices by Defendant that allegedly violated California and/or federal law, and whether Plaintiffs contended that the scanning of messages violated federal law and/or California law. *Id.* at *5-6. The Court observed that a party who seeks answers to contention interrogatories before substantial documentary or testimonial discovery has been completed must be able to show that there is good reason to believe that answers to its well-tailored questions will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56. *Id.* at *10. The Court remarked that Defendant failed to demonstrate that its contention interrogatories were appropriate at this stage of the litigation. Defendant asserted that its interrogatories asked Plaintiffs to explain the precise conduct Plaintiffs contended was unlawful, and the factual basis for specific allegations in the consolidated amended complaint ("CAC"), contending that the conduct Plaintiffs challenged had been a moving target and that these interrogatories were necessary to determine the precise scope of the conduct at issue in this case. *Id.* at *11. Defendant, however, did not show how or why it remained unclear what precise conduct Plaintiffs intended to challenge. Although Defendant contended that Plaintiffs recently suggested that they could be challenging conduct much broader than that framed by the CAC, it did not explain or cite anything that indicated that Plaintiffs were changing theories or fundamentally altering their position in some way such that Defendant's interrogatories would contribute meaningfully to clarifying the issues in the case or narrowing the scope of the dispute. *Id.* at *13. The Court noted that the CAC contained detailed factual allegations about the conduct Plaintiffs challenged as unlawful, and contained allegations that addressed Defendant's concerns. Specifically, one interrogatory asked whether Plaintiffs were contending that the scanning of messages for any purpose violated federal law and/or California law, and Plaintiffs responded that as alleged in the operative complaint, Defendant's conduct of scanning their messages was a violation of federal and California law. The Court remarked that Defendant failed to show that this response was insufficient or how a response to its next interrogatory, which asked Plaintiff to identify all facts that support this response, was needed to clarify the issues in the case. *Id*. at *14. Finally, Defendant asserted that if the Court compelled Plaintiffs to respond now, Plaintiffs would have the opportunity to update their responses later and that they need not provide responses listing trivial or non-material matters. The Court, however, observed that if Plaintiffs were to respond now, their answers likely would be materially incomplete as soon as Defendant began its document production, and that the tentative nature of any responses generated at this stage would be of questionable value to the goal of efficiently advancing the litigation. *Id.* at *17. Accordingly, the Court denied Defendant's motion.

***Campbell, et al. v. Facebook, Inc.,* 2015 U.S. Dist. LEXIS 149931 (N.D. Cal. Nov. 3, 2015).** Plaintiffs brought a putative class action alleging that Defendant improperly scanned the content of users' private messages in violation of the Federal Electronic Communications Privacy Act ("Wiretap Act") and California's Invasion of Privacy Act ("CIPA"). Earlier, the Magistrate Judge entered a discovery order.

Defendant now moved for relief from the Magistrate Judge's non-dispositive pre-trial order, which the Court denied. Defendant challenged two aspects of Magistrate Judge's discovery order. First, Defendant challenged the order to the extent it granted Plaintiffs' motion to compel a response to produce documents related to assigning a monetary value to Facebook users or related to revenue and profits generated from users' data and content. Second, Defendant challenged the order to the extent it granted Plaintiffs' motion to compel a response to produce documents related to Defendant's efforts to increase or maximize the presence of its "Like" social plug-in. *Id.* at *2-3. Defendant argued that the order was contrary to law for two primary reasons, as it addressed the requests for production en masse, rather than conducting an individualized relevance analysis of each request, and it improperly expanded the scope of discovery on the basis that no discovery supported or proved Plaintiffs' underlying theory. *Id*. at *3. The Court found no basis in Defendant's objection that the order improperly treated the RFP's en masse. The Court remarked that the order grouped together eight RFPs because they sought related categories of information and as such, it found no reason to conclude that the order's grouping together of eight RFPs related to damages was contrary to law. *Id.* at *4. Further, the Court found that the order properly discussed the discoverability of damages-related documents. The Court stated that the order properly concluded that Plaintiffs were entitled to discovery related to the scanning of putative class members' private messages and the potential benefit Defendant received as a result of obtaining information from those messages. *Id*. The Court noted that although, the order correctly held that Plaintiffs were entitled to discover how Defendant generated profit, it did not hold that Plaintiffs were entitled to information about hypothetical methods of generating profits that Defendant may have contemplated but not undertaken. *Id.* at *6. The Court concluded that it would enforce Plaintiffs' request only to the extent that they sought all documents and ESI relating to the assignment of monetary value to Defendant users or to the revenue and profits made from data received or content Defendant collected from the users. Similarly, as to the second contested request, the Court ruled that it would enforce it only to the extent that Plaintiffs sought all documents and ESI relating to efforts to increase and/or maximize the presence of the "Like" social plug-in on third-party websites. Accordingly, the Court denied Defendant's motion, finding that the reasoning set forth in the order was not contrary to law.

***Chiquita Brands International, Inc., et al. v. U.S. Securities & Exchange Commission*, 2015 U.S. App. LEXIS 12348 (D.C. Cir. July 17, 2015).** Plaintiff brought an action against the U.S. Securities & Exchange Commission ("SEC") seeking to prevent disclosure of documents from a probe of payments it made to Autodefensas Unidas de Colombia ("AUC"), a global terrorist organization. Plaintiff pled guilty to engaging in unauthorized transactions with the AUC, produced thousands of documents related to the payments, and requested that the SEC treat the records it received confidentially and not release them under the Freedom of Information Act ("FOIA"). *Id.* at *2-3. The National Security Archive (the "Archive") issued two FOIA requests seeking documents related to the federal investigation of the AUC matter and any documents in the SEC's possession relating to Plaintiff's finances. *Id.* at *4. Plaintiff invoked FOIA Exemption 7(B), asserting that the release would deprive it of a fair trial particularly with respect to a Florida litigation because the Florida Plaintiffs would gain premature access to documents relevant to their claims and enjoy an unfair advantage. *Id.* at *6-7. The SEC rejected Plaintiff's argument, and Plaintiff brought this action alleging that the SEC arbitrarily failed to apply Exemption 7(B). The District Court granted summary judgment to the SEC. On Plaintiff's appeal, the D.C. Circuit affirmed. Plaintiff asserted that Exemption 7(B) should bar the release of all documents relevant to the Florida litigation until discovery in that case began. Exemption 7(B) protects against the release of records or information compiled for law enforcement purposes the disclosure of which would deprive a person of a right to a fair trial or an impartial adjudication. *Id.* at *11. The D.C. Circuit observed that "trial" is the ultimate determination of factual and legal claims by judge or jury in a judicial proceeding, and that Exemption 7(B) comes into play only when it is probable that the release of law enforcement records will interfere with the fairness of that final step. *Id.* at *12-13. Plaintiff argued that the phrase "fair trial" should be disregarded and the focus should be on Exemption 7(B)'s protection of an "impartial adjudication" and reasoned that the term "adjudication" applies to a decision made at any point during a judicial proceeding. *Id.* at *13-14. The D.C. Circuit noted that, under the Administrative Procedure Act, "adjudication" is the agency process for the formulation of an order, and "adjudication" as used in Exemption 7(B) refers to quasi-judicial decision-making by federal and state administrative agencies. *Id.* at *14. Thus, the D.C. Circuit opined that the phrase "impartial adjudication" as it appears in the statute refers to determinations made by administrative agencies, not to

pre-trial decisions issued by a judge. *Id*. at *14-15. Further, the D.C. Circuit noted that a party invoking Exemption 7(B) must show that disclosure would impair his right to a fair trial, not merely that disclosure temporarily would disadvantage him during a single stage of a judicial proceeding. *Id.* at *19. The D.C. Circuit agreed with the SEC that Plaintiff had not met its burden of showing how releasing the law enforcement records to the Archive would deprive Plaintiff of a fair trial. *Id.* at *23-24. Plaintiff further contended that the SEC failed to consider adequately its argument that releasing the documents through FOIA would preclude it from seeking an appropriate protective order. Plaintiff argued that, if the documents were obtained through discovery, it could obtain a protective order prior to releasing the records to the Florida Plaintiffs. The D.C. Circuit found that Exemption 7(B) was not a tool to protect reputation and privacy interests unless the damage from disclosure was likely to impact the ultimate fairness of a trial. *Id.* at *26. Plaintiff did not claim that release of the documents would impair judicial fairness or bias potential jurors, nor did it explain how a trial in the Florida litigation would be rendered unfair because the Archive and the public had access to the documents at issue. Accordingly, the D.C. Circuit concluded that Exception 7(B) was inapplicable and affirmed the District Court's order granting summary judgment to the SEC.

***In Re Bank Of New York Mellon Corp. Forex Transactions Litigation,* Case No. 11-CV-9175 (S.D.N.Y April 30, 2015).** Plaintiffs, a group of customers, brought a putative class action alleging that Defendants assigned fictitious foreign currency exchange rates to Plaintiffs' purchases and sales of foreign securities in violation of contractual guarantees. The U.S. Department of Justice and several other groups of private Plaintiffs also sued Defendants for civil penalties or alleged damages stemming from its foreign exchange practices. Plaintiffs asserted that Defendants' standing instruction foreign exchange ("FX") service was marketed as providing its customers with best execution for FX transactions when, in truth and in fact, it did not and provided Defendants with exceptional profits at their customers' expense. *Id*. at *1. Defendants settled the government and customer cases, subject in some cases to Court approval, for more than $700 million and admitted in substance Plaintiffs' assertion regarding the standing instruction service and best execution allegations. This case, in which Plaintiffs claimed that Defendants misled its common stock purchasers, remained. Plaintiffs moved to eliminate the confidentiality protection for a handful of the millions of documents that Defendants designated as confidential, and the Court granted the motion. The documents included e-mails between and among Defendants' personnel concerning a variety of matters relating to the standing instruction program and the pricing of FX services. *Id*. The Court reviewed the documents and remarked that most documents were old, and parts of two e-mails had already been made public. All the documents appeared to relate to the fraud alleged in this case and, in some respects, fraud that Defendants admitted in cases that were pending for settlement approval. Under the circumstances, the Court ruled that Defendants failed to demonstrate good cause for maintaining the confidentiality of the documents. Accordingly, the Court granted Plaintiffs' motion to remove the confidentiality designations.

***In Re Chiquita Brands International, Inc. Alien Tort Statute & Shareholder Derivative Litigation,* Case No. 08-MD-1916 (S.D. Fla. April 7, 2015).** Plaintiffs brought putative class actions alleging that Defendants violated Columbian law, the Alien Tort Claims Act ("ATCA"), and the Torture Victims Protection Act ("TVPA") by funding, arming, and otherwise supporting the Autodefensas Unidas de Columbia ("AUC") paramilitary organization with knowledge that the AUC was a violent terrorist organization. The District Court suspended all discovery until resolution of Defendants' motions to dismiss Plaintiffs' initial complaints and entered a general stay of all proceedings until conclusion of an interlocutory appeal. The general stay remained in effect until January 6, 2015, when the Eleventh Circuit issued its mandate dismissing all of the ATCA and TVPA claims against Defendants. Plaintiffs then filed discovery motions seeking to perpetuate the discovery of Cyrus Freidheim – a former executive of Defendants who allegedly made or participated in Defendants' decision to make secret payments to the AUC – and the testimony of three high-level commanders in the AUC who allegedly had direct knowledge of Defendants' financial support of the AUC. *Id.* at 5. The District Court granted Plaintiffs' emergency request for the depositions of these paramilitary witnesses. The District Court found that Plaintiffs sufficiently had shown that the three witnesses likely would disappear and not cooperate after their release from Colombian prison, which could occur at any time. *Id.* at 9-10. The District Court, therefore, found a legitimate urgency to Plaintiffs' request to serve compulsory process and immediately depose the witnesses while they remained in the custody of the

Columbian government and prison authorities. *Id.* Defendants argued that allowing the depositions to proceed during the pleading stage of the litigation would place an undue financial burden on them, theorizing that the cost of preparing for and taking the depositions would be wasted if the District Court ultimately granted Defendants' motions to dismiss. *Id.* at 10. Defendants also argued that it would be unfair to allow the taking of potential trial testimony from the paramilitary witnesses before Defendants had an opportunity to conduct general discovery on Plaintiffs' claims or to investigate the possibility that the witnesses might have been recipients of a witness-payment scheme in light of allegations that surfaced in another ATCA litigation pending in Alabama against Terrence Collingsworth, lead counsel for one of the ATCA groups in this action. *Id.* Although the District Court did not find any undue financial burden on Defendants posed by the proposed discovery, it found that, given Collingsworth's participation as ATCA counsel in both cases, and in light of uncontested evidence that the issue was discussed at a meeting of ATCA counsel in this proceeding, Defendants should be allowed an opportunity to conduct discovery on the witness-payment issue, under an accelerated schedule, before the parties deposed the paramilitary witnesses. *Id.* at 12. The District Court, therefore, allowed Defendants an opportunity to issue limited written discovery requests addressing the issue of witness-payments, gifts, or benefits of any kind or nature in this case. *Id.* Accordingly, the District Court granted Plaintiffs' motions for expedited discovery in part.

***In Re Facebook Privacy Litigation,* 2015 U.S. Dist. LEXIS 75962 (N.D. Cal. June 11, 2015).** Plaintiff brought a putative class action alleging that Defendant sent data to advertising companies that they could use to find consumer names and other personal details, without user consent, in violation of privacy laws. *Id.* at *2. Defendant moved to compel Plaintiff to produce documents concerning the creation of her Facebook account, her access to and review of Facebook's terms and conditions, the information publicly available on her Facebook page during the relevant time period, documents related to Plaintiff's non-privileged communications concerning the action, any documents relied upon by Plaintiff in responding to Defendant's interrogatories, and documents relating to Plaintiff's assertion that Defendant disclosed her personal and/or sensitive information. *Id.* at *3. Plaintiff argued that she had produced all responsive information in her custody or control. The Court denied Defendant's motion to compel, but ordered Plaintiff to submit a declaration explaining her search in detail. The Count found it "less than clear" that Plaintiff had conducted a diligent search because, among other things, she testified that she used two personal e-mail accounts from which she failed to produce any e-mail. *Id.* at *4. The Court directed Plaintiff to submit a declaration explaining her search in detail, including all sources searched and all search parameters used. *Id.* at *5-6. Plaintiff moved to compel production of names and contact information of putative class members, information regarding Defendant's advertising revenue and profit, and information about the value to Facebook users of their personally-identifiable information. *Id.* at *6. While the Court acknowledged that Plaintiff was entitled to contact information of putative class members before filing a motion for class certification, it noted the overwhelming burden associated with producing contact information and ad-click data for the entire putative class. *Id.* at *7-11. Therefore, to balance the burden of production with the benefits that might flow therefrom, the Court ordered Defendant to produce contact information and ad-click data for a sample of 5,000 individuals. *Id.* at *11. The Court, however, rejected Plaintiff's request for information about Defendant's advertising revenue and profit and Plaintiff's request for information regarding the value to Facebook users of their personally-identifiable information, finding that Plaintiff failed to substantiate how such information was relevant to class certification. *Id.* at *12-13. Accordingly, the Court granted in part and denied in part the parties' motions to compel.

***In Re General Motors LLC Ignition Switch Litigation*, 2015 U.S. Dist. LEXIS 5199 (S.D.N.Y. Jan. 15, 2015).** In this multi-district class action litigation, Plaintiffs alleged that a defect in certain vehicles caused the vehicle's ignition switch to move unintentionally from the run position to the off position. Following the announcement of vehicle recalls, Defendant retained a law firm, Jenner & Block LLP ("Jenner") and its chairperson, Anton Valukas, to investigate the circumstances that led up to the recall. *Id.* at *222. Over 350 interviews with 230 witnesses were conducted, including with over 200 current and former employees. The Jenner lawyers produced attorney notes taken during the interviews; summaries created after each interview; and formal attorney memoranda created after the interviews (collectively, the "Interview Materials"). *Id.* at *223. Subsequently, Valukas presented a document ("Valukas Report"), which included citations to many of the witness interviews. Plaintiffs in *Melton, et al. v. General Motors, LLC*, Case No. 14-

A-1197-4 ("*Melton II*"), a related state court action in Georgia, moved to compel Defendant to produce various documents relating to the Valukas Report, and Defendants refused to produce the Interview Materials. *Id.* at *224-225. The Court denied Plaintiffs' motion. The Court noted that the attorney-client privilege applies to communications between corporate counsel and a corporation's employees, made at the direction of corporate superiors in order to secure legal advice from counsel, and also extends to conversations between corporate counsel and former employees of the corporation, so long as the discussion related to the former employee's conduct and knowledge gained during employment. *Id.* at *230. The internal investigation and accompanying interviews were conducted by Jenner as part of the company's request for legal advice in light of possible misconduct and accompanying governmental investigations and civil litigation. Moreover, the employees interviewed were aware that the purpose of the interviews was to collect information to assist in providing legal advice to the company, and that the matters discussed were confidential. Further, although the investigation was conducted by outside counsel rather than in-house counsel, the Court thus opined that the attorney-client privilege applied to the portions of the Interview Materials reflecting communications between current and former employees, agents, and outside counsel of Defendant. Regarding the attorney work-product doctrine, the Court observed that Rule 26(b)(3) provides that ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative. *Id.* at *244. To demonstrate that material is protected by the attorney work-product doctrine, a party need only show that, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Id.* at *245. Here, the interviews were conducted and the Interview Materials were prepared in light of the pending investigation of the U.S. Department of Justice and in anticipation of civil litigation. Further, the Court remarked that considering the nature of the documents at issue and the factual situation, it could fairly be said that the Interview Materials would not have been created in a similar form if Defendant had not been faced with the inevitability of such litigation. Accordingly, the Court denied Plaintiffs' request for discovery of the Interview Materials on the independent ground that they constituted attorney work-product.

***In Re JPMorgan Chase Bank, N.A.,* 2015 U.S. App. LEXIS 14721 (1st Cir. Aug. 21, 2015).** Plaintiffs, a group of investors, brought a class action alleging that Defendant aided and abetted fraud in relation to a $150 million Ponzi scheme. According to the complaint, a customer used his accounts with Defendant and a predecessor bank to operate a Ponzi scheme that Defendant failed to detect and stop. *Id.* at *2. After the commencement of the action, a dispute arose as to whether Defendant shielded its records from discovery and litigation use under the Bank Secrecy Act (the "Act") and related regulations. *Id.* Plaintiffs filed the documents with the District Court, under seal, for a determination of whether the investigative file was privileged under the Act, which prohibits disclosure of suspicious activity reports ("SARs"). After extensive litigation, a Magistrate Judge presiding over the case issued a decision, holding that, with the exception of several pages from the investigative file, the documents were not privileged under the Act. *Id.* at *3. Defendant then filed a petition for a writ of mandamus with the First Circuit, arguing that the Act shielded 55 pages of records from evidentiary or other uses in the putative class action. *Id.* Defendant characterized them as "evaluative documents" and claimed that the documents were protected because they were prepared for purposes of determining Defendant's obligation under the Act and related regulations to report certain transactions to Financial Crimes Enforcement Network ("FinCEN"). *Id.* at *3-4. Conducting a *de novo* review of the files in camera, the First Circuit affirmed the Magistrate Judge's decision. The First Circuit determined that the documents at issue were not protected under the Act because none of the documents constituted a SAR or revealed the existence of a SAR. The First Circuit noted that the vast majority of the allegedly privileged documents featured only lists and descriptions of transactions, which were not encompassed by the Act or the regulations, but instead, constituted the underlying facts, transactions, and documents upon which a SAR was based, which are expressly declared exempt from the confidentiality obligation. *Id.* at *17-18. The First Circuit also opined that a careful *de novo in camera* review of the documents revealed that none of the documents at issue constituted a draft SAR, and none of the documents reflected the decision-making process as to whether a SAR should be filed, the process of preparing a SAR, or an attempt to explain the content of a SAR post filing. *Id.* at *18. The First Circuit rejected Defendant's invitation to view the "privilege" as extending to any document that might speak to the investigative methods of financial institutions, reasoning that it would be inconsistent

with the portions of the regulations specifically exempting from protection the underlying facts, transactions, and documents upon which a SAR could be based. *Id.* at *21. The First Circuit therefore denied Defendant's petition for writ of mandamus.

***In Re General Motors LLC Ignition Switch Litigation*, Case No. 14-CV-4798 (S.D.N.Y. April 17, 2015).** In this multi-district product liability litigation, Plaintiffs sued an automobile manufacturer for a defect in certain vehicles that caused the vehicle's ignition switch to move unintentionally from the run position to the off position. Plaintiffs had sought production of certain documents in discovery, which Defendant believed were protected from discovery by attorney-client privilege, work-product protection, or other privileges and protections ("disputed documents"). Defendant, however, agreed to produce certain disputed documents ("produced documents") on the condition that, among other things, the production would not waive the attorney-client privilege or work-product protection or other privileges and protections with respect to any undisclosed communications or information, including work-product that Defendant may redact ("undisclosed information"). *Id*. at *1-2. Plaintiffs agreed to not assert that the production of the produced documents would waive the attorney-client privilege or work-product protection or other privileges and protections with respect to any undisclosed information, provided that Defendant did not offensively use or make a selective or misleading presentation concerning the produced documents. Accordingly, the Court entered an order directing Defendant to produce the produced documents. In its order, the Court directed to inform Plaintiffs which of the documents were protected by discovery within seven days of production. *Id*. at *3. The Court permitted Defendant to redact portions of the produced documents that contained opinion work-product or highly sensitive non-responsive information. *Id*. at *4. The Court specifically ordered that disclosure of the produced documents did not constitute a waiver of attorney-client work-product, or of any other privileges or protections by Defendant. *Id*. at *5. The Court also ordered that if Defendant disclosed communications or information that Defendant thereafter claimed to be privileged or protected or beyond the scope of the order ("inadvertently disclosed information"), it shall not be considered a waiver of work-product protection. *Id*. at *5. Accordingly, the Court directed Defendant to produce the documents that Plaintiffs requested.

***In Re Monitronics International, Inc. Telephone Consumer Protection Act Litigation,* 2015 U.S. Dist. LEXIS 51913 (N.D. W. Va. April 21, 2015).** Plaintiffs brought a putative class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by making telemarketing calls to numbers on the national "Do Not Call" Registry or to persons from whom they did not have consent. Plaintiffs sought to enforce the TCPA's limits on telemarketing calls placed through automated telephone dialing systems and artificial or pre-recorded voice messages and calls placed to numbers listed on the Do Not Call Registry. *Id.* at *4. In August of 2014, Plaintiffs served a request for inspection to Defendant, ISI Alarms NC, Inc. ("ISI"), requesting ISI to permit Plaintiffs to inspect the computers in ISI's office. ISI moved for a protective order. Following a hearing, the Court found that ISI had ceased its business operations in March of 2013, and Power Home Technologies ("PHT") had leased the building that ISI previously held and used the computers ISI owned. Because Plaintiffs were entitled to access information on the computers relevant to ISI, the Court directed ISI to disclose the images taken from 27 computers it owned, and to image a specific computer and two randomly selected units. *Id.* at *5-6. The Court also allowed PHT to seek protection from disclosure of information relating solely to PHT. The parties then entered into an agreement under which ISI agreed to produce a privilege log to Plaintiffs, the training computer, the two randomly selected units and Office 365 accounts. *Id.* at *9. ISI, however, failed to comply with several parts of the agreement, including failure to review the initially pulled back potential privileged documents, failure to produce non-privileged documents, and to provide a privilege log. *Id.* at *9-10. Plaintiffs therefore sought to enforce the Court's order by contending that, despite numerous compromises and genuine efforts to proceed without further intervention from the Court, ISI repeatedly failed to adhere to the deadlines agreed to by the parties. Specifically, Plaintiffs requested the Court to compel ISI to produce all documents from all of the imaged computers and 365 accounts, regardless of whether those documents had been pulled for reasons of potential privilege. *Id.* at *10. Although ISI did not respond to Plaintiffs' motion, before the Court could issue an appropriate order for Plaintiffs, the counsel for ISI informed the Court that the parties had reached a proposed resolution to this issue. *Id.* at *16. The Court ordered the parties to provide in writing the specifics of their proposed resolution within 24 hours. *Id.* The Court

warned that if the parties failed to provide the specifics within the required time period, it would issue an appropriate order disposing of Plaintiffs' motion.

***In Re Morning Song Bird Food Litigation,* Case No. 12-CV-1592 (S.D. Cal. Feb. 6, 2015).** Plaintiffs, a group of consumers, brought a nationwide class action alleging that Defendants, Scotts Miracle-Gro Company and Scotts Company LLC, marketed and sold toxic bird food throughout the country. Plaintiffs alleged that Defendants continued to sell toxic bird food even after receiving warnings about the application of pesticides to the bird food products. Defendants pled guilty in January 2012 to a federal misdemeanor violation related to using unapproved pesticides. *Id.* at 2. During discovery, a dispute arose out of Plaintiffs' request to interview Defendants' former employees and contractors who might have information relevant to the use of pesticides in Defendants' bird food product. Asserting that the interviews might implicate subjects protected by the attorney-client privilege or work-product doctrine that were protected under confidentiality agreements, Defendants suggested that Plaintiffs "either depose the employee or interview the employee with a Defendants' attorney on the telephone for the limited purpose of protecting Defendants' interests." *Id.* at 4. Unable to agree on the terms of the interview, Plaintiffs filed an *ex parte* motion to limit confidentiality and to allow them to obtain informal discovery from those employees. Plaintiffs argued that Defendants used the confidentiality agreements with the former employees "to silence witnesses regarding Defendants' admittedly criminal acts, in violation of public policy." *Id*. The Court denied Plaintiffs' motion. Although Plaintiffs intended to limit the scope of any confidentiality agreement on public policy grounds where employees might wish to assist in investigations of wrong-doing, the Court found no cases in support that allowed Plaintiffs to "be the sole arbiters of the confidentiality agreements." *Id.* at 7. The Court noted that Plaintiffs did not refer any provision of the agreements they sought to limit or describe any part of the agreement that they alleged to be overbroad or unenforceable. *Id.* at 8. Plaintiffs also failed to inform the Court of the exact language of the agreements they challenged, or the identities of the former employees and contractors they sought to interview, their job titles and a description of their roles, or the circumstances of their departures. *Id.* at 8. Plaintiffs neither offered any specific questions they proposed to ask the employees nor showed that Defendants' former employees and contractors declined to speak with them because of confidentiality agreements. Although Plaintiffs described the subject matter of the interviews as "limited to the issue of the use of pesticide on bird feed, including customer complaints," the Court found that the topic was not "limited" as it could be broadly construed, and did not restrict Plaintiffs' counsel from asking questions that would violate the terms of confidentiality agreements. *Id.* The Court therefore denied Plaintiffs' *ex parte* motion to limit confidentiality.

***In Re NHL Players' Concussion Injury Litigation*, No. 13-CV-2551 (D. Minn. May 5, 2015).** In this multi-district class action litigation brought by former NHL players seeking to hold Defendant responsible for the pathological debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained during their careers, the Court granted in part Defendant's motion for protective order concerning NHL Commissioner Gary Bettman's deposition. Citing the "apex doctrine," the Court noted that the doctrine protects high-level corporate officials from depositions unless: (i) the executive has unique or special knowledge of the facts at issue; and (ii) other less burdensome avenues for obtaining the information have been exhausted. *Id*. at 3. The Court observed that before a CEO or a similar high-level officer may be deposed, the party seeking the deposition must make a good faith effort to first pursue less burdensome sources for obtaining the requested information. *Id*. at 4. Plaintiffs argued that in their Rule 26 initial disclosures, Defendant identified Commissioner Bettman as one of the two most knowledgeable persons about all aspects of the game and business of NHL hockey specifically in response to Plaintiffs' master administrative long-form and class action complaint. *Id*. at 4. In support of their argument that Commissioner Bettman possessed unique knowledge concerning concussion injuries, Plaintiffs submitted Commissioner Bettman's public statements to Yahoo Sports on March 18, 2015 where he stated that the concussions had declined by moderate to low double-digits as a percentage, and a April 7, 2001 San Jose Mercury News article where he stated that the NHL analyzed tapes of all concussions and determined that two-thirds occurred on open ice. *Id*. at 4-5. Given that Defendant identified Commissioner Bettman as a person with knowledge about the matters at issue and in light of his two statements, the Court found that Commissioner Bettman possessed unique or special knowledge relevant to this lawsuit *Id*. at 6. The Court, noted Defendant's position that Commissioner Bettman be deposed last, and its objection to him

being deposed first. Defendant contended that the Court should instead adopt a "wait and see" approach, requiring Plaintiffs to first seek information about Commissioner Bettman's knowledge via written discovery, or seek similar information from lower-level NHL employees. *Id*. The Court remarked that Defendant's point was valid that in order to adequately prepare Commissioner Bettman for his testimony, and it should first produce the relevant documents in the Commissioner's custody. *Id*. at 7. Accordingly, the Court concluded that Commissioner Bettman could be deposed after the written discovery was produced and after other priority fact witnesses are deposed. *Id*. The Court reasoned that this would not cause any hardship to Plaintiffs, and accordingly, granted Defendant's motion in part.

***In Re NHL Players' Concussion Injury Litigation*, 2015 U.S. Dist. LEXIS 33230 (D. Minn. Mar. 16, 2015).** Plaintiffs, a group of former professional hockey players, brought various actions throughout the country alleging that Defendant failed to warn players of the short and long-term effects of repeated concussions and head trauma. Plaintiffs contended that Defendant's actions and inactions resulted in players' increased incidence of, or risk of incidence of, serious brain diseases, and increased the speed and severity of players' mental decline following retirement. *Id.* at *3. Defendant asserted that it had a strong record of player safety and that the risks associated with playing in the NHL were known to Plaintiffs. *Id.* After consolidation of similar cases for pre-trial proceedings, Plaintiffs filed a master class action complaint on behalf of six named Plaintiffs, asserting various claims against Defendant including negligence, fraudulent concealment, failure to warn, and medical monitoring. *Id.* at *3-4. As part of fact discovery related to class certification as well as merit-based discovery, Defendant served interrogatories on all Plaintiffs named in any complaint that was transferred to, or filed in, this proceeding. *Id.* at *4. Defendant thereafter moved to compel Plaintiffs to produce a full list of healthcare professionals who had provided medical care to them for any condition since they began playing hockey at a competitive level, and attached a medical records disclosure authorization form. *Id.* The Court granted Defendant's motion in part and denied it in part. First, Plaintiffs argued that Defendant was only entitled to discovery concerning the six named Plaintiffs identified in the master complaint, noting that the master complaint served as the operative complaint in this matter. *Id.* at *9-10. The Court agreed with Defendant's argument that a master complaint operates in the place of individual complaints for pre-trial purposes, but pointed out that it does not supersede them. *Id.* at *10. Moreover, the Court observed that, consistent with that understanding, Defendant had moved to dismiss the master complaint aimed at the individual claims asserted by the six proposed class representatives. *Id.* Thus, the Court found the master complaint served as the operative complaint in this case. *Id.* As a result, the Court limited initial discovery to the six named Plaintiffs, consistent with other cases involving putative class actions. *Id.* at *12. The Court opined, however, that if Plaintiffs sought discovery of the NHL regarding a broader class of Plaintiffs who had filed suit, in the interests of parity, it would require the remaining 24 Plaintiffs who had brought suit but were absent putative class members to comply with Defendant's discovery requests. *Id.* at *12-13. Plaintiffs also objected to the apparently unlimited temporal scope of the requested information. Defendant agreed to Plaintiffs' proposed limit of the discovery of player's medical information to a period from age 15 to the present. The Court found that that was a reasonable limitation. *Id.* at *13. Finally, regarding the range of medical information encompassed by Defendant's interrogatories, Plaintiffs objected to the discovery as impermissibly broad. Plaintiffs contended that the discovery should be limited to medical providers, including general practitioners, who provided services related to the head or brain. *Id.* at *13. Plaintiffs also specifically objected to language in the medical records authorization form that included records regarding HIV, AIDS, and sexually transmitted diseases. *Id.* The Court held that while the most relevant medical information in this case would concern treatment of the head or brain, other medical conditions or treatment may also be relevant. *Id.* at *14-15. The Court concluded, however, that highly-sensitive information was not relevant unless individual discovery later warranted the production of such information. *Id.* at *15.

***In Re Target Corp. Customer Data Security Breach Litigation,* Case No. 14-CV-2522 (D. Minn. May 5, 2015).** In this action relating to the 2013 massive data breach which compromised as many as 40 million credit and debit card accounts and personal information of Target Corp.'s customers, the Court denied Plaintiffs' motion for relief from or modification to the protective order to compel the production of improperly clawed back documents to the extent the motion sought an order concluding that Defendant

had waived the attorney-client privilege and work-product protection for the documents at issue. *Id.* at 23. The Court also denied the motion to the extent Plaintiffs requested to be relieved from any obligation to return or destroy any copies of the 3,095 documents at issue and ordered Plaintiffs to return or destroy the documents within fourteen days of the order. *Id.* at 23-24. Defendant produced the 3,095 documents at issue shortly after the 2013 data breach incident occurred that precipitated this action and after receiving a subpoena from the U.S. Security Exchange Commission ("SEC"). Defendant collected over 1.7 million documents by March 2014 in response to the subpoena and set up a process for reviewing its documents to determine their relevance and to protect the privileged documents. *Id.* at 5-6. After Defendant completed the review process and produced documents to the SEC, Defendant also produced a number of documents to the Federal Trade Commission and to the attorney generals of several states (collectively "government entities"), each of which had requested documents from Defendant about the data security breach. *Id.* at 8. Before Defendant's counsel became aware that Defendant's production to the SEC and government entities contained a large number of allegedly privileged materials, Defendant produced approximately 39,000 documents to Plaintiffs on October 20, 2014. When Defendant re-reviewed the documents it produced to the SEC and the government entities, it discovered that it included numerous privileged documents, and because Defendant produced the same material to Plaintiffs that it had previously given to the SEC in the production, Plaintiffs also received a large number of privileged or protected documents from Defendant. *Id.* at *10-11. Defendant then demanded Plaintiffs return or destroy those documents. Plaintiffs contended that Defendant had intentionally waived the attorney-client privilege and work-product protection for all documents at issue because it had intentionally produced the documents to the government entities, and when it realized those documents might hurt its position in this action, it changed its mind. *Id.* at 12-13. Defendant sought guidance from the Court. The Court found that Defendant had not waived protection for its privileged and work-product protected documents. The Court noted that Defendant had employed reasonable methods for reviewing electronically-stored documents and had taken reasonable precautions to protect attorney-client privileged communications and confidential work-product. *Id.* at 14-15. The Court opined that there was no basis to conclude that Defendant acted unreasonably in developing its approach to conducting a privilege review or that Defendant intentionally disclosed the information to government entities and then changed its mind later. *Id.* at 15. The Court pointed out that the production was of larger magnitude, and reviewing 230,000 documents was no small undertaking. Defendant had hired several contract attorneys, staffed the review project with attorneys employed by a large law firm with senior attorneys overseeing the entire process, and provided a reasonable explanation for why the review did not identify certain privileged documents. *Id.* at 18. Thus, even though the number of documents Defendant sought to claw-back appeared quite high, the Court ruled that Defendant did not waive its privilege and work-product protections. *Id.* at 19. The Court therefore ordered Plaintiffs to comply with Defendant's claw-back request.

***In Re Target Corp. Customer Data Security Breach Litigation,* 2015 U.S. Dist. LEXIS 151974 (D. Minn. Oct. 23, 2015).** Plaintiffs, a group of consumers, brought multi-district litigation alleging that they suffered economic damage from Defendant's 2013 data breach that allegedly compromised their personal information. The Court granted in part and denied in part Plaintiffs' motion to compel Defendant to produce certain documents that Defendant withheld from production and identified on its privilege log. *Id*. at *3. First, Plaintiffs asserted that Defendant improperly raised claims of attorney-client privilege and work-product protection for items relating to the Data Breach Task Force, a group that Defendant established in response to the data breach that precipitated this action. *Id*. at *4. The Court disagreed. Defendant asserted that it established the Data Breach Task Force at the request of Defendant's in-house lawyers and its outside counsel to educate the attorneys about aspects of the breach and to enable the attorneys to give legal advice. *Id*. at *5. Second, Plaintiffs contended that Defendant improperly asserted privilege for communications prepared by Verizon, a company that Defendant retained to investigate the data breach. The Court disagreed. Defendant explained that, as to Verizon, it only claimed privilege and work-product protection for documents involving one team from the Verizon Business Network Services, which Defendant's outside counsel engaged to enable counsel to provide legal advice. *Id*. at *6. Third, Plaintiffs sought the production of redacted information in e-mail communications that reflected updates to Defendant's Board of Directors in the aftermath of the data breach. The Court ordered Defendant to produce the documents. It noted that the redacted communications from Defendant's Chief Executive

Officer merely provided updates to the Board of Directors on what Defendant's business-related interests were in response to the breach and did not involve any confidential communications between an attorney and a client, contain requests for discussion necessary to obtain legal advice, or include the provision of legal advice. *Id*. at *9. Accordingly, the Court granted Plaintiffs' motion regarding the redacted communications from Defendant's CEO updating the Board of Directors, but denied the motion as to the other privilege log entries. *Id*. at *10.

***Johnson, et al. v. Ford Motor Co.,* Case No. 13-CV-6529 (S.D. W. Va. Oct. 26, 2015).** Plaintiffs brought a putative class action alleging that some of Defendant's vehicles produced between 2002 and 2010 were prone to sudden, unintended acceleration and that the company failed to install fail-safe systems that would allow the drivers to physically prevent or mitigate the problem. The Magistrate Judge ordered Defendant to engage in additional discovery relating to its engineering of the electronic throttle control ("ETC") system and the receipt and investigation of unintended acceleration incidents. *Id.* at 1. Defendant filed Rule 72 objections to the Magistrate's Order, which the Court denied. Defendant argued that the discovery order was unduly burdensome, would require it to produce documents and witnesses concerning matters already covered by previous discovery, and would impose substantial expenses. The Court noted that pursuant to Rule 72(a), it may reverse the Magistrate Judge's determination of a non-dispositive motion only if it is clearly erroneous or contrary to law. The Court found that after reading the parties' papers and hearing arguments, the Magistrate Judge narrowed down the permitted discovery and precisely listed what discovery would go forward and under what conditions. *Id.* at 2. The Court determined that the Magistrate Judge considered Rule 26 and appropriately balanced the burden of additional discovery with its benefits. The Court further found that the Magistrate Judge considered and appreciated the complexity and cost of the discovery that had already taken place. The Court acknowledged that Defendant had expended substantial time and resources to comply with discovery to this point; however, it was satisfied that overall discovery ordered by the Magistrate Judge was reasonable and proportional. *Id.* at 3. Accordingly, the Court denied Defendant's objections.

***Payton, et al. v. Kale Realty, LLC,* Case No. 13-CV-8002 (N.D. Ill. Aug. 20, 2015).** Plaintiff, an Illinois citizen, brought a putative class action alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA") by sending him unsolicited text message advertisements. According to the complaint, Defendant Kale Realty, LLC directed Defendant VoiceShot, LLC, a web-based communications common carrier, to send Plaintiff and other putative class members unsolicited commercial text messages on their cellular telephones using an automatic telephone dialing system. *Id.* at 1. VoiceShot moved for summary judgment arguing, in part, that it could not be liable under the TCPA because it was merely a conduit used to transmit text messages allegedly sent by Kale Realty. *Id.* In order to respond to this argument, Plaintiff filed a motion to compel VoiceShot to produce documents related to the stated defense, as well as an appropriate Rule 30(b)(6) deponent who could explain the working mechanism of VoiceShot's telecommunications system. *Id.* at 1-2. After the Court granted the motion, Plaintiff served a deposition notice identifying six topics on which the deponent should testify. Although VoiceShot unduly delayed the production of requested documents, it ultimately produced the documents and identified Mark Schwartz, the President of Covatron, Inc., a 50% member of Voice Shot, as its deponent. *Id.* at 3. Plaintiff took Schwartz's deposition on October 30, 2014. Plaintiff filed a motion to hold VoiceShot in contempt, alleging that Schwartz was deliberately evasive during questioning on even basic issues. *Id.* The Magistrate Judge recommended granting Plaintiff's motion. The Magistrate Judge noted that, although VoiceShot designated Schwartz as the person most knowledgeable about the mechanics of its telecommunications system and the technology used to send the text messages at issue, he spent most of his October 2014 deposition essentially refusing to answer even basic questions in any meaningful way. *Id.* According to the Magistrate Judge, Schwartz's lack of cooperation was likely an effort to avoid discussing VoiceShot's use of an automatic dialing system to place commercial text messages, which violated the TCPA. *Id.* at 10. VoiceShot argued that Schwartz was merely being "careful with his language" because it was his first deposition and blamed the mutual difficulty the parties had communicating on the fact that the examination was conducted telephonically. *Id.* The Magistrate Judge, however, disagreed, pointing out Schwartz's obstructionist testimony as well as the absence of evidence that VoiceShot's counsel made any effort during a break or otherwise to admonish Schwartz about his evasive responses. *Id.* at 11. The Magistrate

Judge found that VoiceShot and its designated witness did not engage in a good faith effort to answer completely reasonable questions, but instead purposefully sought to avoid answering or providing any useful information. On this basis, the Magistrate Judge determined that a finding of contempt was appropriate, and recommended granting Plaintiff's motion to hold VoiceShot in contempt. *Id*. at 12. The Magistrate Judge also recommended that the Court order VoiceShot to pay a total of $6,051 in attorneys' fees and $245.05 in costs, for a total sanction of $6,296.05. *Id.* at 19.

***Texas Roadhouse, Inc. v. EEOC,* 2015 U.S. Dist. LEXIS 25468 (W.D. Ky. Mar. 3, 2015).** Plaintiffs brought a declaratory judgment action alleging that the EEOC failed to issue a determination on Plaintiffs' three initial Freedom of Information Act ("FOIA") requests and failed to produce documents responsive to those requests within the required statutory timeframe. Following the EEOC's age discrimination investigation, Plaintiffs had filed the three separate FOIA requests with the EEOC. Subsequent to filing of this suit, the EEOC issued determinations as to FOIA requests 1 through 3 and produced some of the requested records, thereby making Plaintiffs' claim moot. *Id*. at *2. Plaintiffs then submitted a fourth FOIA request, for which the EEOC sent a letter to Plaintiffs estimating the cost associated with searching for responsive documents at over $24,500 and advised Plaintiffs that the EEOC would not process the request further until Plaintiffs notified it that they were willing to pay the fees incurred. *Id*. at *3. Plaintiffs represented that they still had not received the EEOC's determination about the fourth request and, thus, amended their complaint to assert that claim against the EEOC. The EEOC moved to dismiss the amended complaint, primarily arguing that Plaintiffs failed to exhaust their administrative remedies. The Court granted the motion. The Court found that Plaintiffs did not challenge the adequacy of the EEOC's belated production of documents in their amended complaint. *Id*. at *8. Instead, Plaintiffs alleged in both the complaint and amended complaint that the EEOC failed to provide either a determination regarding, or the documents responsive, to Plaintiffs' funds request. *Id*. Plaintiffs argued that they constructively exhausted their administrative remedies by filing suit before the EEOC made any determination or produced any documents. The Court remarked that while the constructive exhaustion provision allows a person making a FOIA request to break out of the administrative process and proceed directly to federal court in the face of an unresponsive agency, a difficulty arises when the agency responds after the lawsuit is initiated. *Id*. at *11. Because Plaintiffs had not challenged the adequacy of the response in their amended complaint, the Court found that Plaintiffs must first exhaust their administrative remedies before seeking judicial review of those matters. *Id*. at *11-13. Finally, regarding the fourth FOIA request, although Plaintiffs submitted that they did not receive the reasonable fee requirement letter and therefore had not failed to exhaust administrative remedies, the EEOC argued that Plaintiffs did receive a copy of the letter because it had attached the letter to the motion to dismiss. *Id*. at *14-15. The EEOC maintained that Plaintiffs failed to provide any assurance to the EEOC of their willingness to pay the assessed fee. *Id*. at *15. Thus, given the current status of the fourth FOIA request, as well as the remaining FOIA claims, the Court dismissed without prejudice Plaintiffs' fourth FOIA request claim so that Plaintiffs first could respond to the reasonable fee request letter and then administratively exhaust the claim.

***Troice, et al. v. Proskauer Rose LLP,* Case No. 09-CV-1600 (N.D. Tex. Mar. 9, 2015).** In this action brought by Plaintiffs, a group of investors in Stanford Investment Bank ("SIB"), alleged that Defendants, Proskauer Rose LLP and Chadbourne & Parke LLP, violated the provisions of the Texas Securities Act and/or aided and abetted in the violation of the provisions of the Texas Securities Act by misrepresenting the investment quality of SIB's certificates of deposit. Defendants brought a motion to compel the receiver, Ralph S. Janvey, to produce documents related to class certification. Defendants subpoenaed the receiver in November 2014, requesting him to produce documents they claimed were critical to its analysis of Plaintiffs' motion for class certification. The Court, however, found that the requests for a list of names, addresses, telephone numbers, and other contact information for each claimant in the putative class were "not reasonably related to proof of class certification issues." *Id.* at *4. Further, the receiver had already provided a spreadsheet identifying claims-related information for more than 13,000 claim groups, and according to the Court, the specific names and contact information of putative class members was not necessary to determine issues such as numerosity, common questions, and adequacy of representation under Rule 23. *Id.* The Court also denied several other requests for information, including requests for any notices of deficiency distributed by the receivership estate to potential claimants, on the grounds that

Defendants failed to establish how such information bore relation to any class certification issues. *Id.* at *5. Accordingly, the Court denied Defendants' motion to compel.

(xxi) Class-Wide Proof And Class-Wide Damages In Class Actions

***Astrazeneca AB, et al. v. UFCW Union And Employers Midwest Health Benefits Fund,* 2015 U.S. App. LEXIS 968 (1st Cir. Jan. 21, 2015).** Plaintiffs, a group of union health and welfare funds that reimburse plan members for prescription drugs, brought an action against Defendant AstraZeneca, alleging anti-competitive conduct in the sale of a heartburn drug called Nexium. Defendant, who owned several patents related to the Nexium compound, had sued three generic drug companies who sought to market a generic form of Nexium, alleging infringement of some of the Nexium patents. Defendant eventually settled with each generic manufacturer by paying significant sums in exchange for not challenging the validity of the Nexium patents and for delaying the launch of its respective generic products until the two main patents covering the drug product itself expired on May 27, 2014. *Id.* at *3. Plaintiffs contended that, but for Defendant's anti-competitive conduct, a generic version of Nexium would have been available as early as April 2008, and that Defendant had overcharged for Nexium from April 14, 2008 to at least May 27, 2014. *Id.* at *4. Plaintiffs also alleged that the Nexium patents were invalid because they would have been obvious in light of Defendant's earlier patents and other references, and that the settlement agreements between Defendant and the generic companies constituted unlawful agreement not to compete because of the likely invalidity of the Nexium patents, the size of Defendant's payments to the generic companies, and the fact that generic companies provided nothing to Defendant other than an agreement not to compete. *Id.* at *4. Plaintiffs claimed damages under the antitrust and consumer protection laws of 24 states and the District of Columbia, and sought certification for a class of third-party payors ("TPPs"), such as Plaintiffs and individual consumers. The District Court granted certification. Defendant appealed and contended that class certification was improper because the class included individuals who were not injured by general foreclosure, *i.e.*, individual consumers who would have continued to purchase branded Nexium for the same price after generic entry. According to Defendant, the existence of these more than a *de minimis* uninjured class members precluded the use of common proof at trial, and thus defeated the predominance requirement of Rule 23(b)(3). The First Circuit disagreed and affirmed the District Court's class certification order . The First Circuit found that class certification was permissible even if the class included a *de minimis* number of uninjured parties, and it had not been shown at this stage that future proceedings would not be manageable. *Id.* at *7. Plaintiffs' theory of liability here was appropriately limited as they only required that Defendant pay aggregate damages equivalent to the injury that they caused. *Id.* at *17. While it was true that the pay-out of the amount for which Defendant would be liable must be limited to the injured parties and Plaintiffs have not yet proposed a proper mechanism for exclusion of uninjured class members, the First Circuit noted that there was nothing which showed that such a mechanism could not be developed in future. *Id.* at *20-21. The First Circuit explained that there appeared at least two ways that the consumer could establish injury: (i) either through a presumption that economically rational consumers faced with two identical products would purchase the less expensive alternative, or (ii) through testimony that, given the choice, the consumer would have purchased the generic. *Id.* at *21-22. Thus, according to the First Circuit, a mechanism would exist for establishing injury at the liability stage of the case, and Defendant's speculation that a mechanism for exclusion of uninjured members could not be developed later did not defeat the class certification requirements. Defendant argued that more than a *de minimis* number of class members were uninjured, thereby barring class certification. The First Circuit, however, noted that Plaintiffs had shown that the vast majority of the class members were probably injured, and a "rigorous analysis" of Plaintiffs' expert testimony did not show that the number of uninjured was more than *de minimis.* The First Circuit further opined that a certified class might include a *de minimis* number of potentially uninjured parties as numerous case law precedents had certified classes even though Plaintiffs have not been able to use common evidence to show harm to all class members. The First Circuit reasoned that Defendant's objections to certifying a class including uninjured members ran counter to fundamental class action policies. *Id.* at *27-36. Accordingly, the First Circuit affirmed the District Court's grant of class certification.

***Grodzitsky, et al. v. American Honda Motor Co., Inc.,* 2015 U.S. Dist. LEXIS 64683 (C.D. Cal. April 22, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that Defendant sold cars

with defective window regulators. According to the complaint, the glass of the side window affixed to a carrier bracket that was pulled upwards or downwards by cables anchored to the carrier. The cables had metal balls or ferrules at each end that were anchored into ferrule inserts on the polymer component of the carrier. The vehicles used polymer ferrule insert made from either polyoxymethylene ("POM") or polybutylene terephthalate ("PBT"). *Id.* at *4. Plaintiffs asserted that this polymer carrier ferrule insert was defective because it was insufficiently strong to bear the load of the window and therefore the window regulators were prone to premature and repeated failure. *Id.* at *5. Seeking to represent a nationwide class of similarly-situated consumers, Plaintiffs asserted claims under California's Consumer Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL"). Following the initial denial of class certification, Plaintiffs proposed alternative classes for certification. The proposed alternatives included: (i) a class of only California purchasers/lessees of the class vehicles; (ii) a class of only California purchasers/lessees of those class vehicles with window regulators using POM in the ferrule insert; or (iii) three California sub-classes corresponding to the three vehicle platforms owned by the proposed class representatives. *Id.* at *28. For each of these alternatives, Plaintiffs sought to certify an "owner class" for the purposes of seeking prospective declaratory relief and a "damages class" for all who have already experienced failures. *Id.* The Court denied the motion, finding that Plaintiffs failed to demonstrate commonality. Although Plaintiffs submitted numerous common questions, the Court found that each question turned on proof of a common defect. *Id.* at *32. The Court held that Plaintiffs adduced no evidence, beyond an expert's testimony, that a common defect existed across all class vehicles or even across all class vehicles with POM carrier ferrule inserts. *Id.* The Court determined that the expert's opinion – that the class vehicles suffered from a common defect, that the POM carrier ferrule inserts were uniform and common, and that the POM carrier ferrule inserts were more defective than the PBT ferrule inserts – was inadmissible. *Id.* at *33. In describing his methodologies, Plaintiffs' expert admitted that he examined ten window regulator assemblies, but performed no tests upon them. *Id.* Plaintiff's expert further admitted that he was not aware of or relying on any other experts' durability or performance testing of the carrier ferrule insets, and did not propose performing any experiments in the future to show the existence of a common defect. *Id.* Even assuming the testimony's admissible, the Court found that Plaintiffs' expert failed to show that either the proposed California class members or the POM class members all suffered the same injury. Further, the three proposed sub-classes included no less than four model years, and Defendant submitted evidence that, even though the platform remained the same, design revisions existed within that platform. *Id.* at *35. Plaintiffs failed to address whether the window regulators were the same in all relevant ways through the proposed sub-class platform's run, and thus failed to establish that each of the proposed sub-classes' members suffered a common injury. *Id.* at *36. Because each of the asserted common questions relied on existence of a common injury, the Court concluded that Plaintiffs failed to carry their burden of showing the existence of common questions of law or fact. *Id.* Accordingly, the Court denied Plaintiffs' renewed motion for class certification.

***Gulino, et al. v. Board Of Education Of The City School District Of The City Of New York,* 2015 U.S. Dist. LEXIS 125979 (S.D.N.Y. Sept. 21, 2015).** Plaintiffs, a group of African-American and Latino individuals, brought a putative class action alleging that Defendant's LAST-1 exam violated Title VII as it had a disparate impact on African-American and Latino test-takers. *Id.* at *2. After sixteen years of litigation, the Court certified a remedy-phase class pursuant to Rule 23(b)(3), and appointed a Special Master to oversee the phase, which included resolution of both class-wide and individual issues. *Id*. On July 17, 2015, the Special Master issued an Interim Report and Recommendation (the "Report") which recommended denying Defendant's motions to permit class-wide calculation of attrition and to cut-off damages for claimants who failed to obtain a teaching position after ultimately passing the LAST-1. *Id.* at *3. The Court conducted a careful *de novo* review of the Report and adopted it in full. *Id.* at *5. Although Defendant claimed that a class-wide 25% reduction was warranted because only 75% of applicants who passed the LAST-1 and fulfilled all other requirements were hired as full-time teachers, the Court denied any such reduction pointing out that class members, who failed the LAST-1 but were otherwise qualified, would have received a full teaching license and been hired as a full-time teacher, given the large number of vacancies during the time period at issue. *Id.* at *19-20. To the extent Defendant believed that a specific class member would not have been hired for some non-discriminatory reason, the Court noted that Defendant would have the opportunity to raise its argument at the class member's individual hearing. *Id.* at

*20. Defendant also argued that any damage award should be reduced to reflect the reality that not all teachers remain in their position until retirement, and thus damages should be adjusted on a class-wide basis to account for the statistical outcomes of non-class comparators. *Id.* at *20-21. The Court, however, agreed with the Special Master that a class-wide reduction of based on attrition was inappropriate as class-wide calculations would under-compensate some class members and over-compensate others, and thus individualized determinations would best recreate what would have occurred absent discrimination. *Id.* at *21. Finally, Defendant argued that individual hearings would result in a windfall to Plaintiffs and a punitive back pay award. The Court recognized the possibility that Defendant might over-compensate some claimants, but held that Title VII's goal of restoring Plaintiffs to the position they would have achieved absent discrimination could be reached here only by examining each claimant's circumstances and estimating damages. *Id.* at *22. According to the Court, individual hearings would best ensure that the requirements of Title VII were met and that claimants were properly compensated, and to the extent that individual hearings might result in the overcompensation of some individuals, it must be tolerated as an inevitable consequence of a process that was designed to tailor awards as closely as possible to the damage suffered by the claimant. *Id.* at *22-23. The Court therefore agreed with the Special Master that disputes concerning a hearing decision and attrition should be resolved through individual hearings rather than class-wide reductions. *Id.* at *24. Because the mere fact that a claimant eventually passed the LAST-1 did not necessarily warrant the conclusion that his or her inability to gain employment was unrelated to the discriminatory effects of the test, the Court held that a claimant who passed the LAST-1 but did ultimately secure a permanent teaching position was not categorically barred from a back pay award, and such an issue could be resolved on a case-by-case basis at individual hearings. *Id.* at *24-25. Accordingly, the Court denied Defendant's motion to adjust damages for attrition on a class-wide basis and to cut-off damages for claimants who failed to obtain permanent teaching positions after passing the LAST-1.

***In Re Wilmington Trust Securities Litigation,* 2015 U.S. Dist. LEXIS 117423 (D. Del. Sept. 3, 2015).** In this consolidated securities fraud class action, Plaintiffs, a group of investors, alleged that Defendants engaged in an overarching bank fraud conspiracy that was designed to fraudulently conceal Defendant Wilmington Trust Corporation's ("WTC") true financial condition, causing WTC to misrepresent its reporting of past due and non-performing loans. *Id*. at *2-3. Plaintiffs moved for class certification. Defendants argued that Plaintiffs failed to satisfy the predominance requirement as they did not present a proposed class-wide damages methodology and did not provide proof of damages. *Id.* at *5-6. Defendants argued that pursuant to *Comcast Corp. v. Behrend,* U.S. 133 S. Ct. 1426 (2013), Plaintiffs must show that damages can be calculated on a class-wide rather than individual basis. *Id.* The Court, however, noted that in *Neale v. Volvo Cars of North America, LLC,* 2015 U.S. App. LEXIS 12629 (3d Cir. July 22, 2015), the Third Circuit found that whatever ramifications for antitrust damages models or proving antitrust impact are established by *Comcast*, it must consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class. *Id*. at *6. Consistent with the Third Circuit's analysis, the Court concluded that class certification is not defeated when there are individual issues with respect to the calculation of damages. *Id*. The Court further reasoned that Plaintiff's theory that there is a common, class-wide methodology to calculate damages based on its expert's event study methodology was adequate to establish predominance. *Id*. at *7. Accordingly, the Court granted Plaintiff's motion for certification.

***Kamakahi, et al. v. American Society For Reproductive Medicine,* 2015 U.S. Dist. LEXIS 12677 (N.D. Cal. Feb. 3, 2015).** Plaintiffs, a group of egg donors, brought a putative class action alleging that Defendants' guidelines regarding appropriate compensation for egg donors constituted a horizontal price fixing agreement in violation of § 1 of the Sherman Act. Plaintiffs sought certification of a nationwide class of women who donated eggs between April 2007 and the present to any clinic that was a member of Defendants' organization and followed price rules set by them, or to an agency that, at the time of the donation, had agreed to follow those rules. *Id.* at *10. The Court granted the motion on the question whether Defendants violated the Sherman Act and reserved the issue of damages until after adjudication of the antitrust violation. In granting Plaintiffs' motion for class certification, the Court found that Plaintiffs established the numerosity requirement as the proposed class consisted of thousands of women dispersed

throughout the country. Plaintiffs established the commonality requirement by raising the common question of whether Defendants' guidelines violated the antitrust laws. *Id*. at *47. Plaintiffs also satisfied the typicality requirement as the guidelines limiting appropriate compensation applied to the class as a whole. Plaintiffs, however, satisfied the predominance requirement only with regard to whether Defendants' guidelines violated the Sherman Act, but not with regard to damages and antitrust impact. Although Plaintiffs argued that documentary evidence and a regression analysis by their expert witness, Dr. Hal Singer, could show the extent of each class member's damages, the Court excluded Dr. Singer's report based on Defendants' motion to strike. The Court found that Dr. Singer's analysis did not reliably support his conclusion that antitrust impact or damages could be shown through class-wide proof. Plaintiffs identified only three agencies that signed an agreement to adhere to Defendants' price rules and the regression analysis relative to these agencies produced significantly different conclusions concerning the impact on the guidelines. *Id.* at *36-38. Further, neither Plaintiffs nor Dr. Singer explained the variations between the agencies, or how the disparate results could be applied to other agencies or clinics. *Id.* The Court therefore found that Dr. Singer's analysis did not reliably support class-wide proof of impact or damages, and thus irrelevant to the issue of class certification. *Id.* at *44. The Court held that failure to demonstrate class-wide damage did not bar certification to determine whether a violation occurred, and resolving the violation issue on a class-wide basis would be far more efficient for both the parties. Accordingly, the Court granted Plaintiffs' motion for class certification in part for the purpose of determining whether Defendants' compensation guidelines violated the Sherman Act.

***Lambert, et al. v. Nutraceutical Corporation.,* Case No. 13-CV-5942 (C.D. Cal. Feb. 20, 2015).** Plaintiffs, a group of dietary supplement purchasers, brought a class action alleging that Defendant violated California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumer Legal Remedies Act ("CLRA"). Plaintiffs alleged that Defendant falsely marketed its product as having beneficial health and aphrodisiac properties and being scientifically formulated to improve virility even though none of the ingredients in it provided such benefits. *Id.* at 2. The Court certified a class in April 2014 based on Plaintiffs' proposal of calculating damages using a full-refund damages model theory that relied on Defendant's sales numbers and an average retail price for the supplement. Under the model, each class member would be entitled to receive a full refund because none of them benefitted from the product. *Id.* at 6. Plaintiffs relied on Defendant's sales data at the certification stage. While the Court anticipated calculating damages using Defendant's sales data and an average retail price, after discovery Plaintiffs sought to establish monetary relief on a class-wide basis through Defendant's sales data alone. Defendant argued that its sales data by itself could not be used to calculate damages under Plaintiffs' full refund model, and therefore moved for decertification of the class. *Id.* at 7. The Court agreed and granted Defendant's motion. The Court found that the average retail price was essential in this action because it was the average retail price that could reflect the price class members actually paid. *Id.* at 7-8. The Court pointed out that "[a]lthough the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation." *Id.* at 8. According to the Court, missing this calculation was a defect in Plaintiffs' evidence that was fatal to their class claims because restitution serves to provide what the class members lost, not what Defendant gained. *Id.* Although Plaintiffs contended that damages could be calculated based solely on Defendant's sales data, they did not explain how to do so without the average retail price. *Id*. at 9. The Court concluded that Plaintiffs failed to provide the key evidence necessary to apply a class-wide model of damages. *Id.* at 11. Accordingly, the Court granted Defendant's motion for decertification of the class.

(xxii) Multi-Party Litigation Under The WARN Act

***Calloway, et al. v. Caraco,* 2015 U.S. App. LEXIS 15058 (6th Cir. Aug. 26, 2015).** Plaintiff brought a putative class action alleging that Defendant, a pharmaceutical manufacturer, violated the WARN Act when it engaged in a 2009 mass lay-off of employees without providing 60 days' notice. Beginning several years before the mass lay-off, the U.S. Food and Drug Administration ("FDA") issued numerous notifications to Defendant outlining regulatory violations related to its products and processes and warning that failure to correct the violations could result in an enforcement action. *Id.* at *3-4. Defendant hired two outside consultants to conduct an independent audit of its facilities, and the consultants opined that Defendant likely would face some form of enforcement action from the FDA, including a seizure action. *Id.* at *5. In

2008, the FDA issued Defendant a new and more strident warning letter stating that Defendant's response to its earlier letters had been inadequate and that many failures remained uncorrected. *Id.* at *8. In the letter, the FDA also noted its "serious concerns" regarding Defendant's compliance history, as well as the serious nature of the violations, and warned of the potential for legal action without further notice. *Id.* As a result of Defendant's continued failure to correct the violations, on June 24, 2009, the FDA filed a complaint for forfeiture of adulterated articles of drugs. *Id.* at *14-15. The following day, the FDA served Defendant with a complaint and warrant for arrest and seized various products manufactured by Defendant at its Detroit and Farmington Hills facilities. *Id.* at *15. On June 26, 2009, Defendant initiated a mass lay-off of hourly and salaried workers at the affected facilities, and on July 6, 2009, it issued WARN Act notices stating that it did not reasonably foresee that the FDA would take action. *Id.* In response, Plaintiff initiated this class action claiming that Defendant violated the WARN Act by failing to provide affected employees 60 days' notice before the mass lay-off. *Id.* at *18. Defendant argued that the full 60-day notice requirement did not apply because the closing was caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required. *Id.* The District Court certified the putative class of former employees and, following a bench trial, granted judgment for Plaintiff, finding that it was reasonably foreseeable on April 27, 2009 – 60 days before the lay-off – that the FDA would execute a large-scale enforcement action against Defendant, necessitating the mass lay-off. *Id.* at *16. The Sixth Circuit affirmed and held that Defendant's actions in the months leading up to April 27, 2009, demonstrated that Defendant was aware of the serious deficiencies at its facilities that likely would result in an imminent enforcement action, and this rendered the ensuing mass lay-off foreseeable. *Id.* at *29-30. The Sixth Circuit specifically noted that Defendant was aware of the continuing and escalating violations, knew that enforcement action could result from the continuing violations based on the information provided by its consultants, and had publicly acknowledged the warning letter it received in 2008. *Id*. On Defendant's appeal, the Sixth Circuit rejected Defendant's contention that the District Court engaged in "analysis by hindsight." *Id.* Although Defendant asserted that it would not have been reasonable for it to issue notice at the 60-day mark because the FDA had not yet finished its inspection, the Sixth Circuit noted that the consultant's audit had been completed by that time and had indicated outstanding problems. *Id.* at *31-32. Thus, according to the Sixth Circuit, it was not an "analysis by hindsight" for the District Court to conclude that a reasonable employer – based on the tenor of the 2008 warning letter, the multiple outstanding violations dating back several years, and the advice of the consultants – would have realized that an enforcement action was imminent. *Id.* at *32. Accordingly, the Sixth Circuit affirmed the District Court's judgment that Defendant violated the WARN Act.

***Droste, et al., v. Vert Capital Corp.*, 2015 U.S. Dist. LEXIS 43849 (E.D. Va. April 2, 2015).** Plaintiffs, a group of workers, brought a putative class action alleging that Defendants improperly terminated employees without notice and adequate compensation in violation of the Worker Adjustment and Retraining Notification ("WARN") Act. Plaintiffs contended that, on June 10, 2014, Defendants terminated Plaintiffs without notice and that, although Defendants provided paychecks, many of the paychecks bounced because of insufficient funds. *Id*. at *6-7. Plaintiffs further alleged that, on June 23, 2014, Defendants terminated most of the remaining employees without providing any paychecks. *Id*. Plaintiffs moved to certify two classes: (i) a June 10 sub-class; and (ii) a June 23 sub-class. The Court granted the motion. The Court found that Plaintiffs satisfied the Rule 23(a) commonality requirement for both sub-classes because they identified a common set of facts concerning Defendants' actions and a common core of legal issues with respect to putative sub-class members. The Court explained that, in order to prevail under the WARN Act, each putative class member had to establish that Defendants were subject to the WARN Act; that Defendants employed the class member; and that Defendants terminated the class member on June 10, 2014, or June 23, 2014, with proper notice. *Id*. at *13-14. The Court found these questions central to each claim and susceptible to common proof. The Court also concluded that Plaintiffs satisfied the Rule 23(b)(3) predominance requirement. The Court recognized that some individualized inquiry would be necessary to determine the proper amount of damages. *Id*. at *19-20. In particular, under the WARN Act, a damages inquiry would entail an individualized analysis of each employee's salary level immediately before termination and the average of the three preceding years. *Id*. at *20. Nevertheless, the Court found that differences in damages among putative class members did not generally defeat predominance if liability was common to the class. *Id*. Although the case involved individualized damages

issues, the Court ruled that Defendants' liability to class members was a common issue that could be resolved by an overarching inquiry into Defendants' behavior with respect to the two sub-classes. *Id.* at *20-21. The Court, therefore, concluded that Plaintiffs satisfied the predominance requirement. *Id*. at *21. Finally, the Court found that the class action mechanism was superior over individualized adjudication of disputes because the potential class members' claims were small, forcing each potential class member to bring and prove his or her case would waste judicial resources and each individual's time and money, and the similarity of legal and factual issues indicated that a class action would be manageable. *Id.* at *23-24. Accordingly, the Court granted Plaintiffs' motion for class certification and certified two sub-classes.

***Likes, et al. v. DHL Express (USA), Inc.,* 2015 U.S. App. LEXIS 8954 (11th Cir. May 29, 2015).** Plaintiff, a former driver, brought a putative WARN Act class action alleging that DHL Express (USA) Inc., failed to provide 60 days' notice of impending lay-offs at its Birmingham delivery facility. Until 2009, DHL had maintained a delivery network in the U.S. consisting of approximately 300 contractors that employed drivers who delivered packages for DHL. In 2008, DHL began to phase out its U.S. domestic delivery program and entered into termination and transition agreements ("TTA") with each of its contractors. In the TTA with Plaintiff's employer, contractor Wood Airfreight, Inc., DHL agreed to provide retention payments to the contractor's employees who worked until the TTA's termination date or until the contractor no longer needed the employee's services as delivery volume dropped. Subsequently, Wood Airfreight laid-off Plaintiff. The District Court granted summary judgment to DHL, finding that Plaintiff failed to establish that he was the subject of a mass lay-off under the WARN Act. *Id*. at *3. On Plaintiff's appeal, the Eleventh Circuit affirmed. At the outset, the Eleventh Circuit agreed with the District Court that, even assuming DHL qualified as his employer, Plaintiff could not show that he was the subject of a mass lay-off under the WARN Act. *Id*. at *7. The Eleventh Circuit noted that the WARN Act defines a mass lay-off as a reduction-in-force that results in an employment loss at the single site of employment during any 30-day period for at least 33% of the employees and at least 50 employees. *Id*. The Eleventh Circuit found it undisputed that Wood Airfreight laid-off fewer than 50 employees, so its reduction-in-force alone could not result in WARN Act liability. Plaintiff argued that the DHL Birmingham facility was a single site of employment such that the lay-offs from three contractors that used the facility should be aggregated; together, the three companies laid-off more than 50 employees. The Eleventh Circuit, however, agreed with the District Court that the Birmingham facility constituted multiple sites of employment. *Id*. at *8. Although DHL's contractors worked out of the same Birmingham facility, each had distinct day-to-day management and employee structures. *Id*. at *8-9. The Eleventh Circuit observed that the record showed that each contractor had its own administrative staff and payroll, made personnel decisions individually, and delivered packages to a distinct geographic area of Birmingham. *Id*. Thus, because Plaintiff had presented no evidence from which a reasonable jury could conclude that the Birmingham facility constituted a single site of employment, an element necessary for a WARN Act violation, the Eleventh Circuit affirmed the District Court's grant of summary judgment to DHL. *Id*. at *10.

***Murphy, et al. v. Lenderlive Network, Inc.,* 2015 U.S. Dist. LEXIS 71184 (D. Colo. June 2, 2015).** Plaintiffs, a group of underwriters, brought a putative class action alleging that Defendant terminated 120 similarly-situated employees without giving them the required 60 days advance written notice of their terminations or 60 days' pay and benefits in lieu of notice under the WARN Act. After the Court certified a WARN Act class and denied Defendant summary judgment, the parties settled the action. The Court preliminarily approved the settlement. The Court found that the settlement amount, which provided each class member an average payment of approximately $3,000 – approximately 20% of the total value of class members' WARN Act claims – was fair and reasonable. *Id*. at *5-6. Further, the Court determined that the settlement agreement was the result of extensive, arms' length negotiations by counsel well-versed in the prosecution of class actions and collective actions. Further, the Court concluded that serious questions of law and fact existed, which put the outcome of the WARN litigation in doubt, and the presence of such doubt weighed in favor of settlement because settlement created a certainty of some recovery. *Id*. at *4. In addition, the Court noted that the value of an immediate recovery in the settlement outweighed the mere possibility of future relief after protracted and expensive litigation. *Id*. at *4-5. The parties believed that, if litigation continued and Plaintiffs prevailed, it could be years before class members obtained any recovery. By reaching a settlement prior to dispositive motions or trial, Plaintiffs would avoid significant

expense and delay and ensure recovery for the class in a prompt and efficient manner. *Id*. at *5. Regarding certification of the settlement class, the Court opined that the class it already certified would remain appropriate for settlement purposes. *Id*. at *6. Finally, the Court approved the proposed WARN settlement notice and ordered delivery of the proposed notice to the settlement class. The Court also approved a modified class notice attached to the addendum to the settlement agreement for distribution to a group of class members that the parties inadvertently excluded from the previous opt-out notice in the litigation. *Id*. at *7-8. The Court held that the proposed notice and modified notice adequately put class members on notice of the proposed settlement because they described the terms of the settlement, informed the class about the allocation of attorneys' fees, and provided specific information regarding the date, time, and place of the final approval hearing. *Id*. at *8. Accordingly, the Court preliminarily approved the settlement.

***Ramcharan, et al. v. A.F.L.,* 2015 U.S. Dist. LEXIS 91695 (D.N.J. April 14, 2015).** Plaintiff, a former employee, brought a putative class action alleging that Defendants terminated him and approximately 250 similarly-situated employees without notice and as part of mass lay-offs or plant closings, in violation of the Worker Adjustment and Retraining Notification Action ("WARN") Act. The Court had previously the certified a class, and had stayed notification of the class pending resolution of the issue of whether Defendant Westbury Investment Partners may be held liable as joint employer under the WARN Act. Plaintiff then requested the Court to reconsider its stay of notification or, alternatively, grant the class counsel permission to communicate with class members prior to notification, and to advise them during the litigation, which the Court granted. Plaintiff contended that the Court overlooked case law establishing that Rule 23 does not permit the Court to delay notification of the class pending the outcome of the summary judgment motion, and the lack of evidence in the record demonstrating any cost, burden, or prejudice to Defendant in the event the class received notification. *Id.* at *3. The Court held that although Rule 23 mandates notification to the class in Rule 23(b)(3) class, it does not specify when that notice must be issued; rather, the timing of the notice is left to the discretion of the Court, which may decide to postpone notice where circumstances permit. *Id.* at *5. Plaintiff pointed to case law recognizing that notice should be given promptly and, in any event, before the merits of the matter are sufficiently adjudicated. *Id*. at *5-6. The Court reasoned that this case law authority was not brought to its attention when it considered Plaintiff's class certification motion. Accordingly, the Court remarked that it was persuaded that the class should be notified in advance of summary judgment motion that may determine Westbury's liability and, in all likelihood, resolve the matter. Moreover, the Court remarked that as Plaintiff's counsel was bearing the expenses and burden associated with the class notice and certification, Westbury would suffer no loss. *Id*. at *12. Accordingly, the Court granted Plaintiff's motion for partial reconsideration and ordered issuance of notice.

(xxiii) Class Definition Issues

***Durocher, et al. v. National Collegiate Athletic Association,* 2015 U.S. Dist. LEXIS 41110 (S.D. Ind. Mar. 31, 2015).** Plaintiffs, a group of former college football players, brought a putative class action alleging that Riddell Inc. sold football helmets to colleges and universities that failed to protect them from head injuries. Plaintiffs claimed that they suffered concussions and repeated head impacts while wearing Riddell helmets and that Riddell and the National Collegiate Athletic Association ("NCAA") failed to warn players that a concussion could lead to brain disorders. Plaintiffs sought to represent a nationwide class consisting of hundreds of players who developed or would develop mental or physical problems as a result of sustaining traumatic brain injuries, concussions, or concussion-like symptoms while playing in college football games or practices. *Id.* at *6-7. Defendants moved to strike Plaintiffs' class allegations, arguing that personal injury product liability claims were inherently individualized and state law specific and that class members could be ascertained only through individualized inquiries based on subjective criteria. *Id.* at *22-23. The Court granted Defendants' motion on the basis that medical causation and personal injury allegations raised significant hurdles that made class treatment questionable. *Id.* at *33. The Court noted that the "individualized inquiries related to medical causation described by Defendants weigh heavily in favor of striking Plaintiffs' class action allegations and foreshadow a tremendous uphill battle for Plaintiffs to certify a class action based on personal injuries of individual class members." *Id.* at *34. Although Plaintiffs claimed that discovery might shape the class definition, the Court found that Plaintiffs had not explained what discovery they would seek or how such discovery could enlighten the pursuit of class

treatment. *Id.* at *25. The Court further noted that, even after considering the segregation of states into two proposed sub-classes, the claims involved too many individualized questions relating to differing state laws with differing treatment of products liability that might impede common treatment across the class. *Id.* at *35. According to the Court, creating sub-classes based on the locations of the college football teams for which class members played would not eliminate the obstacles to class treatment because the differences among the potentially 55 different jurisdictions posed a major impediment to class treatment. *Id.* at *38. The Court, however, found that identifying the putative class members would not be impossible based on the proposed class definition. The Court noted that discovery could enlighten the facts pertaining to the sale and distribution of Riddell helmets to college football teams, and at least some of the symptoms described in the class definition such as headache, dizziness, double vision, or fuzzy vision would not require verification by a healthcare professional. *Id.* at *40-42. Because Defendants did not definitively establish that Plaintiffs could not maintain a class action in any form, the Court held that Plaintiffs were entitled to an opportunity to narrow and more specifically define their proposed class in light of and consistent with the law and facts. *Id.* at *42. Accordingly, the Court granted Defendants' motion to strike Plaintiffs' class allegations and gave Plaintiffs 20 days to file an amended complaint to narrow the proposed class definition.

***Friedman, et al. v. Dollar Thrifty Automotive Group, Inc.,* 2015 U.S. Dist. LEXIS 9661 (D. Colo. Jan. 27, 2015).** Plaintiffs brought a class action alleging that Defendants tricked consumers into buying add-on products such as loss damage waiver, supplemental liability insurance, and roadside assistance (collectively "add-on products"), which they declined or were charged for without proper consent or contrary to disclosure requirements, and/or that Defendants misled customers into signing up for the services contrary to their initial agreements. Plaintiff alleged that this was a nationwide systematic pattern of conduct and asserted violations of the Colorado Consumer Protection Act and the Florida Deceptive and Unfair Trade Practices Act. Plaintiffs moved for certification of a class comprised of all individuals who rented cars from Defendants in Colorado and Florida and were charged for the add-on products other than as part of a prepaid tour reservation. The Court denied the motion, finding that the class definition, which covered approximately 2.5 million putative class members, was overly broad. The Court found that the class definition was overbroad because it included all persons who rented the pertinent add-on products in Colorado and Florida, even if they purposely chose to purchase the add-on products, were not deceived in connection with the purchase of the products, received a benefit from purchasing the products, or were otherwise not injured by them. *Id.* at *11-12. The class also included people, like named Plaintiff Friedman, who received a full refund of his purchase of the add-on products. Additionally, because Plaintiffs did not propose any objective criteria by which such individuals could be identified and excluded from the class, the Court concluded that individualized fact finding would be required to identify a class member. *Id.* at *12. Accordingly, the Court denied certification to Plaintiffs' proposed class due to deficiencies with the proposed class definition.

***McKinnon, et al. v. Dollar Thrifty Automotive Group, Inc.,* 2015 U.S. Dist. LEXIS 97815 (N.D. Cal. July 27, 2015).** Plaintiffs, a group of customers, brought a putative class action alleging that Defendant misled consumers into purchasing add-on insurance products, including loss damage waiver ("LDW"), supplemental liability insurance ("SLI"), and roadside assistance service ("Roadsafe"), in violation of the California Unfair Competition Law, the Consumers Legal Remedies Act, and the Oklahoma Consumer Protection Act. *Id.* at *9-10. Plaintiffs requested certification of a California class and an Oklahoma class of persons residing in or who rented cars in California and Oklahoma from Defendant since January 2009 and who Defendant charged for LDW, SLI, and Roadsafe as part of a prepaid tour reservation. *Id.* at *10. The Court denied class certification. The Court found that the proposed class definition was overbroad because it included people who were not exposed to allegedly deceptive practices and people who received a benefit from buying the add-on insurance. *Id.* at *16. The Court also found that Plaintiffs included transactions in their class definition that had no connection to California or Oklahoma and that Plaintiffs failed sufficiently to identify the deceptive practices in which Defendant allegedly engaged, including training employees on how to persuade customers to purchase add-on products, paying employees commissions based on sales of add-on products, and failing adequately to respond to customer complaints regarding add-on products. *Id.* at *17-19. The Court determined that Plaintiffs neither alleged

facts nor presented evidence establishing that Defendant exposed all members of the class to a deceptive practice. *Id.* at *20-21. Further, the Court opined that Plaintiffs failed to provide common proof but, instead, alleged facts that applied only to some customers, at some locations, some of the time. *Id*. at *29. The evidence showed that what Defendant told class members, what class members understood regarding the products, and class members' reasons for purchasing the products could have varied greatly depending on their individualized communications with Defendant's agents. The Court, therefore, ruled that individualized inquiries defeated commonality. *Id.* at *29-31. Finally, the Court found that Plaintiffs had conflicts with other class members due to their unique factual circumstances and the unique defenses Defendant likely would assert against them that were not applicable to the class as a whole. *Id.* at *36. The Court concluded that Plaintiffs failed to meet class certification requirements, but agreed to let Plaintiffs try again, instructing them to submit a revised class definition identifying common issues of fact and law. *Id.* at *39. Accordingly, the Court denied Plaintiffs' motion for class certification without prejudice.

***Moore, et al. v. Apple, Inc.,* 2015 U.S. Dist. LEXIS 102849 (N.D. Cal. Aug. 4, 2015).** Plaintiff, a former Apple device user, brought a putative class action alleging that Defendant's messaging system interfered with text delivery after Plaintiff switched to an Android-based smartphone. According to Plaintiff, Apple's iMessage retained text messages sent from other users of Apple devices and failed to deliver them to Plaintiff's Samsung phone running on an Android operating system. Plaintiff moved for certification of a class consisting of all individuals who switched their wireless telephone accounts by porting their cellular telephone numbers from an Apple iPhone device to a non-Apple cellular telephone during the time period from October 12, 2011, to the present. *Id.* at *12. The Court denied Plaintiff's motion on the basis that Plaintiff's proposed class was overbroad because it included individuals who might not have suffered any injury due to Defendant's allegedly wrongful conduct. *Id.* at *25. Plaintiff contended that Defendant had injured all putative class members because they paid for a wireless service agreement with a text messaging feature, and all were subject to having their text messaging disrupted due to Defendant's iMessage flaw. *Id.* at *24. The Court found that, whereas many wireless service agreements might have included the contractual right to send and receive text messages, Plaintiff did not and could not contend that every putative class member's wireless service agreement included the right to receive text messages. *Id.* at *23. Plaintiff's own evidence indicated material variations in wireless service agreements. Plaintiff's expert conceded that some wireless service agreements involved a fixed price for unlimited services, others provided service up to an agreed maximum of service consumed, and still others provided for separate billing with respect to each incoming or outgoing text message. *Id.* at *31. Restrictions in the contracts could mean that individuals did not receive text messages because they exceeded their maximum number of text messages or because they affirmatively opted not to receive text messages. *Id.* at *32. The Court, therefore, found that putative class members could have experienced disruptions in text messages because of the particular terms of their wireless service agreements, and, accordingly, the Court would have to evaluate each individual's wireless service agreement in order to determine the facts of their injury. *Id.* The documents also showed that, whereas some putative class members might have included unlimited text messages in their wireless service agreements, an unknown number of others might not have included any text messaging in their plans or might have included only a limited text messaging option. *Id.* at *34. The Court, therefore, concluded that it could not determine on a class-wide or even carrier-wide basis whether individual class members were entitled to receive text messages. *Id*. Defendant argued that myriad reasons entirely unrelated to iMessage, including network error, user action, or operating system issues, could have resulted in the disruption of text message services for each individual putative class member. The Court agreed and found that individualized inquiries into the circumstances under which the individual class members failed to receive particular messages would be required to determine whether iMessage caused any putative class member's injury. *Id.* at *37. Accordingly, the Court denied Plaintiff's motion for class certification.

***Otto, et al. v. Abbott Laboratories, Inc.*, Case No. 12-CV-1411 (C.D. Cal. Jan. 28, 2015).** Plaintiff brought a putative consumer class action alleging that the label on Defendant's Muscle Health shake was materially misleading because Revigor, one of the ingredients in the drink, did not rebuild strength as suggested by the label, and Revigor's effectiveness hinged on consumers' vitamin-D levels. Plaintiff asserted claims under California's Unfair Competition Law ("UCL"), False Advertising Law, and Consumers

Legal Remedies Act ("CLRA") on behalf of a state-wide class, and pursued his negligent misrepresentation claim on behalf of a nationwide class. Defendants moved to deny class certification, and the Court granted the motion. Plaintiff's theory of liability focused on Defendant's failure to disclose that Revigor did not work for people with less than 30 ng/ml of vitamin-D. Although this omission could mislead those with deficient vitamin-D levels, those with a history of low vitamin-D levels, or those who did not know their vitamin-D levels, Plaintiff sought to certify classes of all purchasers of Muscle Health. The Court remarked that 60% of elderly adults are vitamin-D deficient, and that it was implausible that all purchasers of the product at issue were elderly adults, and even if they were, 40% of the class would not be vitamin-D deficient. Because it was also implausible to assume that a significant share of this 40% had a history of vitamin-D deficiency or had significant concern about their vitamin-D levels, the Court stated that the omission of Revigor's inefficacy among vitamin-D deficient consumers would be immaterial for a significant portion of the proposed class. Thus, because the proposed class included a substantial number of people who had no viable claim under the theory advanced by the named Plaintiff, the Court opined that the proposed class was overbroad. *Id.* at 5. The Court also noted that a putative class lacked cohesion if its UCL claims would involve factual questions associated with class members' reliance on Defendant's alleged false representations. *Id.* Plaintiff alleged that the omission would deceive a consumer with vitamin-D levels less than 30 ng/ml or who was concerned that his or her vitamin-D levels might be less than 30 ng/ml. The class, however, encompassed a group of consumers who might rely on the omission and another group who would not rely on it. Therefore, the Court found that the class was overbroad as it contained many Plaintiffs without a claim under the theory of liability. *Id.* at 6. Finally, although Plaintiff asserted that Illinois law should be applied to the negligent misrepresentation claims, the Court found that Plaintiff failed to demonstrate that the application of Illinois law complied with California's choice-of-law rules. *Id.* at 8. Because Plaintiff failed to do so, the Court was unable to determine that Illinois law should be applied instead of the laws of the other 48 states that could be represented in this nationwide class. Further, Plaintiff did not demonstrate that the nationwide class could be further divided into manageable sub-classes accounting for conflicts in state laws, that a representative Plaintiff could be obtained for each of these classes, or that each sub-class met the Rule 23 requirements. Accordingly, the Court granted Defendant's motion to deny class certification.

(xxiv) Settlement Approval Issues In Class Actions

***Allen, et al. v. Dairy Farmers Of America, Inc.*, 2015 U.S. Dist. LEXIS 42436 (D. Vt. Mar. 31, 2015).** Plaintiffs brought a putative class action alleging that Defendants engaged in a wide-ranging conspiracy to fix milk prices in violation of the Sherman Act. The parties settled and sought settlement approval. The Court denied without prejudice Plaintiffs' motion for final settlement approval. The proposed settlement required Defendants to make a payment of $50 million to class members in two installments. Based on the number of claims filed, a class member could receive approximately $4,000. *Id.* at *2. The settlement also authorized injunctive relief and provided incentive payments to sub-class representatives and proposed attorneys' fees of approximately $16.6 million plus expenses. *Id.* A total of 35 dairy farmers representing 28 farms objected to the proposed settlement and challenged both its procedural and substantive fairness. *Id.* at *9-10. The Court held that the reaction of the class to the proposed settlement raised an issue with regard to substantive fairness. *Id.* at *28. Although the Court acknowledged that the proposed settlement's monetary relief of $50 million was not inadequate or unreasonable on its face, the Court also noted that, when this amount was considered from the class' perspective, in light of the broad proposed release and the absence of meaningful injunctive relief, the receipt of approximately $4,000 per dairy farm reasonably could be perceived as a modest recovery. *Id.* at *33. Whereas class counsel contended that the objectors represented a very small fraction of the 9,000 farmers notified of the proposed settlement, the Court pointed out that the class' silence did not necessarily indicate approval or establish the fairness of the proposed settlement. *Id.* at *28-29. Thus, primarily based on the reaction of the class, the Court concluded that the proposed settlement was not substantively in the class' best interests. *Id.* at *33-34. Accordingly, the Court denied Plaintiffs' motion for final approval of the proposed settlement without prejudice.

***Allen, et al. v. Labor Ready Southwest, Inc.,* 787 F.3d 1218 (9th Cir. 2015).** Plaintiff filed a putative class action in state court alleging that Defendant, a temporary staffing agency, violated the FLSA and

California wage & hour laws by failing to pay employees for their wait and travel times as well as taking unlawful paycheck deductions. The parties subsequently reached a settlement that included a gross settlement fund of $4.5 million as well as injunctive relief. *Id.* at 1221. A group of objectors, who were litigants in other uncertified class actions against Defendant that included some similar claims, moved to intervene permissively in Plaintiff's action. *Id.* at 1220-21. The District Court denied the objectors' motion, but granted them leave to object to the settlement at the preliminary approval stage. At that hearing, the District Court found that the settlement terms were fair and reasonable. *Id.* at 1221-22. After the District Court approved the settlement, the objectors appealed. The Ninth Circuit affirmed the District Court's decision to deny the objectors' motion to intervene. *Id.* at 1221. The Ninth Circuit noted that while the District Court did not explain its decision to deny the motion, it could affirm on any basis supported by the record. *Id.* Finding the motion untimely, the Ninth Circuit concluded that the objectors knew of Plaintiff's litigation for at least a year before they moved to intervene and had regularly asked Defendant about the status of settlement talks. *Id.* However, the Ninth Circuit agreed with the objectors' contention that the District Court's settlement approval ruling was improper since the deadline for filing class member objections was before Plaintiff's counsel submitted its final fee request. *Id.* at 1225. Finally, the Ninth Circuit declined to address the objectors' substantive challenges to the settlement, noting they may raise those issues on appeal if the District Court exercised its discretion to re-approve the settlement. *Id.* at 1226. Accordingly, the Ninth Circuit affirmed the District Court's order denying the objectors' motion to intervene, vacated the District Court's order granting final approval of the settlement and an award of attorneys' fees, and remanded to the District Court for further proceedings. *Id.*

Editor's Note: The Ninth Circuit's ruling in *Allen* manifests a trend of its "high procedural standard for review of class action settlements negotiated without a certified class." *Id.* at 1220. The Ninth Circuit appeared particularly concerned about the possibility of collusion in the negotiation of the settlement. Its analysis of the factors that district court judges must analyze is particularly important for employers entering into class-wide settlements.

***Brady, et al. v. Air Line Pilots Association,* 2015 U.S. App. LEXIS 16867 (3d Cir. Sept. 23, 2015).** Plaintiffs, a group of former pilots, brought an action alleging that Defendant breached its duty of fair representation during an asset acquisition in violation of the Railway Labor Act. In 2002, Cureton Clark, P.C. ("Cureton") represented Leroy Bensel as class representative and obtained certification of an injunctive relief class. In 2005, Cureton moved to withdraw its representation, and the District Court granted the motion. Subsequently, Trujillo Rodriguez & Richards, LLC and Green Jacobson, P.C. (collectively, "class counsel") represented the class. In 2011, Class Counsel conducted a five-week liability trial that resulted in a jury verdict in favor of the class. Subsequently, the District Court approved a $53 million settlement and a 30% fee award from the settlement fund to class counsel. At the same time, the District Court denied Cureton's application for additional attorneys' fees holding that, based on the record, the Cureton firm already had been fully compensated for its work on the case before it abandoned the class. The District Court also authorized incentive awards to twelve current and former class representatives, including an award to Theodore Case ("Case"), totaling $640,000. Case and Cureton appealed the District Court's order, and the Third Circuit affirmed. Case appealed the amount of the District Court's award of attorneys' fees to class counsel and his incentive award, and Cureton appealed the District Court's denial of its motion for additional attorneys' fees. As to class counsel's fees, the Third Circuit found that the District Court correctly applied the factors set forth in *Gunter v. Ridgewood Energy Corp.,* 223 F.3d 190 (3d Cir. 2000), and applied a lodestar cross-check. The Third Circuit, therefore, found that the District Court employed the correct standards and procedures and did not abuse its discretion in awarding a 30% fee. *Id.* at *6. Case argued that he was entitled to an incentive award higher than the $81,702.13 awarded by the District Court because of the lengthy duration of the case and the personal sacrifices made by the class representatives. The Third Circuit found that the District Court considered those factors at the fairness hearing and did not abuse its discretion in declining to allocate additional funds for incentive payments. *Id.* at *7. Finally, Cureton appealed the denial of its motion for additional attorneys' fees. The Third Circuit found that the District Court appropriately heard testimony regarding Cureton's work on the case, the fees already paid to Cureton, and its withdrawal prior to certification of the ultimately successful Rule 23(b)(3) class. The Third Circuit held that the District Court made reasonable factual

findings and did not abuse its discretion in denying Cureton's motion. *Id.* at *7-8. Accordingly, the Third Circuit affirmed the judgment of the District Court.

***Godfrey, et al. v. City Of Chicago,* Case No. 12-CV-8601 (N.D. Ill. Jan. 9, 2015).** Plaintiffs, a group of African-American female firefighter applicants, brought a class action alleging that the City of Chicago discriminated against them again because of their gender when they went through the remedial hiring process, and failed the department's physical abilities test ("PAT"). Subsequently, the parties settled the action, and moved for preliminary approval of the proposed stipulation and settlement agreement. The Court granted the motion. First, the Court conditionally certified a settlement class pursuant to Rule 23(b)(3) consisting of all women who took and failed the firefighter PAT in November 2011. *Id*. at 2. The Court preliminarily approved the settlement as set forth in the parties' stipulation as it appeared to be within the range of fairness, reasonableness, and adequacy. *Id*. at 3. The Court noted that the stipulation was subject to the Chicago City Council's approval of the settlement, which was obtained in December 2014. The Court directed and authorized the City to retain Class Action Administration, Inc. as the claims administrator to administer the settlement in accordance with the terms and conditions of the stipulation. *Id*. at 4. The Court also approved the class notice and summary class notice attached to the stipulation, and directed and authorized the claims administrator to provide class notice to the last known address or updated address of all settlement class members, and to publish a summary class notice in the form the parties had suggested. *Id*. at 5. Further, the Court ordered that any settlement class member who would wish to be considered for hire pursuant to the terms of the settlement must submit an interest card to the Chicago Fire Department Academy. *Id*. at 6. In addition, the Court ruled that any settlement class member who would wish to receive a back pay award must submit a proof of claim to the claims administrator. *Id*. at 7. The Court remarked that unless a settlement class member submitted a valid and timely request for exclusion, the final judgment would bind a settlement class member who took no action, and would not receive any payment, or opportunity to be considered for hire. *Id*. Accordingly, the Court preliminarily approved the settlement and set a hearing on final approval.

***In Re Comcast Corporation Set-Top Cable Television Box Antitrust Litigation*, 2015 U.S. Dist. LEXIS 150160 (E.D. Pa. Nov. 5, 2015).** In this multi-district class action litigation, Plaintiffs, a group of cable television subscribers, alleged that Defendant unlawfully tied the sale of premium cable to the rental of a specific cable box. After extensive litigation, the Parties settled the action and the proposed settlement class comprised of all subscribers who: (i) resided in and subscribed to premium cable in California, Washington, or West Virginia; or (ii) subscribed to premium cable in any state in the United States and elected to opt-out of Defendant's arbitration clause as reflected in the records; and paid a rental fee for a cable box. *Id.* at *4. Defendant agreed to pay all claims not exceeding $15.5 million in value. *Id.* at *5. The type of relief class members would receive depended upon whether they were former or current subscribers, and the length of time they rented the cable box. *Id.* at *5. Plaintiffs sought certification of a Rule 23(b)(3) settlement class. The Court denied the motion. Defendant lacked records for most former subscribers, and the critical question was whether a reliable and administratively feasible method existed to determine if former subscribers fell within the class definition. Plaintiffs argued that with respect to former customers, Defendant had represented that it may have records by which it could verify class membership back to 2011, depending on location, and that in the absence of such records membership could be demonstrated by a customer's account number, old bills and invoices, geographic information coupled with other identifying variables, communications to or from Defendant during the relevant period, and other indicia from which Defendant could determine or challenge a claimant's status as a Former Subscriber. *Id.* at *15. Further, Plaintiffs asserted that the parties had proposed a claim form requiring settlement class members to affirm, under penalty of perjury, that the information provided in the claim form was true and correct. The Court observed that Plaintiffs failed to submit any methodology for screening out unreliable sworn statements, and they did not submit a screening model specific to this case or prove how the model would be reliable. *Id.* at *19. Further, the Court found that while Plaintiffs listed possible types of evidence that former subscribers could submit to prove membership in the settlement class, none of them were actually required. The Court opined that the sworn statements that Plaintiffs alone relied upon to establish membership in the settlement class were an inadequate method of determining ascertainability. *Id.* Accordingly, because the settlement class was not ascertainable due to a lack of a reliable and

administratively feasible mechanism for determining whether putative class members fell within the class definition, the Court denied certification of the proposed settlement class.

***In Re High-Tech Employee Antitrust Litigation,* 2015 U.S. Dist. LEXIS 26635 (N.D. Cal. Mar. 3, 2015).** Plaintiffs, a group of technical employees, brought a class action alleging that Defendants engaged in conspiracy to fix and suppress employee compensation and to restrict employee mobility though anti-solicitation agreements. Plaintiffs and a group of Defendants agreed to settle. The Court granted Plaintiffs' motion for preliminary approval of settlement. Under the proposed settlement, Defendants would pay a combined total of $415 million into a settlement fund, which would be distributed to each class member based on a formula using the class member's base salary during the class period. *Id.* at *9-10. The Court found the settlement's consideration substantial, particularly in light of the risk that the jury could find no liability or award no damages. *Id.* The Court determined the plan of allocation was sufficient, fair, reasonable, and adequate, as it provided a neutral and fair way to compensate class members based on their salaries and alleged injuries. *Id.* at *10. Because the proposed settlement included a previously certified class, the Court also found that Plaintiffs met the requirements of Rule 23 for settlement purposes. *Id.* at *11. The Court held that the notice procedures set forth in the settlement agreement were the best practicable means of providing notice, and the proposed notice satisfied the requirement of due process. The Court also approved the appointed notice administrator and the notice for dissemination to the class. The Court further approved establishment of the escrow account under the settlement agreement as a qualified settlement fund ("QSF"), and retained continuing jurisdiction as to any issue that might arise in connection with the formation and/or administration of the QSF. *Id.* at *14. The Court scheduled deadlines for class members to opt-out of the class and for the class counsel to file motions for payment of attorneys' fees and costs. Accordingly, the Court granted Plaintiffs' motion for preliminary settlement approval.

***In Re High-Tech Employee Antitrust Litigation,* 2015 U.S. Dist. LEXIS 118052 (N.D. Cal. Sept. 2, 2015).** In this antitrust class action filed against Defendants, a number of Silicon Valley technology employers including Apple Inc. and Google, Plaintiffs asserted claims that Defendants conspired to repress Plaintiffs' wages and job opportunities by sharing salary and benefit information, agreeing to pay caps among themselves, and agreeing not to hire employees from competitors. The parties entered into a settlement after a period of litigating the case. The Court approved a $415 million settlement and partly granted Plaintiffs' motions for attorneys' fees, reimbursement of expenses, and service awards. The original complaints alleged that Defendants violated antitrust laws by agreeing to fix and suppress employee compensation and to restrict employee mobility. The case followed an investigation in 2009-2010 by the U.S. Department of Justice into Silicon Valley hiring and recruitment practices and led to the DOJ filing a complaint in September 2010 that ultimately resulted in a stipulated final judgment. *Id.* at *8-9. Plaintiffs then filed a class action in May 2011 and sought class certification for all salaried employees or all technical employees. The Court later certified a narrower class of technical employees. In 2013, Plaintiffs settled with some of the companies for $20 million and the Court entered a judgment as to those Defendants in June 2014. *Id.* at *10-11. After discussion among the remaining parties, the Court rejected an initial settlement of $324.5 million. Plaintiffs then filed a motion in January 2015 to approve a new settlement the parties negotiated for $415 million. *Id.* at *14. The Court granted preliminary approval in March 2015. *Id*. at *15. The settlement included a request for an attorneys' fee award of $81,125,000 or 19.5% of the settlement fund, unreimbursed expenses of $1,184,810.98, and services awards of up to $160,000 to each of the individual class representatives. *Id*. at *16. While the Court granted final approval of the $415 million settlement, it awarded only $40 million toward attorneys' fees, finding that the requested $81 million would yield "windfall" profits for the class counsel in light of the hours spent on the case. *Id.* at *28. Although class counsel pointed to some "mega-fund" cases allowing large multipliers that were far from the norm, the Court found that allowing a multiplier of 4.46 would be unusual for a $415 million settlement, and accepting the counsel's request for more than $85 million in total fees – which did not even take into account the $5 million in fees already awarded for the $20 million settlement – would be unreasonable. *Id.* at *31-32. The Court therefore determined to use the lodestar method with a percentage-of-recovery cross-check to achieve the fairest and most reasonable result. The Court then reviewed the billing rates and records for the attorneys, paralegals, and litigation support staff at each of the firms representing Plaintiffs, and adjusted the lodestar figures by an appropriate positive or negative

multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of non-payment. As a result, it reached a figure of $40,822,311.75 for attorneys' fees. *Id.* at *34-45. The Court then cross-checked the amount with the percentage-of-recovery method and held that a percentage recovery of 9.8% was far from unreasonable for a $415 settlement. *Id.* at *48. According to the Court, the percentage was more reasonable, given that class counsel had already received the 25% benchmark in attorneys' fees for the earlier $20 million settlement with some Defendants. *Id.* at *51. The Court therefore awarded class counsel a total fee of $40,822,311.75 or 9.8% of the $415 million settlement fund. Finding the request for unreimbursed expenses reasonable, the Court also awarded class counsel $1,200,000 in unreimbursed expenses. *Id*. at *59. Finally, factoring in the $20,000 service awards each class representative received as part of the earlier settlement, and taking into account the hundreds of hours each class representative spent on this high-profile litigation, the Court awarded $80,000 to each of the class representatives. *Id.* at *62-67.

Editor's Note: The $415 million settlement is the largest for any workplace class action in 2015.

***In Re National Football League Players' Concussion Injury Litigation*, 2015 U.S. Dist. LEXIS 52565 (E.D. Pa. April 22, 2015).** In this consolidated class action involving over 5,000 former football players in over 300 substantially similar lawsuits, Plaintiffs alleged that Defendants failed to take reasonable actions to protect players from chronic risks created by concussive and sub-concussive head injuries and fraudulently concealed those risks from players. Plaintiffs alleged that Defendants had a duty to provide players with rules and information that protected players as much as possible from short-term and long-term health risks, including from the risks of repetitive mild traumatic brain injury ("TBI"). *Id*. at *16. The parties reached a settlement, and the Court granted final approval of the settlement agreement. The Court observed that the class consisted of all living former NFL football players and representative claimants of either deceased, legally incapacitated, or incompetent retired players. *Id*. at *27. The settlement had three primary components. First, the settlement had an uncapped monetary award fund ("MAF"), overseen by a claims administrator, providing compensation for retired players who submitted sufficient proof of qualifying diagnoses. *Id*. at *28. Second, the settlement had a $75 million baseline assessment program ("BAP") providing eligible retired players with free baseline assessment examinations of their objective neurological functioning. *Id*. Third, the settlement had an education fund to educate the class members regarding Defendants' existing medical and disability benefits programs and to promote safety and injury prevention for football players of all ages, including youth football players. *Id*. The Court appointed a special master, who would be responsible for overseeing, implementing, and administering the entire settlement. The Court noted that the MAF was an uncapped, inflation-adjusted fund that provided cash awards for retired players who received qualifying diagnoses. *Id*. at *30. To collect from the MAF or participate in the BAP, the settlement required the class members to register with the claims administrator within 180 days of receiving notice that the settlement had been approved and was in effect. *Id*. at *35. According to the settlement, the BAP was a $75 million fund that provided retired players with an opportunity to be tested for cognitive decline, and any retired player who had played at least half an eligible season could receive a baseline assessment examination, even if he had not yet developed any adverse symptoms nor received a qualifying diagnosis. *Id*. at *37. The settlement required the class members to release and dismiss with prejudice all claims and actions against Defendants in exchange for the benefits. Defendants agreed not to contest any award of attorneys' fees and costs equal to or below $112.5 million. *Id*. at *40-41. The Court found that the class satisfied the requirements of Rule 23. As to the predominance factor, the Court noted that the central issues in the case were factual questions regarding the Defendants' knowledge and conduct. The Court noted that Defendants' alleged conduct injured the class members in the same way, *i.e.*, the retired players all returned to play prematurely after head injuries and continued to experience concussive and sub-concussive hits. *Id*. at *74. The Court noted that resolution of these and other such common questions were predominant in the action. The Court next applied the nine factors enumerated in *Girsh v. Jepson*, 521 F.2d. 153 (3d Cir. 1975), and found that all factors favored settlement. *Id*. at *99-123. The Court also applied the additional factors identified by the Third Circuit in *In Re Prudential Insurance Co. of America Sales Practices Litigation*, 148 F.3d. 283 (3d Cir. 1998), and determined that the settlement was fair and adequate. Accordingly, the Court granted the final approval of the settlement.

***In Re Target Corp. Customer Data Security Breach Litigation,* 2015 U.S. Dist. LEXIS 155137 (D. Minn. Nov. 17, 2015).** In this multi-district class action litigation brought by consumers alleging that they suffered economic damage over Defendant's 2013 data breach that allegedly compromised their personal information, the Court preliminarily approved the class action settlement of the consumer actions. *Id.* at *1. The settlement provided that Defendant would pay $10 million to settle class members' claims and to pay service awards to class representatives. *Id.* at *2. Plaintiffs' moved for final approval of class action settlement and for payment of class representative service awards and attorneys' fees and expenses, which the Court granted. At the outset, the Court found that although it had earlier denied in part Defendant's motion to dismiss the consumer cases, the hurdles to succeed in the litigation were multitude. *Id.* at *3. The Court opined that Plaintiffs had sufficiently alleged injury for purposes of Rule 12(b)(6), but the injury question loomed over the litigation as it progressed, since some consumers undoubtedly suffered but many more consumers suffered no concrete injury. *Id.* at *4. The Court also noted that proving causation for any established losses would be difficult, given the other large-scale retailer data breaches that occurred at approximately the same time as Defendants' breach. *Id.* Finally, the Court observed that the vast majority of the class suffered very small losses, because the losses for those consumers whose identities were stolen were limited by the card company's reimbursement policies and the identity-theft protection Defendant offered to all consumers in the wake of the breach. *Id.* Consequently, the Court found that the legal and factual issues would make ultimate success in the consumer track tenuous, and therefore favored the settlement. *Id.* The Court also noted that Defendant's financial condition was sound and had the ability to pay the amounts involved in the settlement. *Id.* at *5. The Court found that further litigation in the case would be expensive and complex as it would result in separate state law classes and voluminous discovery; thus, an early settlement would benefit the Plaintiff class immensely. *Id.* The Court noted that 386 people timely requested exclusion from the class and 11 objected to the settlement, making for a small amount of opposition. *Id.* Similarly, the Court found that the attorneys' fee request was not excessive. Based on these factors, the Court granted the motion for settlement approval.

***In Re World Trade Center Lower Manhattan Disaster Site Litigation,* 2015 U.S. Dist. LEXIS 34447 (S.D.N.Y. Mar. 19, 2015).** In this consolidated action, Plaintiffs were thousands of remediation workers who, following the September 11 attacks, worked in the World Trade Center ("WTC") site or buildings surrounding the WTC site and alleged claims for various respiratory and gastrointestinal illnesses as a result of their work. The WTC site workers brought claims against New York City and its contractors, and the workers of the surrounding buildings brought claims against 345 building owners, managing agents, tenants, environmental consultants, general contractors, and sub-contractors that owned, leased, and performed work in the buildings. *Id*. at *39. After the Court denied class certification because each individual claim involved materially different facts related to exposure, causation, and damages, and given the complexity involved, the Special Master developed a set of 360 narrowly-tailored questions seeking case-crucial information. Based upon the information collected, the parties and the Court selected test cases to proceed to intensive discovery and trial. *Id*. at *37. The WTC site workers then settled the action for $810 million, which the Court approved ("2010 settlement"). *Id*. at *39. Given the variety of worksites and Defendants, the claims of the workers of the surrounding building ("Plaintiffs") involved a greater complexity. To manage this complexity, the parties first conducted discovery in response to the 360 questions, and then with respect to 33 representative Plaintiffs. Plaintiffs also served document requests to all 345 Defendants and deposed their representatives. Plaintiffs exchanged thousands of documents, and deposed their treating physicians and experts. *Id*. at *40-41. In order to facilitate the settlements, Plaintiffs' counsel applied a methodology where each Plaintiff had to submit, under oath, discovery responses that provided relevant information including the buildings in which they worked, their alleged injuries, and any pre-existing medical conditions. *Id*. at *41. Plaintiffs' counsel used the information to categorize each Plaintiff according to a tiered ranking system and engaged in settlement negotiations with each Defendant. *Id*. at *41-42. Subsequently, 78 Plaintiffs agreed to settle their claims against most, but not all, Defendants, and moved for approval of the settlements. The Court granted the motion. First, regarding the issue of procedural fairness, the Court found that the law firm that represented Plaintiffs was a competent law firm with considerable experience in mass tort litigation, including other September 11 litigation from almost its inception in 2002. *Id*. at *46. Further, the firm's negotiations with Defendants were adversarial, there was no evidence of collusion, and resolution came at a time when discovery was sufficiently advanced to permit

the parties to fairly evaluate the value of the lawsuits they filed. *Id*. at *46-47. In addition, the Court observed that the parties had conducted nearly 600 depositions of fact and expert witnesses; reviewed documents from approximately 350 Defendants as well as numerous third-party witnesses and experts; and briefed and argued significant legal issues, including the relevant scope of the New York Labor Law, and the risks and force of potential expert testimony. *Id.* at *47. Regarding substantive fairness, the Court found that because the settlements were the result of a fair process, and the consideration to be paid was also fair, adequate, and reasonable. *Id*. at *47. The Court determined that the settlement terms were well within the range of reasonableness, and were reflective of the uncertainties of law and fact and the concomitant risks and costs of litigating the cases through trial. *Id*. at *48. Accordingly, the Court approved the settlements.

***In Re World Trade Center Lower Manhattan Disaster Site Litigation,* 2015 U.S. Dist. LEXIS 75273 (S.D.N.Y. June 9, 2015).** In the aftermath of the September 11 terrorist attacks, thousands of remediation workers who worked at the World Trade Center ("WTC") site, or buildings surrounding the WTC site, brought actions for various respiratory and gastrointestinal illnesses as a result of their work. The WTC site workers brought claims against the City and its contractors, and the workers at the surrounding buildings brought their claims against 345 building owners, managing agents, tenants, environmental consultants, general contractors, and sub-contractors that owned, leased, and performed work in the buildings. While many of those cases had been settled, 82 additional Plaintiffs represented by the law firms of Gregory J. Cannata & Associates, LLP and Robert A. Grochow, P.C. (the "Cannata Plaintiffs"), reached a settlement in principle with nearly all Defendants against whom they brought claims, and sought approval of the settlements and awards of attorneys' fees. *Id*. at *76. The Court granted the Cannata Plaintiffs' motions for settlement approval. To reach their settlements, the Cannata Plaintiffs used an approach that was functionally equivalent to that used to reach the settlement with the City of New York and its captive insurer (the "Captive Settlement") in the previous stage of the September 11 litigation, which the Court had approved in June 2010 as fair and reasonable. After a careful review of both the methodology used in reaching the settlements and the aggregate settlement amount, the Court found that the settlement was fair and appropriate. *Id*. at *79. First, regarding the issue of procedural fairness, the Court determined that the law firms that represented Plaintiffs were competent law firms with considerable experience in mass tort litigation, including being involved in the September 11 litigation since 2005. *Id*. Further, as the firms' negotiations with Defendants were adversarial and at arms' length, there was no evidence of collusion, and resolution came at a time when discovery was sufficiently advanced to permit the parties to fairly evaluate the value of the lawsuits. *Id*. at *79-80. Regarding substantive fairness, the Court opined that because the settlements were the result of a fair process, the consideration to be paid was also presumably fair, adequate, and reasonable. *Id*. at *80. While the aggregate settlement amount was $53,801,796.96, the payments to Plaintiffs ranged from $25,000 to $1,453,089.72, and the average settlement amount was $656,119. *Id*. The Court found that the settlement amounts here compared favorably with the Captive Settlement. *Id*. at *81. The Court thus concluded that the settlement terms were well within the range of reasonableness and reflective of the uncertainties of law and fact and the concomitant risks and costs of litigating the cases through trial. *Id*. Accordingly, the Court approved the settlements. *Id*. Regarding attorneys' fees, the Court determined a fee of 25% to be reasonable and thus approved it. *Id*.

***Lilly et al. v. Jamba Juice Co.,* 2015 U.S. Dist. LEXIS 34498 (N.D. Cal. Mar. 18, 2015).** Plaintiffs filed a putative consumer fraud class action alleging that Defendants labelled their smoothie kits "all natural," when in fact the kits contained ingredients that consumers would not have understood to be natural, in violation of the California Consumer Legal Remedies Act ("CLRA"), the False Advertising Law ("FAL"), and the Unfair Competition Law ("UCL"). *Id*. at *1, 4. After the Court certified a class, the parties reached a settlement and moved for preliminary approval. The Court granted the motion. The settlement provided Plaintiffs injunctive relief even though Defendants previously had moved to dismiss on the ground that Plaintiffs lacked standing to pursue such relief. The Court, therefore, addressed the issue before addressing settlement approval. *Id*. at *5. The Court noted that, to have a standing to obtain injunctive relief, a Plaintiff must allege that a real or immediate threat exists and that he or she will be wronged again. *Id*. at *6. In a class action, unless Plaintiffs themselves are entitled to seek injunctive relief, they cannot represent a class seeking injunctive relief. *Id*. The Court noted that any rule that prevents a consumer

from seeking an injunction does not comport with traditional notions of standing and prevents the person most likely to be injured in the future from seeking redress. *Id*. Because Plaintiffs stated that they would consider spending their own money to purchase Defendants' products if they were labelled correctly in the future, the Court concluded that Plaintiffs had standing to seek injunctive relief. *Id*. at *15. In its analysis on settlement approval, the Court first found that the settlement was procedurally fair. The Court explained that the settlement appeared to be the product of serious, informed, non-collusive negotiations, had no obvious deficiencies, did not improperly grant preferential treatment to the class representatives, and fell within the range of possible approval. *Id*. at *20. As to the substantive fairness of the settlement, the Court noted that its certification order indicated that Plaintiffs faced substantial obstacles to obtaining class-wide monetary relief. The Court found that Plaintiffs had not shown that common questions predominated for the purposes of determining damages, but that, although it could not certify a class for purposes of ascertaining damages, it could exercise its discretion to certify the class for determining the liability issue under Rule 23(c)(4). *Id*. at *21. In light of the difficulties that Plaintiffs would face in establishing damages on a class-wide basis, vis-à-vis the relatively small amounts to which individual class members would be entitled, the Court concluded that the settlement seemed substantively fair. *Id*. Accordingly, the Court preliminarily approved the settlement and directed notice to the absent class members.

***Marshall, et al. v. National Football League,* 2015 U.S. App. LEXIS 8373 (8th Cir. May 21, 2015).** In this class action brought against Defendant alleging that for many years Defendant used the names, images, likenesses, and identifies of Plaintiffs, a group of National Football League ("NLF") players, in its various videos to generate revenue and promote the NFL in violation of Lanham Act, common law, and statutory rights of publicity under several states' law, the Eighth Circuit affirmed the District Court's approval of the parties' class action settlement. The settlement prohibited any payments made direct to the class. Instead, it established a "common good" entity to distribute funds to unidentified, third-party charitable organizations, which in turn, would offer benefits to either class members or similarly-situated non-class members. *Id.* at *6. The settlement further provided two unique benefits to the class, including: (i) the establishment of a licensing agency to assist former NFL players in marketing their publicity rights with the support of the NFL; and (ii) up to a $42 million pay-out by the NFL for the benefit of the class. *Id.* at *2. A group of objectors contended that the District Court abused its discretion in approving the settlement because it did not provide for a direct financial payment to each class member. The objectors attempted to characterize the settlement as simply "giving away" their proceeds to a third-party charity. *Id.* at *4. The Eighth Circuit, however, noted that the financial payment to the third-party organization was not the only benefit of the settlement agreement. The licensing agency created by the settlement allowed for one-stop shopping for those seeking to purchase the publicity rights of former NFL players. *Id.* at *7. Thus, according to the Eighth Circuit, all class members received a direct benefit from the settlement through the opportunity to license their publicity rights through the established licensing agency as well as the payments by the NFL to the licensing agency. The Eighth Circuit agreed with the District Court that, through the licensing agency, class members had an avenue to pursue commercial interests in their own images, and even in the absence of any financial pay-out, the settlement would not fail as a matter of law. *Id.* at *13. Further, although the $42 million was not paid directly to class members, the Eighth Circuit found that the money was clearly designated for the benefit of the class as the "common good" entity was obligated to administer the money for the benefit of class members under specifically identified purposes. *Id.* at *13-17. The Eighth Circuit therefore held that the class action settlement agreement did not fail as a matter of law merely because it did not provide a specific financial pay-out to each class member or because the financial pay-out was made through a third-party organization. *Id.* at *17. The Eighth Circuit further found that the settlement was fair, reasonable, and adequate, as the resolution of the publicity rights claims would have required tremendous efforts regarding issues of statute of limitations for the various class members' home states, complex conflict of law analyses involving multiple states, and many legal obstacles, including Defendant's plausible affirmative defenses and highly speculative nature of Plaintiffs' alleged damages. *Id.* at *20-26. Thus, evaluating the strength of Plaintiffs' case, the potential value, and the interests of the entire class, the Eighth Circuit concluded that the District Court properly determined that the settlement was "a remarkable victory for the class as a whole." *Id.* at *44. Accordingly, the Eighth Circuit affirmed the District Court's approval of the settlement.

***Monteferrante, et al. v. The Container Store, Inc.*, 2015 U.S. Dist. LEXIS 13212 (D. Mass. Feb. 4, 2015).** Plaintiff brought a class action alleging that Defendant collected zip codes from its customers when they made purchases using credit cards at its retail stores and used the zip codes and names to identify customers' addresses and/or telephone numbers using commercially available databases. Subsequently, the parties reached a settlement, and the Court granted final approval, albeit with reservations. The Court observed that zip code class actions confer little benefit on society and that class members receive just a small value coupon to encourage shopping at the store that allegedly victimized them, while class counsel reap a big cash award. *Id.* at *1-2. Here, the settlement provided a $10 coupon to each class member, and attorneys' fees and costs were $120,000. The Court noted that, if the action had been brought under the Class Action Fairness Act ("CAFA"), rather than the Massachusetts Consumer Protection Act, an award of attorneys' fees would have been based on the value of the coupons actually redeemed by class members. *Id.* at *2. Although there were about 87,700 class members, only 1,627 claims had been submitted. If the 1,627 class members intended to redeem the coupons, the value of the settlement would be $16,270, rather than the $877,000 asserted by class counsel. Thus, the Court noted that the $120,000 fee award would be roughly 600% of the value of the settlement fund under the CAFA. Further, the Court opined that there must be at least some rational connection between the fee award and the amount of the actual distribution to the class, and the approval of attorneys' fees absent any such inquiry could have several troubling consequences. *Id.* at *3. The Court found that an arrangement such as the one at issue here potentially undermines the underlying purposes of class actions by providing Defendants with powerful means of enticing class counsel to settle lawsuits in a manner detrimental to the class. *Id.* Thus, although the Court approved the settlement, it noted that it would not have granted approval if Plaintiff had brought the action under the CAFA.

***Poertner, et al. v. The Gillette Co.,* 2015 U.S. App. LEXIS 12318 (11th Cir. July 16, 2015).** Plaintiffs brought a putative nationwide class action alleging that Defendant put misleading statements on the package of Ultra batteries in violation of the Florida Deceptive and Unfair Trade Practices Act. *Id*. at *3. Subsequently, the parties settled the action, and Defendant offered to give class members $12 worth of batteries with proof of purchase and $6 worth of batteries without proof of purchase. Defendant also agreed to make a donation of $6 million of batteries to charitable organizations, and pay $5.68 million in attorneys' fees. *Id*. at *5. The District Court granted final approval to the settlement. Upon the appeal of a group of objectors, the Eleventh Circuit affirmed. First, the Eleventh Circuit found that the settlement was fair and reasonable as it provided both monetary and equitable relief between $6.00 and $12.00 per class member, and Defendant's contribution of $6 million of batteries to charitable organizations. Therefore, the Eleventh Circuit determined that the monetary relief of $6 that could be claimed without proof of purchase exceeded the damages that an average class member would have received if the class had prevailed at trial. *Id.* at *10. Further, the Eleventh Circuit ruled that because only those class members who submitted claims could receive monetary relief, the use of a claims process was not suspect, nor was the claims process of completing a one-page form difficult or burdensome. *Id.* The objectors also argued that the District Court abused its discretion when it included the value of the non-monetary relief and *cy pres* award as part of the settlement. *Id.* at *11. The Eleventh Circuit reasoned that in another class action settlement, it had held that attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class, as well as other pertinent factors, including any non-monetary benefits. *Id.* The objectors contended that the non-monetary relief was illusory because Defendant was no longer selling Ultra batteries when it agreed to stop putting the allegedly misleading statements on the batteries' packaging. The Eleventh Circuit, however, found that Defendant's decision to stop selling and marketing Ultra batteries was motivated by the present litigation. *Id.* at *12. Third, the objectors argued that the District Court's approval of the *cy pres* award was inappropriate as it favored the non-class member charities over class members. The Eleventh Circuit held that the donation was independent of the monetary relief available to the class. *Id.* at *14. The Eleventh Circuit rejected the objectors' argument that the charitable recipients of Defendant's distribution were vague, and it remarked that the settlement provided that the donation recipients would be charitable organizations, including first responder charitable organizations like Toys for Tots and The American Red Cross or 501(c)(3) organizations that regularly used consumer batteries. *Id.* The objectors contended that the settlement was not the best practical means of providing relief to the class. The Eleventh Circuit, however, reasoned that

the record was clear that Defendant did not sell at retail, so it had no records from which it could identify actual purchasers of Ultra batteries and hence the District Court's finding – that attempting to gain information from retailers would be difficult, expensive, and essentially fruitless – was not unsupported by the record. *Id.* at *16. Further, the Eleventh Circuit noted that the parties settled only after engaging in extensive negotiations moderated by an experienced mediator. *Id.* at *17. Finally, the objectors claimed that the fees and costs award was unreasonable. The Eleventh Circuit, however, rejected this objection because it was based on a flawed valuation of the settlement, limiting the monetary value to actual payments, and excluding the substantial non-monetary benefit and the *cy pres* award. *Id.* at *18. Accordingly, the Eleventh Circuit affirmed the District Court's order.

***Segal, et al. v. Raymond Bitar,* 2015 U.S. Dist. LEXIS 76620 (S.D.N.Y. May 26, 2015).** Plaintiffs, a group of internet poker players, brought a putative class action alleging that Defendants processed players' funds through illegal means and denied players access to approximately $150 million deposited in their accounts. Plaintiffs held Full Tilt Poker Player Accounts and contended that their accounts were frozen by Defendants when the U.S. Attorney for the Southern District of New York seized the assets of the "Big Three" internet poker companies. *Id*. at *6-7. Plaintiffs demanded return of player funds and sought damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In December 2012, the Court entered a stipulation and order of settlement in the government's civil money laundering and *in rem* forfeiture action in regard to Defendant Howard Lederer, who agreed to forfeit to the United States certain property, to liquidate funds and other assets in certain accounts, and to pay a civil money laundering penalty judgment in the amount of $1.25 million. *Id*. at *10. In March 2014, a stipulation and order of settlement were entered with regard to Defendant Christopher Ferguson, who agreed to forfeit all funds in his accounts to the United States. *Id*. at *11. In July 2013, Defendant PokerStars filed a stipulation and proposed order of settlement wherein it agreed to forfeit $547 million to the United States and to make available for withdrawal all balances for players of the Full Tilt Group in an amount believed to be $184 million. *Id*. at *12. Plaintiffs moved for preliminary settlement approval. The Court denied the motion. Plaintiffs contended that the proposed settlement addressed Defendants' allegedly deceptive conduct by providing carefully tailored therapeutic relief to the class without the risk and delays of continued litigation, trial, and appeal. With respect to numerosity, the Court noted that the proposed settlement agreement defined the class as including all persons or entities, exclusive of Defendants and their employees or affiliates, who had monies in the Full Tilt Poker Player Account but were unable to access the funds. *Id.* The Full Tilt Poker Claim Administration Website, resulting from the related civil money laundering and *in rem* forfeiture action brought by the United States, demonstrated that the number of potential class members was in the thousands. Accordingly, the Court found that the class was so numerous that joinder of all members was impracticable and the numerosity requirement was satisfied. However, the Court found that Plaintiffs failed to demonstrate commonality. The Court noted that Plaintiffs merely recited questions that they alleged were common to the class and failed to identify any contention whose truth or falsity would resolve an issue that was central to the validity of each claim in one stroke. *Id*. at *30-32. Further, the Court held that Plaintiffs failed to satisfy the adequacy requirement because they negotiated a proposed settlement agreement that included a definition of the class different from the putative class definition in their complaint and, therefore, they failed to protect and fairly and adequately represent the interests of the putative class members. *Id*. at *33. Finally, the Court found that Plaintiffs failed to demonstrate that they met the requirements of Rule 23(b)(2). Accordingly, the Court denied Plaintiffs' motion for preliminary approval of the settlement.

***United States v. City Of New York*, 2015 U.S. Dist. LEXIS 29859 (E.D.N.Y. Mar. 11, 2015).** The United States brought a suit against the City of New York alleging that certain aspects of the City's policies for selecting entry-level firefighters for the New York Fire Department ("NYFD") violated Title VII of the Civil Rights Act. Specifically, the United States alleged that the City's pass-fail and rank-order use of Written Exams 7029 and 2043 had an unlawful disparate impact on black and Hispanic candidates for entry-level firefighter positions. *Id*. at *10. Subsequently, the parties reached an agreement to settle claims for back pay and fringe benefits, including interest, and jointly moved to provisionally approve and enter a Monetary Relief Consent Decree ("MRCD"). *Id*. at *23. After 101 Claimants objected to the settlement, the United States filed an amended decree (the "AMRCD"), which the parties jointly moved for final approval. The

AMRCD, as compared to the MRCD, contained a technical change regarding the entity (the City versus the Court-appointed claims administrator) that would be issuing payments to claimants for the fringe benefits and interest portions of their awards. *Id*. at *25. Under the AMRCD, the City agreed to pay to eligible claimants a total of $80 million in back pay; $11 million in interest on back pay; $6.2 million in fringe benefits; and $832,129.54 in interest on fringe benefits – amounting to a total settlement sum of $99,098,358.29. *Id*. at *30. The amounts included interest accrued through the end of 2014, and the decree provided for allocation of the aggregate funds by the claims administrator, according to a methodology devised by the United States and firefighters who intervened in the case as Plaintiffs. *Id*. at *31. The Court approved the settlement. The Court first applied the nine factors articulated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), and found that the approximately 15% discount from the City's likely post-mitigation liability was fair, reasonable, and adequate. *Id*. at *53. The Court explained that resolving those claims currently would speed relief to claimants who had been waiting years for relief, as those claimants took the unlawful exams 12 and 15 years ago, and the case was pending for eight years. *Id*. The Court concluded that increased speed was desirable, and avoiding the continued use of the claims process eliminated a material burden on claimants, who would be subjected during that process to additional discovery, individual hearings before special masters, motions to dismiss, and further litigation. *Id*. at *54. Furthermore the Court found that the generally positive response to the decree weighed in favor of the final approval. Further, the Court scrutinized the allocation methodology and found it fair. The Court explained that all claimants were assigned to one of the eight damages categories based on: (i) the race identified on his or her claim form; (ii) the Court's determination of the examination for which the claimant was eligible for relief; and (iii) the Court's determination regarding the claimant's status as a non-hire or delayed-hire claimant. *Id*. at *59. Pursuant to the decree's allocation methodology, the claims administrator was provided with interim earnings data with respect to each eligible non-hire claimant, and it averaged each non-hire claimant's annual interim earnings over the back pay period. *Id*. at *60. The Court determined that the allocation methodology for non-hire claimants, delayed-hire claimants, allocation of fringe benefits, and calculation of allocation of interest met the relevant standard for approval. Although the Court received several objections against the allocation methodology, it nevertheless concluded that none warranted denial of the final approval of the settlement agreement. Accordingly, the Court granted the joint motion for final approval of the settlement agreement.

***Wilkins, et al. v. HSBC Bank Nevada, N.A.,* Case No. 14-CV-190 (N.D. Ill. Mar. 6, 2015).** In this class action alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA") by placing unauthorized automated calls to thousands of individuals, the Court granted Plaintiffs' motion for final settlement approval and sought clarification from the class counsel on the number of timely claimants. On February 27, 2015, the Court issued a memorandum opinion and order granting Plaintiffs' motion for final approval of the class action settlement finding a nearly $40 million settlement fair, reasonable, and adequate. The Court also approved a fee award of $9,495,000 to class counsel and payment of incentive awards for the class representatives in the amount of $5,000 each. The Court further requested the parties to submit an agreed proposed order effectuating their settlement agreement consistent with the Court's opinion. In response, the class counsel submitted a "Proposed Final Order of Dismissal and Final Judgment" ("Proposed Order") on March 5, 2015, stating that "a total of 284,344 settlement class members submitted timely and proper claims." *Id.* at 1. The Court noted that, in both a memorandum in support of motion for attorneys' fees and at the fairness hearing, class counsel had represented that a total of 286,433 class members had submitted timely claims. *Id*. The Court had relied on class counsel's representation about the number of timely claimants in its order approving the settlement. Because the Court found discrepancies in the number of timely claimants, it ordered the class counsel to file statements by March 9, 2015, clarifying the number of class members who submitted timely and proper claims. *Id.* The Court also ordered class counsel to include an explanation as to why they failed to identify and correct their multiple inaccurate representations, if the number of timely claimants was indeed 284,344 as set forth in the Proposed Order. *Id.* Accordingly, the Court directed the parties to submit a revised proposed order.

Editor's Note: The $40 million settlement in *Wilkins* is the largest TCPA class action settlement in 2015.

(xxv) Mootness Issues In Class Action Litigation

***Bais Yaakov Of Spring Valley, et al. v. ACT, Inc.*, 2015 U.S. App. LEXIS 14718 (1st Cir. Aug. 21, 2015).** Plaintiff brought a putative class action alleging that Defendant, a college-entrance examination services provider, sent three unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act ("TCPA"). After the parties mutually agreed on a deadline for the class certification motion, Defendant tendered Plaintiff an offer of judgment under Rule 68. Defendant offered to pay $1,600 for each fax ($1,500 for violating the TCPA and $100 for violating the New York General Business Laws). *Id*. at *2. Defendant contended that this figure represented the maximum amount that Plaintiff could be awarded in damages; Defendant also offered to be enjoined from sending any additional unsolicited faxes to Plaintiff and offered to pay attorneys' fees and costs. Plaintiff moved for class certification four days after the Rule 68 offer, and did not respond to the offer within 14 days after it was served, which meant that the unaccepted offer was withdrawn by Rule 68. *Id*. at *3. Instead of renewing the withdrawn offer, Defendant moved to dismiss for lack of subject-matter jurisdiction. The District Court denied the motion to dismiss, and certified for appeal to the First Circuit the question of whether an unaccepted Rule 68 offer of judgment in a putative class action moots Plaintiff's entire action, if the offer is made before a class certification motion is filed. In certifying the question, the District Court accepted Defendant's contention that had Plaintiff accepted the offer, it would have provided Plaintiff with all the relief that it would be entitled to if Plaintiff had prevailed in the action. The First Circuit agreed to review the question. At the outset, the First Circuit remarked that Plaintiffs seeking to pursue a class action must show they are members of the class, and they adequately represent the class. *Id*. at *6. The First Circuit remarked that Defendant advanced a stratagem for defeating motions for class certification: offer only the named Plaintiff full payment for individual claims, and then move to dismiss the suit as moot before the District Court has a chance to consider whether a Plaintiff can represent the putative class. *Id*. at *6-7. The First Circuit observed that the U.S. Supreme Court's previous holding in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), found that the entry of judgment over the putative class Plaintiffs' objection, of full payment on their individual claims after a class certification motion had been denied, did not moot their private case, and that they could still appeal the denial of class certification motion. The Supreme Court reasoned that allowing claims of class representatives to be "picked off" would frustrate the objectives of class actions, and also noted Plaintiffs' desire to shift part of the costs of the litigation to those who would share in its benefits. *Id*. at *8. Plaintiff argued that it too had a continuing economic interest in the litigation, *i.e.*, of sharing the attorneys' fees, and a possible incentive award for serving as the lead Plaintiff. The First Circuit observed that in order to decide whether an unaccepted Rule 68 offer triggers mootness, the District Court must first decide whether a Plaintiff who has refused such an offer has received complete relief, such that there remained no individual case or controversy sufficient to satisfy Article III. *Id*. at *13. The First Circuit noted that in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), four of the dissenting justices expanded on the reasoning of *Rooper*, finding that a rejected Rule 68 offer does not moot a claim because the rule itself provides that an unaccepted offer is considered withdrawn. *Id*. Accordingly, the First Circuit concluded that an unaccepted Rule 68 offer cannot, by itself, moot a Plaintiff's claim, as an unaccepted offer does not provide any relief on its own. *Id*. at *16.

***Chapman, et al. v. First Index, Inc.,* 2015 U.S. App. LEXIS 13767 (7th Cir. Aug. 6, 2015).** Plaintiff brought a putative class action alleging that Defendant sent him unsolicited fax advertisements in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff alleged that he received two unsolicited faxes demanding $3,000 in damages, without substantiating his actual damages. *Id*. at *5. After the District Court certified a class action, Plaintiff attempted to change the class definition and moved for amendment of the certification order. The District Court denied Plaintiff's motion. *Id*. at *2-3. While the class certification motion was pending, Defendant made an offer of judgment of $3,002 and an injunction to Plaintiff. When Plaintiff failed to respond, the District Court denied his claims as moot, and dismissed his complaint. *Id*. at *3. The District Court also denied a motion to intervene filed by "All American Painting, Inc.," who wanted to replace Chapman as the named Plaintiff. *Id*. at *5. On appeal, the Seventh Circuit reversed in part. At the outset, the Seventh Circuit noted that pursuant to Rule 68, a District Court cannot enter judgment in a moot case, but only could dismiss the case for lack of controversy. *Id*. at *7. Under the circumstances, the Seventh Circuit noted that if $3,002 offer made this case moot, then even if Plaintiff had accepted it, the District Court could not have ordered Defendant to pay, and at most it could dismiss the

case for lack of an Article III controversy. *Id*. at *7-8. The Seventh Circuit further noted that Rule 68(d) provides that failure to accept a fully compensatory offer may suggest that Plaintiff is an inadequate representative of the class, for he has nothing to gain and may have given up something that the class values. *Id*. at *8. The Seventh Circuit remarked that if there is only one Plaintiff, District Courts should not be required to assist in a controversy when a Defendant fully compensates Plaintiff's claims with an offer of judgment. *Id*. at *10. The Seventh Circuit, however, observed that Defendant did not make an argument there was no sum currently in dispute, and that a fleeting offer could not reasonably be equated to full compensation. *Id*. at *11. Accordingly, the Seventh Circuit vacated the judgment as to Plaintiff's personal claim, but affirmed as to the order denying the motion to intervene.

***Epps, et al. v. Wal-Mart Stores, Inc.,* 2015 U.S. Dist. LEXIS 66647 (E.D. Ark. May 21, 2015).** Plaintiffs brought a putative class action alleging that Defendant failed to credit them for the full amount of insurance proceeds that they received for services at Wal-Mart Vision Centers. *Id.* at *1. Plaintiffs sought relief on theories of conversion, unjust enrichment, and violations of the Arkansas Deceptive Trade Practices Act. *Id.* Plaintiffs also sought damages for themselves and a class of all individuals similarly-situated. Defendant served an offer of judgment to Plaintiffs under Rule 68 and filed a motion to dismiss, arguing that the action was moot because it had offered Plaintiffs full relief satisfying their individual claims before they filed a class certification motion. *Id.* at *2. Plaintiffs, in response, moved to strike Defendant's offer of judgment and to certify a class. The Court denied Defendant's motion to dismiss, granted Plaintiff's motion to strike, and held Plaintiff's motion to certify a class in abeyance. *Id.* The Court noted that in *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525 (8th Cir. 1996), the Eighth Circuit had held that Defendant's offer of payment of the putative class representative's individual claim did not moot the class action. *Id*. at *15. Following the guidance of *Alpern*, case law authorities in the Eighth Circuit had held that a pre-motion-to-certify Rule 68 offer of judgment that would satisfy only the named Plaintiffs' claims failed to offer complete relief for the claims of the class and thus did not moot the class action. *Id.* at *15. The Court reasoned that "an unaccepted pre-motion-to-certify Rule 68 offer of complete relief to the named Plaintiff is ineffective to moot the name Plaintiff's claim because the cost-sharing provision of Rule 68(d) creates a conflict of interest between the class representative and the class members." *Id.* at *16. Because the class has some legal status prior to certification and because Defendant's offer created a conflict of interest between the named and unnamed Plaintiffs, the Court concluded that striking the Rule 68 offer of judgment would be appropriate. *Id.* at *21-22. Accordingly, the Court denied Defendant's motion to dismiss and granted Plaintiffs' motion to strike Defendant's Rule 68 offer of judgment.

***Floyd, et al. v. Sallie Mae, Inc., John Doe,* 2015 U.S. App. LEXIS 7322 (11th Cir. May 4, 2015).** In this action challenging the District Court's order granting Defendant's motion to dismiss for lack of subject-matter jurisdiction, the Eleventh Circuit reversed and remanded the case. Plaintiff argued that the District Court erred in concluding that his case was moot after he rejected Defendant's Rule 68 offer of judgment. *Id*. at *1. Plaintiff contended that the District Court erred because Defendant's offer provided him complete relief on his individual claims, while providing no relief to the putative class. *Id*. At the outset, the Eleventh Circuit noted that in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), it held that unaccepted offers of judgment did not render the named Plaintiffs' complaint moot. *Id*. at *2. Defendant argued that Plaintiff waived his argument that an unaccepted Rule 68 offer of judgement cannot moot his claim because he never presented it to the District Court. The Eleventh Circuit, however, noted that the District Court explicitly held that Plaintiff's claim was moot because the Rule 68 offer included more than all of this relief that Plaintiff could obtain at trial. *Id*. at *2-3. Therefore, the Eleventh Circuit remarked that the issue of whether Plaintiff's claim was moot was undoubtedly before the District Court. *Id*. at *3. Accordingly, based on its precedent in *Stein*, the Eleventh Circuit concluded that Plaintiff's claim was not moot simply because he rejected Defendant's Rule 68 offer of judgment. For this reason, it reversed the District Court's order.

***Hooks, et al. v. Landmark Industries, Inc.,* 2015 U.S. App. LEXIS 14116 (5th Cir. Aug. 12, 2015).** Plaintiff brought a putative class action seeking statutory damages for violations of the Electronic Funds Transfer Act ("EFTA"). Plaintiff alleged that Defendant charged $2.95 for withdrawals from the ATM it operated without posting a notice on or at the ATM to inform customers of the fee. *Id*. at *2. Defendant

tendered a Rule 68 offer of judgment to settle the statutory claim and offered to pay reasonable attorneys' fees and costs. *Id*. at *2-3. When Plaintiff did not accept the offer, Defendant filed a motion to dismiss for lack of subject-matter jurisdiction. The Magistrate Judge issued a recommendation to certify a class and to dismiss Defendant's motion as moot. *Id*. Defendant then filed a second motion to dismiss for lack of subject-matter jurisdiction, arguing that the unaccepted Rule 68 offer of judgment mooted Plaintiff's individual claim as well as Plaintiff's class action. The District Court granted the motion. Plaintiff appealed and the Fifth Circuit reversed and remanded. At the outset, Plaintiff argued that the Rule 68 offer was not a complete offer of judgment because it included only reasonable attorneys' fees accrued through the date of the offer. The Fifth Circuit refused to offer an opinion on the issue, noting that the outcome of the appeal did not hinge on the completeness of the offer but on whether an unaccepted offer moots a Plaintiff's individual claims. *Id*. at *7. The Fifth Circuit observed that in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), and in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), the Ninth Circuit and the Eleventh Circuit, respectively, held that an unaccepted offer of judgment to a named Plaintiff in a class action was a legal nullity, with no operative effect. *Id*. at *11-12. Following these decisions, the Fifth Circuit ruled that, because the unaccepted offer did not moot Plaintiff's individual claim, it did not moot Plaintiff's class claim. Accordingly, the Fifth Circuit reversed the District Court's order and remanded the action.

***Lafollette, et al. v. Liberty Mutual Fire Insurance Co.*, 2015 U.S. Dist. LEXIS 2283 (W.D. Mo. Jan. 9, 2015).** Plaintiffs, a group of homeowner's insurance policyholders, brought a class action alleging that Defendant violated the terms of their insurance policies by applying a $1,000 deductible to the actual cash value payment for the losses to their homes. After several months of litigation, Defendant made offers of judgment to all Plaintiffs. In the offers of judgment, Defendant offered to pay each Plaintiff $1,000 plus pre-judgment interest and costs, but did not address the class claims. Plaintiffs moved to strike Defendant's offers of judgment, and Defendant moved to dismiss for lack of subject-matter jurisdiction. The Court granted Plaintiffs' motion and denied Defendant's motion. Defendant argued that, because its offers of judgment provided relief for the entirety of Plaintiffs' claims, no controversy existed for the Court to exercise its Article III jurisdiction. The Court noted that the majority of circuits addressing the issue had held that unaccepted Rule 68 offers of judgment do not moot a pending class action. *Id.* at *3. The Court observed that Rule 68 gives a Plaintiff 14 days to accept an offer of judgment, after which time an unaccepted offer is automatically withdrawn and rendered a legal nullity. *Id.* The Court, therefore, opined that Defendant's offers had lapsed, and a justiciable controversy remained. Defendant contended that, after the Court has considered and denied class certification, a Rule 68 offer of judgment for the entirety of Plaintiffs' claims should moot the action. *Id.* at *4. The Court, however, found that Plaintiffs had alleged a putative class claim in their complaint and that the time for filing a motion for class certification had not yet run. Because Defendant provided no relief for putative class members in its offers of judgment, the Court found that a justiciable controversy existed regarding the remainder of the damages to which Plaintiffs argued they were entitled, and, therefore, Plaintiffs' claims were not moot. *Id.* Plaintiffs further contended that Defendant's Rule 68 offers of judgment should be stricken because they created an unacceptable conflict between the Plaintiffs and putative class members. The Court agreed. It reasoned that forcing a Plaintiff to weigh her personal risks against the potential benefit to the remainder of the class, *i.e.,* benefits in which she would share equally with the other class members, would threaten the entire class action mechanism. *Id.* at *6-7. The Court held that, because the time for filing a motion for class certification had not run when Defendant made its offers of judgment, the offers did not moot Plaintiffs' claims. *Id*. at *8. Accordingly, the Court denied Defendant's motion to dismiss and granted Plaintiffs' motion to strike Defendant's offers of judgment.

***Tanasi, et al. v. New Alliance Bank*, 2015 U.S. App. LEXIS 7932 (2d Cir. May 14, 2015).** Plaintiff brought a putative class action alleging that Defendants made improper assessments of overdraft fees on his account and the accounts of others similarly-situated and sought money damages. Defendants offered to settle Plaintiff's individual claims pursuant to Rule 68 for an amount greater than the statutory damages to which Plaintiff would have been entitled if successful. *Id*. at *4. After Plaintiff refused to accept the offer, Defendants filed a motion to dismiss, arguing that the unaccepted Rule 68 offer rendered Plaintiff's individual and putative class action claims moot. The District Court denied Defendants' motion to dismiss,

holding that although Plaintiff's individual claims were rendered moot by the unaccepted Rule 68 offer, his putative class action claims were not. On appeal, the Second Circuit reversed the District Court insofar as it held that Plaintiff's claim was moot. At the outset, the Second Circuit noted that under Rule 68, if a offeree accepts an offer within 14 days after it is made, the clerk must enter judgment; however, if the offeree does not accept the offer, it is considered withdrawn, and the case must proceed. *Id*. at *7. The Second Circuit remarked that what Rule 68 does not make clear is the effect, if any, of an unaccepted offer on the justiciability of Plaintiff's claim under the U.S. Constitution's case or controversy clause. *Id*. at *8. The Second Circuit observed that a case becomes moot pursuant to Article III's case or controversy clause when it is impossible for the District Court to grant any effectual relief to the prevailing party. The Second Circuit further observed that the Third, Fifth, Seventh, Tenth and Federal Circuits have all concluded that a Rule 68 offer of complete relief to an individual renders his case moot for purposes of Article III, regardless of whether judgment is entered against Defendant. On the other hand, the Ninth and Eleventh Circuits have concluded that an unaccepted Rule 68 cannot moot a case because giving controlling effect to an unaccepted Rule 68 offer is flatly inconsistent with the Rule. *Id*. at *9. In this case, the District Court summarily concluded that in the Second Circuit it was settled that if Plaintiff was not seeking to represent a class, Defendants complete offer of judgment would moot his claims and strip the Court of subject-matter jurisdiction. The Second Circuit remarked that the District Court reached this conclusion based on the circuit's case law, which was not clear on this subject. *Id*. at *10. Consequently, the Second Circuit opined that the District Courts within the circuit have not deduced a single rule on the issue. In the light of this confusion, the Second Circuit clarified the rule that a rejected settlement offer under Rule 68, by itself, cannot render a case moot. *Id*. at *11. The Second Circuit further held that if the parties agree that a judgment should be entered against Defendant, then the District Court should enter such a judgment. *Id*. The Second Circuit concluded that absent such agreement, however, the District Court should not enter judgment against Defendant if it does not provide complete relief. Applying this standard to the present case, the Second Circuit reasoned Plaintiff's individual claims were not rendered moot, in the constitutional sense, by the unaccepted Rule 68 offer. *Id*. at *12. Instead, because the District Court had not yet entered judgment against Defendants when it reached its decision on the motion to dismiss, the Second Circuit concluded the District Court maintained Article III subject-matter jurisdiction over the case regardless of Plaintiff's putative class action claims. *Id*. at *12-13.

***Walker, et al. v. Financial Recovery Services, Inc.,* 2015 U.S. App. LEXIS 4976 (11th Cir. Mar. 27, 2015).** In this putative class action, the District Court found that the Rule 68 offer of judgment Plaintiff rejected her claim, and dismissed the complaint. On Plaintiff's appeal, the Eleventh Circuit reversed the order, holding it contravened the recent decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014). *Id*. at *1-2. In *Stein*, the named Plaintiff had received Rule 68 offers of judgment before moving for class certification. The Eleventh Circuit had held that the unaccepted offers of judgment did not render the named Plaintiffs' complaint moot. *Id*. at *2. Defendant argued that while the offers in *Stein* were deemed revoked if not accepted and Defendant did not request that the District Court enter judgment on the terms of its offers, in this case Defendant continued to stand behind its offer and requested that the District Court provide Plaintiff with complete relief by entering judgment. The Eleventh Circuit remarked that *Stein* broadly held that "[g]iving controlling effect to an unaccepted Rule 68 offer . . . is flatly inconsistent with the rule." *Id*. at *2-3. In so concluding, *Stein* adopted the reasoning of four U.S. Supreme Court Justices in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). Those Justices specifically stated that "an unaccepted offer of judgment cannot moot a case. When a Plaintiff rejects such an offer – however good the terms – her interest in the lawsuit remains just what it was before. And so too does the Court's ability to grant her relief. An unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect." *Id*. at *3. The Eleventh Circuit remarked that even if the facts of this case were distinguishable from *Stein*, its second alternative holding would still bind this case. Specifically, *Stein* held that even assuming a putative class representative's individual claim was mooted, a Rule 68 offer of full relief to the named Plaintiff does not moot a class action even if the offer precedes a class certification motion, so long as the named Plaintiff has not failed to diligently pursue class certification. *Id*. Accordingly, the Eleventh Circuit reversed the District Court's order of dismissing complaint for lack of subject-matter jurisdiction.

***Webster, et al. v. Bayview Loan Servicing,* 2015 U.S. App. LEXIS 18295 (7th Cir. Oct. 21, 2015).** Plaintiff, a borrower, brought an action alleging that Defendant continued to call her cell phone regarding debt she owed Defendant even after she was discharged in bankruptcy, in violation of the Telephone Consumer Protection Act ("TCPA") and the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff sought individual relief and requested actual and compensatory damages, including an order enjoining Defendant from committing any future violations of the FDCPA and the TCPA and a declaratory judgment of the violations. Plaintiff moved to file an amended complaint to assert the claims as a class action and simultaneously moved for class certification. While the motions were pending, Defendant offered to settle Plaintiff's claims by tender of the full relief sought, which Plaintiff rejected. Defendant moved to dismiss, which the Court granted. *Id.* at *3-4. On appeal, the Seventh Circuit vacated and remanded the District Court's order. Plaintiff argued that she moved to amend her complaint to allege a class action and had also sought class certification prior to Defendant's offer to settle her individual claims and that Defendant's offer not did moot her individual claims because the offer did not provide her with the full relief requested. The Seventh Circuit found that Defendant's offer of full compensation did not moot Plaintiff's lawsuit. Accordingly, the Seventh Circuit reversed the District Court's order and remanded the action.

(xxvi) Experts In Class Action Litigation

***Chen-Oster, et al. v. Goldman, Sachs & Co.*, 2014 U.S. Dist. LEXIS 29813 (S.D.N.Y. Mar. 10, 2015).** Plaintiffs, a group of former female employees, brought a class action alleging that Defendants denied them equal compensation and opportunities for promotion in violation of Title VII. Plaintiffs moved for class certification, and each side moved to exclude a part of the other side's expert testimony, which the Court granted in part. Defendants first moved to exclude the report of Plaintiffs' expert, Dr. Henry S. Farber. Dr. Farber used a multiple regression analysis, and found that female associates earned 7.6% less than male associates after accounting for the factors in his model. *Id*. at *7-8. Similarly, Dr. Farber determined that female Vice Presidents were paid 21.36% less than similarly-situated male Vice Presidents. *Id*. at *8. Defendants first challenged Dr. Farber's report on the basis that he failed to include in his model two measures of performance – 360 reviews and quartile placements – that might be considered predictors of compensation and promotion. *Id*. at *14. The Court observed that Dr. Farber did incorporate Defendants' performance measures in his model, and found that, although the performance variables resulted in a less dramatic disparity in compensation between men and women, a statistically significant pay differential, however, remained. *Id*. at *16. Accordingly, the Court concluded that Dr. Farber's model considered performance and productivity in his analysis. Defendants also argued that Dr. Farber did not use the AAP job codes – codes that are assigned pursuant to a DOL regulation – to make evaluation, compensation, or promotion decisions, primarily because 70% of the putative class members fell in one of the three AAP job codes. *Id*. at *18. The Court observed that since Defendants might be able to identify a different variable that would lead to a better fit between a model and the data, that was an issue to analyze the weight of the evidence; hence, it did not render Dr. Farber's report inadmissible. *Id*. at *19. Plaintiffs sought to exclude one aspect of the report of Defendants' expert, Dr. Michael P. Ward, to the extent that his analysis examined pairs of Vice Presidents who, without accounting for gender, shared similar characteristics but who had very different compensation. The Court found that Dr. Ward's pair studies were unreliable because: (i) he did not determine the statistical significance of his findings; and (ii) his sample size of two pairs was too small to serve as the basis for any statistical interference. *Id*. at *30-31. Accordingly, the Court excluded Dr. Ward's report. Defendants also challenged the report of Plaintiff's expert, Dr. David L. Yermack's, insofar as he concluded that financial services firms had similar ranges of jobs and that staff at the Associate and Vice President levels were comparable across firms. While Defendants challenged Dr. Yermack's report in several respects, the Court noted that he was a rebuttal expert, whose evidence would be offered only to the extent it was necessary to controvert the opinions of another expert, Dr. Michael P. Curran. *Id*. at *43. The Court similarly determined the admissibility of experts' reports of Dr. Wayne P. Cascio, Dr. Michael A. Campion, and Dr. Michael P. Curran, and denied the requests to exclude their testimony.

***In Re Blood Reagents Antitrust Litigation,* 2015 U.S. App. LEXIS 5630 (3d Cir. April 8, 2015).** Plaintiffs, direct purchasers of traditional blood reagents, brought a class action alleging that Defendants increased the prices by 2,000% and sought damages under Clayton Act for alleged horizontal price fixing

in violation of the Sherman Act. *Id*. at *3. After Plaintiffs settled with one of the Defendants, Immucor, Inc., the District Court preliminarily approved the settlement and certified a settlement class. Plaintiffs had relied on expert testimony to produce their antitrust impact analyses and damages models. The District Court evaluated the testimony, and held that the expert testimony could evolve to become admissible evidence at trial, and determined that Plaintiffs had satisfied the predominance requirement. *Id*. at *4. The other Defendant, Ortho-Clinical Diagnostics, Inc., ("Ortho") challenged the class certification order, and the Third Circuit vacated it and remanded the case. Ortho pointed to *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013), and asserted that the District Court erred when it declined to address whether Plaintiffs' damages models were capable of producing just and reasonable damage estimates at trial, and by accepting Plaintiffs' theory as capable of proving class-wide antitrust impact. *Id*. at *5. Ortho contended that the methodologies of Plaintiffs' expert could not prove antitrust impact as a matter of law because they were incapable of distinguishing lawful price increases resulting from the creation of a duopoly from price increases resulting from the alleged price-fixing conspiracy. Ortho based its argument on statements in *Comcast* such as, prices whose level above what an expert deems competitive has been caused by factors unrelated to an accepted theory of antitrust harm are not anti-competitive in any sense relevant here, and the suggestion that a damages model must be able to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the antitrust violation. *Id*. at *6. The Third Circuit observed that a Plaintiff cannot rely on challenged expert testimony, which is critical to class certification, to demonstrate conformity with Rule 23, unless Plaintiff also demonstrates that the expert testimony satisfies the standard set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). *Id*. The Third Circuit observed that Plaintiffs primarily relied on the expert testimony to produce most of their antitrust impact analyses and damages models, and they offered this testimony to demonstrate that common questions predominated over individual ones. *Id*. at *11. Because Ortho consistently challenged the reliability of the methodologies of Plaintiffs' expert and the sufficiency of the testimony to satisfy the Rule 23(b)(3) requirement, the Third Circuit remanded the action and left it to the District Court to rule on Ortho's reliability attacks, and if necessary conduct a *Daubert* inquiry before assessing Rule 23 requirements. *Id*. at *11-12. Accordingly, the Third Circuit vacated and remanded the action.

***In Re Chinese Manufactured Drywall Products Liability Litigation*, MDL No. 2047 (E.D. La. May 14, 2015).** Plaintiffs brought a class action alleging that Defendant's gypsum wallboards emitted various sulfide gases, damaged structural, mechanical, and plumbing systems in homes, and damaged other home appliances. Defendant moved to compel documents upon which Plaintiffs' damages expert, George Inglas, relied. The Court denied the motion, finding that the documents were protected from disclosure under Rules 26(b)(3)(B) and 26(b)(4)(B) as drafts of reports or disclosures that contain the "metal impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." *Id*. at 1. The Court found that Inglas' role in helping to create the information invoked work-product protection under Rule 26(b)(4)(B). Defendant argued that Plaintiffs waived any protection when they sent the information to Brown Greer, the settlement administrator. The Court, however, ruled that the work-product sent between Inglas and Greer fell within the ambit of protection under Rule 26(b)(3)(B) because Greer worked on behalf of the litigation in the interest of all settling parties and not as a "third-party." *Id*. at 1-2. Accordingly, the Court denied Defendant's motion to compel.

***In Re Processed Egg Products Multi-District Antitrust Litigation,* 2015 U.S. Dist. LEXIS 9965 (E.D. Pa. Jan. 26, 2015).** Plaintiffs, a group of purchasers of Defendants' egg or egg products, brought a putative class action alleging that Defendants conspired and inflated the prices for processed eggs in violation of Sherman Act. Seeking class certification, Plaintiffs offered the testimony of Dr. Gordon Rausser, an economist. Defendants filed a *Daubert* motion to exclude Rausser's declaration, opinions, and testimony. Defendants asserted that Dr. Rausser's analysis of whether the "Egg Industry is Conducive to Price Manipulation through Output Restriction" and whether "Conspiracy Period Behavior and Pricing is Consistent with Collusion" did not involve the application of his "scientific, technical, or specialized knowledge" because Dr. Rausser merely based his expert credential on factual records. *Id.* at *12-13. The Court denied Defendants' motion. The Court found that, although Dr. Rausser's conclusions appeared to be based on nothing more than his reading of record and finding evidence in support of Plaintiffs' positions,

he did go through the factors that make a market conducive to collusion, and did apply those principles to the factual record. *Id.* at *24. Particularly, the Court found that Dr. Rausser tied the evidence of the case to the economic theory of collusion, and his economic expertise allowed him to opine on whether the evidence supported the conditions for collusion. *Id.* at *25-26. Defendants challenged each of Dr. Rausser's opinions, including his methodology for showing class-wide impact of the prices of various egg products. The Court, however, found Dr. Rausser's analysis – called a co-movement analysis – as a reliable analytical form relevant for the purposes of the case, and sufficient for the facts of the case. According to the Court, analysis of the market structure and the common factors affecting price supported Dr. Rausser's co-movement analysis, and any expert in statistics or economics could understand and test his methods. Moreover, Defendants failed to identify any factor that Dr. Rausser failed to account for that could render his analysis unreliable and inadmissible. *Id.* at *47. To the extent Defendants asserted flaws in Dr. Rausser's model due to some factors, the Court determined that Dr. Rausser's reply declaration adequately accounted for each of the contended flaws, and that the critique of Dr. Rausser's model did not make it inadmissible under *Daubert. Id.* at *59. The Court concluded that Dr. Rausser's methodology was a fairly straightforward way of estimating the increase in price attributable to the conspiracy, and thus reliable. *Id.* at *65. Accordingly, the Court denied Defendants' motion to exclude the opinions and testimony of Dr. Rausser.

***In Re Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, 2015 U.S. Dist. LEXIS 1598 (E.D. Pa. Jan. 7, 2015).** In this multi-district class action litigation, Plaintiffs alleged that Zoloft, a prescription anti-depressant, caused birth defects in the children born to exposed mothers who took the drug while pregnant. Although the Plaintiffs' steering committee ("PSC") had offered the testimony of four expert witnesses on the issue of general causation, the Court had excluded the opinions of all four experts, ruling that these experts could not testify that Zoloft caused birth defects in humans, but could testify as to the limited question of the existence of plausible biological mechanisms in which altered concentrations of serotonin in a developing embryo could cause birth defects. *Id*. at *1-2. The PSC then sought to introduce expert testimony by Nicholas Jewell, Ph.D., a professor at the University of California, Berkeley in the Division of Biostatistics, School of Public Health, and in the Department of Statistics. The PSC asserted that Jewell would opine that *in utero* exposure to Zoloft could cause congenital heart defects. The Court granted the motion. The Court remarked that although there would be additional expense to litigate the admissibility of Jewell's proposed testimony, this prejudice did not warrant denial of the motion. Although the PSC and Jewell had the benefit of the Court's prior rulings in the formulation of the new expert report, the Court opined that this did not prejudice Defendant because either Jewell's expert report and testimony would pass muster under Rule 702 or they would not. *Id.* at *6-7. Further, because there was a possibility that Jewell would be presented as an expert witness in Zoloft cases currently pending in state courts, or in cases that may be filed in the future, the Court reasoned that Defendant likely must address his expert testimony at some point. The Court also noted that the evidence was of critical importance to Plaintiffs because the decision to admit or exclude scientific evidence and expert testimony strongly affected the ability of a party to prevail. *Id.* at *7. Further, the Court opined that there was no reason to conclude that the PSC had acted in bad faith or that its present predicament was the result of deliberate strategy instead of a miscalculation as to the persuasiveness of one of the other experts. Additionally, the Court observed that the initial hearing under *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993), was not futile, because the testimony of the experts offered previously had been limited, and Jewell's proposed expert testimony encompassed a significantly more limited range of birth defects than did the PSC's other experts. *Id*. at *8. Accordingly, the Court granted the PSC's motion to permit the testimony of Jewell.

***Whitlock, et al. v. Pepsi Americas,* 2015 U.S. Dist. LEXIS 16815 (N.D. Cal. Feb. 11, 2015).** Plaintiff and 30 other persons brought an action alleging personal injuries caused by the emission of toxic chemicals, including hexavalent chromium, from Defendant's Remco facility. Initially, Plaintiff asserted that based upon the scientific information available in 2010, her medical expert, Dr. Vera Byers, was unable to attribute Plaintiff's reproductive ailments and miscarriages to her chemical exposure, to a reasonable degree of medical certainty. *Id.* at *3. Subsequently, Dr. Linda Remy, Plaintiffs' epidemiology expert in the related case of *Avila v. REMCO,* Case No. 99-CV-3941, prepared a report (the "2012 report") based on a study she conducted through the University of California, San Francisco. *Id.* at *4. Remy found that

women living in Willits, California experienced significantly higher rates of miscarriages, endometriosis, ovarian cysts, and other pregnancy-related maladies compared to the rest of the county. *Id.* Thereafter, Plaintiff asked Byers to review Plaintiff's case. Plaintiff contended that Byers began to suspect that the 2012 report regarding reproductive injuries was applicable to Plaintiff, and in June 2013 Byers contacted Remy. *Id.* at *5. Remy, however, advised that although the data was striking, the 2012 report could not be reliably compared to Plaintiff because the data had been collected for hospitalized patients, who were sicker than Plaintiff. *Id.* In May 2014, Remy received new patient discharge data ("PDD") from the California Office of Statewide Health Planning and Development for 99 female Plaintiffs in this action and various other lawsuits regarding the Remco facility. Based on the PDD, Remy concluded for the first time that 62 Plaintiffs identified in the database had statistically significantly higher rates of genitourinary and reproductive illness and procedures compared to the rest of the county. *Id.* Byers then re-reviewed Plaintiff's medical history, and notified her counsel that based on Remy's new findings, she would be able to revise her expert report regarding Plaintiff and could now opine that exposure to hexavalent chromium was a cause or substantial contributor to Plaintiff's reproductive problems. *Id.* at *6. Plaintiff thus moved to supplement the expert reports with this updated information, which the Court granted. The Court opined that Plaintiff demonstrated good cause to permit the supplemental report. Plaintiff submitted the declaration of Remy, wherein she explained that the data analyzed in her 2014 report was new, and that she could not have conducted that analysis earlier. Further, Byers diligently updated her medical opinion based upon Remy's 2014 report, and it was only after Remy issued the 2014 report that Byers became confident about offering an opinion that the exposure to hexavalent chromium was a cause or substantial contributor to Plaintiff's reproductive problems. Additionally, the Court found that Defendants would not be prejudiced by the amendment because Plaintiff was not adding a new legal theory or claim, and was only supplementing an expert report to strengthen her claims of reproductive injuries. *Id.* at *8. Thus, because the existing expert report was incomplete or incorrect, and Plaintiff had a duty to supplement that report, the Court granted Plaintiff's motion.

(xxvii) Sanctions In Class Action Litigation

***David, et al. v. Signal International, LLC,* Case No. 08-CV-1220 (E.D. La. Feb. 20, 2015).** Plaintiffs, a group of migrant workers, brought a class action seeking to recover damages inflicted by Defendants and their recruiters and agents operating in India, the United Arab Emirates, and the United States. Over 500 Indian men came to the United States through the federal government's H-2B guest-worker program to provide labor and services to Defendants. Plaintiffs alleged that Defendants fraudulently recruited them to work in the United States and effectuated a broad scheme of psychological coercion, threats of serious harm and physical restraint, and threated abuse of the legal process to maintain control over the class members. The Court ordered Defendants' lead counsel to appear and show good cause why she should not be sanctioned for statements made during her closing arguments before the jury. The Court opined that sanctions were appropriate. During direct examination, defense counsel questioned Defendants' chief operating officer, Ron Schnoor, about the investigation of the U.S. Department of Labor ("DOL"). Schnoor testified that the DOL requested all records regarding how Defendants hired and paid its employees, and toured Defendants' facilities and interviewed H-2B workers and non-H2B workers. Subsequently, the DOL concluded that nothing was improper. *Id.* at 3. Schnoor also testified that the DOL did not cite Defendants for any violations as a result of the investigation. *Id.* Later, during a bench conference, Defendants offered not to introduce a certain letter from the DOJ or mention any other government investigations, and Plaintiffs agreed not to reference the charges filed against Defendants by the EEOC. *Id.* The parties honored this agreement for the remainder of trial. During her closing argument, defense counsel, however, discussed the DOL investigation as recounted by Schnoor. Although Plaintiffs did not expect Defendant to reference the DOL investigation in closing argument, the Court remarked that Defendant's counsel could have believed in good faith that it was permissible to reference Schnoor's testimony on direct examination. *Id.* at 4. Accordingly, the Court reasoned that sanctions were not appropriate for this statement made by Defendant's counsel. In addition, during closing arguments, defense counsel also stated that named Plaintiff Sabulal Vijayan's medical records showed that his suicide attempt was a suicide gesture. *Id.* at 5. The Court had ruled before trial that Defendant could not supplement its exhibit list with a one-page, uncertified copy of a medical record in which an emergency room doctor referred to Sabulal's suicide attempt as a "suicide gesture." *Id.* The Court had not listed the record in the pre-trial order and it was not a

certified record. The doctor for the provider was never deposed. *Id.* Thus, because it should have been clear to all counsel that no testimony could be produced about the medical record, the Court found that defense counsel made the statement in direct contravention of the Court's previous orders, and with reckless disregard of the duty owed to the Court. Accordingly, the Court imposed sanctions on defense counsel for that statement and ordered her to participate in the first available session of the ethics school sponsored by the Louisiana State Bar Association at her own personal expense.

***Guzman, et al. v. Bridgepoint Education, Inc.,* 2015 U.S. Dist. LEXIS 38801 (S.D. Cal. Mar. 26, 2015).** Plaintiff, a student, brought an action alleging that Defendant, a publicly-traded for-profit college, engaged in a pattern or practice of using standardized, misleading tactics to recruit students and over-charge the federal government for federal financial aid. According to the complaint, 67,744 students enrolled in Defendant's institutions and 99% of students attended classes exclusively on-line. Plaintiff alleged that the explosive growth in Defendant's enrollment at its on-line academic institutions was a direct result of misleading marketing tactics designed to recruit students to attend its schools. *Id*. at *3. There were two related actions filed in the same district, including *Rosendahl v. Bridgepoint Education*, Inc., Case No. 11-CV-61 (S.D. Cal. Jan 11, 2011), and *Ferguson v. Bridgepoint Education, Inc.*, Case No. 11-CV-493 (S.D. Cal. Mar. 10, 2011). In *Rosendahl*, Plaintiffs asserted nearly identical claims, and proposed a near verbatim class definition. The *Rosendahl* action was administratively closed after the Court granted the Defendant's motion to compel arbitration. *Id*. at *16. In *Ferguson*, Plaintiffs brought a *qui tam* action under the False Claims Act based on allegations that prospective students were induced to enroll at Bridgepoint schools by making misrepresentations and concealing material information. Defendant filed a motion for sanctions against Plaintiff because she failed to list Ryan Ferguson (a former employee who filed the *qui tam* action against Defendant) as a potential witness either in her disclosures or in her interrogatory responses. *Id*. at *18, 20. Plaintiff's counsel, Francis A. Bottini, along with two other attorneys, represented Ferguson and his co-Plaintiff in the *qui tam* action. After class certification discovery closed, Plaintiff filed her motion for class certification, submitted a declaration from Ferguson, and relied heavily on it to substantiate her contention that the proposed class satisfied the commonality requirements. Subsequently, Plaintiff served amended initial disclosures and identified Ferguson as a possible witness. *Id*. at *21. The Court noted that, when a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, hearing, or at trial. *Id*. at *23. The Court noted that Bottini previously had represented Ferguson in an action against Defendant that featured allegations closely matching those that Plaintiff asserted in her complaint. *Id*. at *24. The Court opined that the suspicious circumstances surrounding Ferguson strongly suggested that Plaintiff violated Rule 26's disclosure requirements. *Id*. The Court explained that Plaintiff could not claim that she was unaware of Ferguson's identity prior to responding to Defendant's interrogatories or serving her amended disclosures. *Id*. The Court, therefore, ruled that Plaintiff failed to meet her burden of demonstrating that her failure to disclose Ferguson was either substantially justified or harmless. *Id*. at *28. The Court further found that Plaintiff's failure to disclose Ferguson's identity before the close of discovery prejudiced Defendant by, at the very least, preventing it from deposing Ferguson as a witness during the regular course of litigation. *Id*. at *35. The Court remarked that, had Plaintiff properly disclosed Ferguson's identity as a witness prior to serving Defendant her second amended initial disclosures, Defendant could have deposed Ferguson as a witness during discovery and fully litigated against Plaintiff's motion for class certification. Accordingly, the Court sanctioned Plaintiff and excluded Ferguson's declaration. *Id*. at *35-36. The Court also denied Plaintiff's motion for class certification finding that the class was not ascertainable.

***In Re Delta/Airtran Baggage Fee Antitrust Litigation,* 2015 U.S. Dist. LEXIS 101474 (N.D. Ga. Aug. 3, 2015).** Plaintiffs, a group of airline passengers, brought a putative class action alleging that Defendants colluded to impose baggage fees for checked bags. Plaintiffs alleged that Defendant AirTran Airways agreed to impose baggage fees as soon as Defendant Delta Air Lines imposed baggage fees so that both carriers could profit without sacrificing market share in violation of the Sherman Act. *Id.* at *7-10. In February 2009, the Antitrust Division of the U.S. Department of Justice (the "DOJ") served a Civil Investigative Demand ("CID") upon Delta seeking information regarding its decision to impose a first-bag fee. *Id.* at *8. Plaintiffs argued that Delta erred in its early efforts to preserve and produce e-mail and other

electronic evidence in response to the CID and moved for spoliation sanctions alleging a loss of data. *Id.* at *10. Although the Court admonished Delta for its delay in preserving evidence, the Court found sanctions for spoliation inappropriate. *Id.* at *13-14. Later, new evidence and documents relevant to the DOJ's bag-fee investigation came to light during the DOJ's unrelated antitrust investigation into Delta's proposal to swap airport landing slots with U.S. Airways at certain airports outside of Atlanta. *Id.* at *15. Plaintiffs filed a second motion for sanctions. Finding that Delta clearly failed to comply with its obligation to produce documents, the Court re-opened discovery. In September 2012, Plaintiffs raised new concerns regarding the adequacy of Delta's document production. Delta disclosed that it found an additional 29 backup tapes that it had not previously reviewed or searched for bag-fee evidence. *Id.* at *18. Delta argued that the backup tapes were largely redundant of backup tapes that it already had searched but, conceding its error, asked the Court to appoint an independent discovery expert to expedite resolution of the issue. On November 19, 2012, the Court directed Plaintiffs to hire an expert, at Delta's expense, to conduct an extensive review of Delta's electronic files and its discovery efforts. The expert issued an initial report of more than 100 pages and an invoice totaling almost $5 million. Before addressing the merits of expert's conclusions, the Court directed Plaintiffs to file a new motion for sanctions. Characterizing Delta's conduct as a widespread pattern of bad-faith spoliation, Plaintiffs sought to preclude Delta from disputing the existence of a conspiracy with AirTran to impose first bag fees. *Id.* at *20. The Court referred the motion to a Special Master. The Special Master rejected Plaintiffs' spoliation arguments, finding insufficient evidence but recommended imposition of $1,855,255.09 in monetary sanctions against Delta to compensate Plaintiffs for the additional time and expenses they incurred as a result of Delta's failure to comply with its discovery obligations. *Id*. at *22-23. On its review of the sanction, the Court agreed with the Special Master that a monetary award was the appropriate sanction because Delta's discovery misconduct rendered the Court's attempts to manage the action and move it toward resolution on the merits futile. *Id.* at *27. The Court, however, increased the monetary sanctions to $2,718,795.05, reasoning that the Special Master's recommendation was "too generous" to Delta and inadequately compensated Plaintiffs for the time their attorneys spent on the discovery dispute. *Id.* at *57. In increasing the award, the Court measured the fees by the current billing rates of Plaintiffs' counsel to compensate for the lengthy delay in resolving the sanctions motions. The Court then overruled several of Plaintiffs' objections to the Special Master's report, finding that, whereas Delta's discovery practices were ineffective, inefficient, and inept, there was no evidence that Delta withheld documents in bad faith or that it should have known that it needed to preserve all of the disputed evidence. *Id.* at *49-50. The Court also upheld part of the report forbidding Plaintiffs from presenting evidence to the jury related to the discovery fight, reasoning that it would transform the trial into a fight over discovery practices and would be unfair to AirTran, which was not involved in the sanctions motions. *Id.* at *47-48. The Court further denied Plaintiffs' motion to re-open discovery on the basis that the discovery dispute had been resolved and the parties should turn to the merits of the action. *Id.* at *84. Accordingly, the Court granted Plaintiffs' motion for sanctions and ordered Delta to pay $2,718,795.05 to Plaintiffs.

Editor's Note: The $2.7 million discovery sanction in this case is believed to be the largest sanction in any class action in 2015.

***In Re Tesla Motors, Inc. Securities Litigation,* 2015 U.S. Dist. LEXIS 36123 (N.D. Cal. Mar. 23, 2015).** In this consolidated securities class action, Plaintiffs, a group of purchasers, alleged that Defendants, Tesla Motors and Elon Musk, made materially false and misleading statements about the risk of fire caused by the lithium batteries that power the Tesla Model S car in violation of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10(b)-5. The Court held that Plaintiffs failed to allege a single actionable false or misleading statement in their complaint and, accordingly, granted Defendants' motion to dismiss. *Id*. at *4. Defendants asked the Court to amend the judgment by imposing sanctions on Plaintiffs' counsel. The Court denied the motion. After conducting a post-judgment review of the attorneys' conduct for compliance with Rule 11(b), the Court concluded that each of the representations by Plaintiffs' counsel to the Court was proper, non-frivolous, and factually supported, although ultimately unpersuasive. *Id*. at *1-2. The Court also found sanctions unwarranted under the Private Litigation Reform Act framework because Plaintiffs' factual contentions had full evidentiary support. *Id*. at *4. The evidence supported the allegations that Defendants made various press releases, conducted various battery tests, and that the

Model S experienced fires caused by road debris. *Id*. Further, Plaintiffs supported the complaint allegations by a thorough investigation, which included witness interviews, a detailed history of the engineering and development of the Roadster and Model S Tesla vehicles, and reviews of public documents, financial filings, and stock performance. *Id*. at *4-5. The Court opined that, by and large, the underlying events occurred much in the way Plaintiffs alleged. *Id*. at *5. Defendants did not argue otherwise but, rather, took umbrage at the legal conclusions that Plaintiffs advanced, *i.e.*, that, in light of the battery tests and fires, Defendants' press releases and statements were false and misleading representations to investors. *Id*. The Court ruled that, although it found that Plaintiffs failed to allege factual allegations that pled a single false statement sufficient to survive a motion to dismiss, the case was hardly one of the rare and exceptional cases that warranted the extraordinary remedy of Rule 11 sanctions. The Court found that facts known to Plaintiffs supported a good faith, if erroneous, argument that Defendants' disclosures were misleading. *Id*. The Court, accordingly, held that Plaintiffs' filings complied with Rule 11(b) and denied Defendants' motion to amend the judgment.

***Johnson, et al. v. Ford Motor Co.*, 2015 U.S. Dist. LEXIS 115425 (S.D. W. Va. Aug. 28, 2015).** Plaintiffs brought a putative class action alleging that some of Defendant's vehicles produced between 2002 and 2010 were prone to sudden, unintended acceleration and that the company failed to install fail-safe systems that allowed the drivers to physically prevent or mitigate sudden acceleration. *Id.* at *120-21. In the course of discovery, Plaintiffs requested that Defendant produce Automotive Safety Office ("ASO") reports and databases for any alleged unintended acceleration of vehicles in the class definition, as well as documents related to any government correspondence or investigations concerning the electronic throttle control systems. *Id.* at *121. In October 2014, after producing non-privileged documents responsive to Plaintiffs' request, Defendant provided Plaintiffs with a privilege log related to its 2010 investigation. *Id.* Plaintiffs' counsel alleged that the log failed adequately to describe each document withheld by Defendant, questioned whether the vast majority of documents were indeed shielded from disclosure, and expressed their belief that the documents might not be privileged. *Id.* at *122-23. In May 2015 Defendant produced a supplemental ASO privilege log containing 132 documents that it claimed met the requirements of Rule 26 and were shielded from discovery due to attorney-client privilege and attorney work-product immunity. *Id.* at *123-24. Plaintiffs then moved to compel and for sanctions contending that the supplemental ASO privilege log was deficient because it did not contain enough information for Plaintiffs to determine whether to challenge the assertions of privilege. *Id.* at *123. The Court explained that the case law authorities have not been entirely consistent about the level of detail that is necessary to comply with Rule 26(b)(5)(A). *Id.* at *133. The Court remarked that, notwithstanding such inconsistencies, Defendant's privilege log did not comply because it failed to provide any concrete facts about the nature or subject matter of the withheld documents. *Id.* at *135. The Court noted that Defendant used the same two document descriptions throughout the entire log, and those descriptions were – essentially synonymous. *Id.* More importantly, the Court stated the descriptions were nothing more than conclusory statements as to the privileged nature of the documents. *Id.* The Court determined that Defendant could have provided more factual detail to describe the withheld documents without disclosing privileged information, as was evidenced by information it submitted to the Court that was not included in the supplemental privilege log. *Id.* at *135-36. The Court, however, refused to sanction Defendant regarding the withheld ASO investigation documents because, while Defendant should have realized that its document descriptions were inadequate, waiver of privilege was not an appropriate sanction at that juncture. *Id.* at *139-40. Accordingly, the Court ordered Defendant to supplement the ASO privilege log with more detailed descriptions of the withheld documents and cautioned that a failure to properly supplement its logs could result in a waiver of privilege. *Id.* at *140. Finally, the Court awarded Plaintiffs attorneys' fees related to their motion to compel. *Id.* at *142-43.

***Johnson, et al. v. SmithKline Beecham Corp.*, 2014 U.S. Dist. LEXIS 28210 (E.D. Pa. Mar. 9, 2015).** Plaintiffs brought personal injury class actions alleging that thalidomide, a drug developed, produced and distributed by Defendants, caused Plaintiffs to suffer severe birth defects. Given that Plaintiffs' injuries occurred in the late 1950s and early 1960s, Plaintiffs' attorneys Hagens Berman Sobol Shapiro LLC ("Hagens Berman") anticipated a statute of limitations' affirmative defense, and specifically pleaded that Defendant's fraudulent concealment as to thalidomide's dangers had tolled the statute of limitation. *Id*. at *6. Because Plaintiffs claims were subjected to a two-year statute of limitations, Defendants contended

that they should not be compelled to defend against claims that were obviously time-barred. *Id*. After Defendants demonstrated that contrary to the Court's orders, several Plaintiffs had failed to produce highly probative evidence, including on-line posts that they had known for decades that thalidomide caused their birth defects, Defendants sought dismissal. *Id*. at *7. The Court instead appointed a Special Discovery Master ("the Special Master"), who found that several of Plaintiffs' claims were not viable. *Id*. at *8. Defendants GlaxoSmithKline ("GSK") and Grünenthal GMBH urged Hagens Berman to review the claims, and dismiss the meritless or time-barred claims, and also offered to assume costs. Hagens Berman did not agree to dismiss any cases, and instead the parties engaged in massive discovery with over 130 depositions being taken, which only belied the claims of almost all Plaintiffs. *Id*. at *9. Defendants filed motions for sanctions in respect of claims of three Plaintiffs, which the Court granted. The Court adopted the recommendation of the Special Master, who found that Hagens Berman should be sanctioned for its delay and evasiveness in connection with written discovery. *Id*. at *89. In his report, the Special Master noted that all 52 Plaintiffs alleged fraudulent concealment as the basis for tolling the statute, and a sub-set of Plaintiffs alleged a non-fraud theory for tolling. *Id*. at *45. As it became apparent that at least some of Plaintiffs' claims were deeply flawed, defense counsel had written to Hagens Berman to review the outstanding cases before the parties spent more time and money on continuing the oral discovery, but Hagens Berman nonetheless continued to pursue discovery. *Id*. at *49-50. As to Plaintiff Merica's claim, the Special Master found that Merica and his mother understood that she had taken thalidomide, but Hagens Berman persisted in its insistence that Merica had no clue on what it meant to be a thalidomider and no idea who was responsible for developing and distributing the drug. *Id*. at *69. Similarly, the Special Master found that although Hagens Berman could have prevented further discovery as to other claims, it still persisted with the oral discovery, adding to additional costs. *Id*. at *77, 83. Based on these findings, the Special Master recommended awarding Defendants 100% of their reasonable fees and expenses solely in the matters relating to Plaintiffs Merica, Boiradi, and Garza, and 3/49ths of their reasonable fees and expenses incurred on work done on the three Plaintiffs. *Id*. at *95. The Court reviewed Plaintiffs' Rule 72 objections to the Special Master's report and found that Defendants demonstrated with clear and convincing evidence that Hagens Berman multiplied proceedings unreasonably and in a vexatious manner and litigated the claims of Merica, Boiradi, and Garza well after Defendants put the firm on notice that the claims were baseless, time-barred, or both. *Id*. at *35. As to Defendant GSK, the Special Master had reported that GSK would drop its sanctions claims contingent on Plaintiffs' claims being dismissed with prejudice, and therefore it was difficult to determine whether GSK would be entitled to recover sanctions. *Id*. at *89. The Special Master had recommended to hold GSK's motion for sanctions in abeyance, which the Court adopted. *Id*. at *95.

***Markey, et al. v. Lapolla Industries, Inc.,* 2015 U.S. Dist. LEXIS 112915 (E.D.N.Y. Aug. 25, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging that they suffered personal injuries and property damages due to spray polyurethane foam insulation ("SPF") manufactured by Defendant Lapolla Industries Inc., which was installed in Plaintiffs' home by Defendant Delfino Insulation Co., Inc. *Id.* at *3. After the parties started depositions, Plaintiffs' former counsel, Morelli Alters Ratner, LLP ("MAR"), filed a motion to withdraw as counsel of record asserting irreconcilable differences with Plaintiffs. *Id.* at *7. After the grant of the motion to withdraw, Plaintiffs, through their new counsel, filed a motion to dismiss the action with prejudice and without costs. Defendants opposed and filed a motion seeking sanctions, asserting that Plaintiffs and MAR failed to disclose certain documents during discovery, and that Plaintiffs maintained an allegedly frivolous lawsuit. *Id.* at *3. The Court granted Defendants' motion to the extent that sanctions be imposed against MAR for its failure to exercise due diligence and to comply with its discovery obligations. *Id.* at *91. When Plaintiff began to develop adverse medical symptoms after the installation of SPF at her home, she contacted George Maul, an industrial hygienist for Insight Environmental, Inc., to conduct air quality testing of her home. *Id.* at *13. Maul e-mailed a copy of his environmental analysis report to Plaintiff, which she forwarded to Attorney Barry Cohen (the "Original Report"). *Id.* at *15. Subsequently, Plaintiff and Maul exchanged various e-mails, which resulted in some revisions in the Original Report (the "Revised Report"), but Plaintiff never disclosed the Original Report and the e-mails in their initial disclosures signed by Attorney David Sirotkin at MAR's office. *Id.* at *23. Plaintiff testified later that she sent only the Revised Report to both the Law Office of Pravato, the firm she retained in August 2012, and to MAR, thinking that the Revised Report was the final one, and never provided MAR with the

e-mails she exchanged with Maul because she did not know that she had to do so. *Id.* at *24-27. Defendants received a copy of the Original Report in October 2013 in response to a subpoena it served on Insight Environmental, and even after that, MAR took no action to learn more about the Original Report. *Id.* at *33. Based on these records, the Court concluded that MAR violated its discovery obligations. *Id.* at *53. The Court found that the Original Report and the e-mails were "reasonably available" prior to the filing of the Initial Disclosures, and therefore should have been disclosed. *Id.* at *55. Moreover, the evidence adduced during the hearing demonstrated that neither Attorney Sirotkin nor anyone at MAR made a reasonable inquiry to determine what documents and other discovery Plaintiffs possessed before certifying that the Initial Disclosures were complete. *Id.* at *56. Acknowledging that an attorney could rely on the representations by its clients or by other attorneys when conducting the reasonable inquiry, the Court remarked that it was not reasonable for MAR to simply assume that the documents it received from the Pravato Firm and Plaintiffs encompassed all the documents required to be disclosed. *Id.* at *57. The Court also found that MAR's inquiry was similarly lacking with respect to its certification of Plaintiffs' responses to Defendants' request for production, as the record revealed that its attorneys had little to no direct contact with Plaintiffs during the process of gathering the responsive documents. *Id.* at *57-60. The Court therefore concluded that Attorney Sirotkin's certifications of Plaintiffs' Initial Disclosures and discovery responses were improper. Because the evidence showed that MAR's failure to disclose the documents caused Defendants to incur additional and otherwise unnecessary attorneys' fees and expenses, the Court concluded that MAR's failure to disclose warranted monetary sanctions. *Id.* at *71. The Court, however, declined to impose discovery sanctions against Plaintiffs, finding that their failure to provide the Original Report and the e-mails was "substantially justified" by the lack of guidance and oversight of the attorneys representing them. *Id.* at *72. Because the Court was unable to conclude that Plaintiffs' personal injury claims were entirely meritless and because Defendants presented no evidence to show that MAR's decision to withdraw as Plaintiffs' counsel was made in bad faith, the Court denied Defendants' motion to impose sanctions against MAR and Plaintiffs under the Court's inherent power. *Id.* at *85-88. Accordingly, the Court granted in part and denied in part Defendants' motion for sanctions.

***Nilon, et al. v. Natural-Immunogenics Corp.,* 2015 U.S. Dist. LEXIS 146315 (S.D. Cal. Oct. 28, 2015).** Plaintiff, a consumer, brought a putative class action alleging that Defendant falsely advertised its "Sovereign Silver" products to have the ability to support consumers' immune systems in violation of California's Consumers Legal Remedies Act and False Advertising Law. Previously, the Court had entered a tentative order and dismissed Plaintiff's claims, but also denied Defendants' motion for sanctions against Plaintiff's counsel based on allegations of bad faith, improper conduct, and recklessness. *Id*. at *1. The Court had remarked that the sanctions request was not a proper motion under Rule 11, as it was made in response to the Court's tentative order, and that Defendants could move the Magistrate Judge with a proper motion. Defendants then filed a separate motion for sanctions, and the Magistrate Judge denied the motion. The Magistrate Judge observed that Rule 11 authorizes imposition of deterrent sanctions if an attorney certifies that: (i) the information presented to the Court is not being presented for any improper use; (ii) the claims, defenses, and other legal contentions are warranted by existing law; (iii) the factual contentions have evidentiary support; and (v) the denials of factual contentions are warranted on the evidence. *Id*. at *7. The Magistrate Judge remarked that when those rules are broken, a party can file a motion for sanctions and the Court can direct the erring party to pay attorneys' fees, but cannot impose monetary sanctions. *Id*. at *8-9. The Magistrate Judge noted that in light of Rule 11's express instructions, it was clear that Rule 11 did not apply to discovery issues. Thus, the Magistrate Judge denied the motion for sanctions that was based on discovery. *Id*. at *10. As to Defendant's grievances with respect to the conduct of Plaintiffs' counsel during discovery, the Magistrate Judge denied the motion for sanctions, finding that they should have been raised at the time they occurred. *Id*. at *11. The Magistrate Judge observed that 28 U.S.C. § 1927 authorizes an award of attorneys' fees where an attorney had multiplied the proceedings to increase costs unreasonably and vexatiously. *Id*. at *15. The Magistrate Judge reasoned that sanctions under § 1927 were not appropriate because Defendant had not proven that Plaintiff's counsel multiplied the proceedings in this case. *Id*. at *16. Accordingly, the Magistrate Judge denied Defendants' motion for sanctions.

***Rabin, et al. v. Dow Jones & Company, Inc.,* 2015 U.S. Dist. LEXIS 101967 (S.D.N.Y. July 30, 2015).** Plaintiff brought a putative class action against Defendants – The New York Times Co., Forbes, Inc., and Dow Jones & Co., Inc., – for their alleged participation in a fraudulent subscription renewal scheme, orchestrated by Circulation Billing Services ("CBS") and its related entities. *Id.* at *1-2. Plaintiff asserted claims for a conspiracy to defraud, deceptive acts or practices in violation of the New York General Business Law, and negligence in disclosing subscribers' information to third-parties and failing to notify subscribers about the CBS fraud. *Id.* at *2. Defendant Dow Jones moved for sanctions, alleging that Plaintiff brought the action for improper purposes and that the complaint was entirely without evidence. The Court granted Defendant's motion, finding that Plaintiff's amended complaint pled no actual facts to support the purported conclusory allegations of Dow Jones' liability in the CBS fraud. *Id.* at *5. The Court opined that the record contained sufficient evidence to show that Plaintiff and his attorney acted in bad faith. During the course of Plaintiff's deposition regarding the alleged conspiracy of Dow Jones with CBS, Plaintiff had admitted that his assertions were no more than "overstatements." *Id.* at *6. Further, the record showed that Plaintiff's attorney failed to conduct a good faith investigation into evidence that Dow Jones had been fighting the fraud. Although Dow Jones' attorney informed Plaintiff's attorney during a meeting that the publisher had not cashed any of CBS-generated checks after it learned of the fraud scheme, Plaintiff's amended complaint reasserted the allegation that Dow Jones received payment and retained the fraudulent proceeds for subscriptions obtained by CBS. *Id.* at *7-8. The Court determined that Plaintiff's admissions and his attorney's failure to investigate or adjust the pleadings supported an inference of bad faith. The Court also found no factual evidence to support an inference that Dow Jones engaged in "misleading acts or practices" or "itself misrepresented anything." *Id*. at *9. In addition, the Court ruled that Plaintiff withheld relevant evidence from Defendant throughout the litigation, including the reverse side of the CBS renewal notices which stated that there was "not necessarily a direct relationship" between CBS and Dow Jones, and the three checks Plaintiff received from CBS refunding a portion of the payments Plaintiff's wife made in response to the CBS notices. *Id.* at *10-11. The Court thus determined that Plaintiff and his attorney sought to suppress the truth underlying the viability of their action against Dow Jones. Finally, the Court opined that there was no merit to Plaintiff's argument that there was no "vexatious multiplication" of proceedings because the case only lasted three months. *Id.* at *12. The Court held that sanctions against Plaintiff and his attorney would be appropriate. *Id.* Accordingly, the Court granted Defendant's motion for sanctions in the amount of its attorneys' fees and costs incurred following the filing of the amended complaint.

***True Health Chiropractic, Inc., et al. v. McKesson Corp.*, 2015 U.S. Dist. LEXIS 43908 (N.D. Cal. April 1, 2015).** In this class action brought under the Telephone Consumer Protection Act ("TCPA") challenging Defendants' alleged practice of sending unsolicited facsimile advertisements, the Court granted, in part, Plaintiffs' motion for sanctions. Plaintiffs had previously moved to compel Defendants to: (i) produce exemplars of all fax advertisements that did not include an opt-out notice that Defendants sent during the class period; (ii) show the recipients of fax advertisements sent by Defendants had given Defendants prior permission to send those faxes; and (iii) produce transmission records of recipients of the fax ads. *Id*. at *4-8. After the Court had granted the motion, Defendants produced only four exemplar faxes and transmission records for eight job numbers, each showing one broadcast of one of the eight known fax images. *Id*. at *14. Defendants produced no additional documents or information regarding its claim that it obtained prior express invitation or permission ("prior express permission defense") to send fax advertisements to the class members. Plaintiffs moved for sanctions on the basis that Defendants failed to produce discovery previously ordered by the Court. As to discovery of exemplar faxes, the Court noted that its previous order was clear requiring Defendants to produce all documents that fell within this description. *Id*. at *20. The Court remarked that it could not excuse Defendants from producing such documents; however, based on defense counsel's representation that production of such documents would be impossible by the Court's set deadline, it ordered the parties to meet and confer further. *Id*. at *19. The Court held that if the parties could not agree on the scope and phased production of documents, they should file a joint letter. *Id*. Similarly, the Court ordered Defendants to produce discovery of transmission records and documents related to its prior express permission defense by the Court's set deadline. *Id*. at *21-25. Defendants contended that Plaintiffs did not meet and confer about the purported deficiencies in their production prior to seeking sanctions. The Court, however, observed that Plaintiffs' submissions

included declarations from three of their attorneys, which described the sequence of communications between Plaintiffs' counsel and Defendants' attorneys and attached written communications between the two. *Id*. at *25. The Court remarked that this demonstrated that Plaintiffs had repeatedly informed Defendants of the insufficiency of their discovery responses, and accordingly concluded that Plaintiffs were within their right to move for sanctions. The Court reasoned that pursuant to Rule 37(b)(2)(C), it must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the failure was substantially justified or other circumstances made an award of expenses unjust. *Id*. at *28. Since this was the third time that the Court had ordered Defendants to produce the discovery that Plaintiffs originally requested in October 2013, the Court held that Plaintiffs should be awarded attorneys' fees. Accordingly, the Court granted Plaintiffs' motion for sanctions in the form of attorneys' fees and costs.

True Health Chiropractic, Inc., et al. v. McKesson Corp., **2015 U.S. Dist. LEXIS 122272 (N.D. Cal. Sept. 12, 2015).** Plaintiffs brought a putative class action alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited facsimile advertisements or junk faxes, and hiding the existence of third-party fax broadcaster and its role in sending or providing a software platform, Slingshot, to send the alleged faxes. Plaintiffs alleged that in 2010 it received unsolicited fax advertisements for software products called Medisoft and Lytec, offered by Physician Practice Solutions ("PPS"), a business unit of MTI. *Id.* at *4. Discovery commenced, and Plaintiffs served its first set of discovery request on October 1, 2013, requesting production of documents and interrogatories that broadly sought information concerning any third-party fax broadcaster, that Defendants might have used to transmit its fax advertisements. *Id.* at *6. Defendants responded in January 2014, but failed to identify or provide documents referencing any third-party fax broadcasters, stating that it did not enter into any contracts or agreements for the provision of fax broadcasting services. *Id.* at *7. On April 28, 2015, Plaintiffs deposed Kari Holloway, who worked for PPS, and she testified that she used her computer to send the alleged faxes using Slingshot. *Id.* at *10. Plaintiffs then requested Defendants to serve supplemental discovery responses that referenced the role of Slingshot in sending the faxes at issue. *Id.* Defendants formally disclosed the use of Slingshot only in their June and July 2015 discovery responses, and produced responsive records, including e-mail communications between Holloway and Slingshot, and records indicating that Holloway paid for Slingshot using her personal corporate credit card. *Id.* at *14. Plaintiffs moved for sanctions asserting that Defendants' knew of Holloway's identity at least as of July 2014, but failed to supplement its initial disclosures or identify her in its discovery responses. *Id.* at *17. Plaintiffs also alleged that Defendants were aware that Slingshot played a significant role in sending faxes by at least September 2014, but their January 2014 and August 2014 discovery responses both explicitly stated and implied that no third-parties had been involved in sending the faxes, and they waited until Plaintiffs' request for the Slingshot information to reveal its role in their June and July 2015 responses. *Id.* at *17-18. Plaintiff moved for sanctions. The Court granted Plaintiffs' motion for sanctions, and found that Defendants' failure to timely supplement their discovery responses to disclose Holloway and Slingshot were without good cause. *Id.* at *18. The Court, however, denied Plaintiffs' request for issuance of preclusion sanctions, finding that granting it would potentially end the case, and Plaintiffs failed to sufficiently show that they suffered harm from Defendants' actions. Plaintiffs also sought preclusion of two of Defendants' affirmative defenses, *i.e.*, that the fax recipients had established business relationships with Defendants, and/or they gave prior express permissions to Defendants to send the faxes. *Id.* at *21. The Court found that Plaintiffs failed to sufficiently explain how the information they received from Holloway or Slingshot was related to Defendants' defenses or how it caused them harm that warranted a harsh preclusion sanctions. *Id.* at *20. Since Defendants' behavior prejudiced Plaintiffs' ability to conduct discovery and to make the best possible arguments at class certification, and because the Court had already awarded significant attorneys' fees as sanctions against Defendants for certain work that Plaintiffs had to undertake due to Defendants' discovery behavior, the Court imposed monetary sanctions on Defendants in the amount of $15,000. *Id.* at *24-25. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for sanctions.

Wengle, et al. v. DialAmerica Marketing, Inc., **Case No. 14-CV-10644 (E.D. Mich. Oct. 27, 2015).** Plaintiff brought a class action alleging that Defendant, a professional telemarketing company, placed

solicitation calls to Plaintiff using artificial or pre-recorded voices after she registered her phone number with the National Do Not Call Registry in violation of the Telephone Consumer Protection Act ("TCPA"). Defendant moved for summary judgment arguing that: (i) Defendant called Plaintiff on behalf of a tax-exempt non-profit organization and, therefore, was exempt from the TCPA's prohibitions (the "non-profit exemption"); and (ii) Defendant did not use an artificial or pre-recorded voice when it called Plaintiff. *Id.* at 1-2. The Court granted Defendant's motion, concluding that Defendant fell within the non-profit exemption. *Id.* at 2. Defendant filed a motion for sanctions, and the Court denied the motion. Defendant argued that Plaintiff filed and pursued a completely frivolous action that had no basis in fact or law. *Id*. The Court disagreed, noting that, as it stated in its order granting Defendant's motion, it found no case law authority addressing whether a calling program exactly like the one Defendant used qualified for the non-profit exemption. *Id*. In fact, the Court found only two judicial decisions – both unpublished and from outside the Circuit – that applied the non-profit exemption. *Id*. In addition, the Court found that Plaintiff's arguments were thoughtful and required careful consideration, particularly the argument that Defendant's calling program was similar to Defendant's earlier calling program which, according to the Federal Communication Commission, did not qualify for the non-profit exemption. *Id*. at 3. The Court, therefore, concluded that an award of sanctions was unwarranted. Accordingly, the Court denied Defendant's motion.

***Wolfchild, et al. v. Redwood County,* 2015 U.S. Dist. LEXIS 74316 (D. Minn. June 9, 2015).** Plaintiffs, a group of descendants of the Mdewakanton Indians, brought a class action against Defendants – landowners, Lower Sioux Indian Community (the "Community") and municipals – seeking damages and possession of certain lands on behalf of themselves and others similarly-situated. According to the complaint, legislation from 1863 stated that the land set aside for Indians who remained loyal during the 1862 Sioux Uprising had the right to exclusive title, occupancy, and use and the right of quiet enjoyment. *Id.* at *5. Plaintiffs sought to eject Defendants from the land and to award them trespass damages. Defendants moved for sanctions pursuant to Rule 11, arguing that Plaintiffs and their counsel knowingly commenced and prosecuted a frivolous action on legal theories that were not supported by existing law or that involved a non-frivolous argument for extending, modifying, or reversing existing law or to establish new law. *Id.* at *7. Defendants argued that sanctions were appropriate in this action because Plaintiffs were well aware that there was no legal basis for filing this action against any Defendants, because Plaintiffs had previously brought similar claims against United States, which had been rejected in the Court of Federal Claims and the Federal Circuit Court of Appeals. *Id.* at *16-18. The Court granted Defendants' motion. Although Plaintiffs argued that the law was not settled as to whether the Community was immune from the action, the Court found that a reasonable and competent attorney would have recognized that, and given the well settled law that the Community was entitled to sovereign immunity, the Court did not have subject-matter jurisdiction over asserted claims against the Community. *Id.* at *21. The Court thus held that Plaintiffs violated Rule 11(b)(1) by bringing the action against the Community. Even assuming that the Court had subject-matter jurisdiction, the Court found that Plaintiffs' claims were frivolous and without a factual or legal basis because the United States had held the disputed land in trust for the Community, and the United States was an indispensable party with respect to Plaintiffs' claims for damages and ejectment. *Id.* at *22. The Court therefore found that Plaintiffs and their counsel acted in bad faith and with reckless disregard for the law by pursuing this action against the Community. As to Landowner Defendants and municipal Defendants, the Court noted that the claims grounded in the 1863 Act had been found to be without merit earlier, and there was no private right of action under the 1863 Act. *Id.* at *24. The Court further noted that, even if there was such a right of action, the land was sold no later than 1895, and the claims raised over 100 years later were equitably barred, and a reasonable and competent attorney would have known this. *Id.* The Court therefore concluded that Plaintiffs acted in bad faith and with reckless disregard for the law by pursuing this action against Defendants, and a monetary sanction in the form of reasonable attorneys' fees and costs was necessary to deter Plaintiffs and their counsel from engaging in frivolous litigation in the future. *Id.* at *27-28. Accordingly, the Court granted Defendants' motion for sanctions and ordered Defendants to submit a detailed accounting of the attorneys' fees incurred.

***Wolfchild, et al. v. Redwood County,* 2015 U.S. Dist. LEXIS 128896 (D. Minn. Sept. 26, 2015).** Plaintiffs, a group of Native American descendants, brought a putative class action alleging that Congress

passed legislation setting aside the 12 square miles at issue in the litigation for them and the U.S. government gave the land to Defendants, the Lower Sioux Indian Community (the "Community") and landowners. Plaintiffs were descendants of Native Americans who defended white settlers in 1862. They brought this action in May 2014. The District Court granted Defendants' motions to dismiss the action with prejudice, finding that Plaintiffs waited too long to file their complaint, and that it lacked subject-matter jurisdiction to address the claims against the Community due to tribal sovereignty, and that legislation prevented legal action on the land in question. *Id.* at *2-3. Plaintiffs had filed an appeal to the Eighth Circuit. *Id.* at *3. Following the dismissal of the action, certain Defendants moved the Court for sanctions on the grounds that Plaintiffs and their counsel knowingly commenced and prosecuted the action on legal theories that were not supported by existing fact or law, and did not involve a non-frivolous argument for extending, modifying, or reversing existing law, which the District Court granted. Plaintiffs appealed that order to the Eighth Circuit. *Id.* Meanwhile, Plaintiffs moved to stay the sanctions proceeding pending the appeal, arguing they were likely to succeed on the merits on appeal based on the same arguments that were included in their opposition to the motions to dismiss. *Id.* at *4. The District Court reviewed the factual background of the case and all of the arguments submitted, and again found Plaintiffs' arguments without merit. *Id.* The District Court reiterated that the Community was immune from suit, Plaintiffs failed to state a claim for relief, and pursuant to the equitable doctrine, Plaintiffs were not entitled to the relief sought. *Id.* Accordingly, the District Court held Plaintiffs had failed to demonstrate a likelihood of success on the merits on appeal. *Id.* The District Court also found Plaintiffs had not demonstrated they would be irreparably injured absent a stay. *Id.* at *7-8. The District Court remarked that sanctions were designed to publically admonish, reprimand, or censure individuals who advanced frivolous litigation in bad faith; therefore, harm to reputation was not a basis to stay the order and Plaintiffs could still seek relief through their appeal of that order. *Id.* at *8. Finally, the District Court considered Defendants' argument that sanctions were necessary to deter Plaintiffs and their counsel from engaging in frivolous litigation in the future, and found the grand total of the reasonable attorneys' fees and costs was $281,906.34. *Id.* at *17-18. Plaintiffs' lead counsel Erick Kaardal asked the District Court to further reduce the sanction award from the near $350,000 amount initially requested by Defendants, arguing that the invoices he and his clients were responsible for were vague, excessive, and unreasonable, making it difficult to determine whether they were reasonably incurred. *Id.* at *18. The District Court also rejected Kaardal's request not to impose the sanction on his small firm because he was the only attorney at his firm handling the case, and since such a sanction would cause significant financial harm to its business and employees. *Id.* at *19. The District Court observed that in addition to Kaardal, attorney James V.F. Dickey, an associate with the firm, was named as lead counsel and attorney to be noticed in the Court's docket and was also included in the signature block of Plaintiffs' memorandum in opposition to the motions to dismiss, and Plaintiffs' memorandum in opposition to Defendants' motions for sanctions. *Id.* Further, the Court noted the three-partner firm did not submit any financial information to the Court. Therefore, Kaardal and his firm had not met their burden of demonstrating that the firm was unable to pay all or part of the sanction. *Id.* Accordingly, the District Court concluded Plaintiffs and their counsel were jointly liable for the sanction. *Id.* at *20.

(xxviii) Issues With The Judicial Panel On Multi-District Litigation In Class Actions

***In Re Ashley Madison Customer Data Securities Breach Litigation*, 2015 U.S. Dist. LEXIS 166049 (J.P.M.L. Dec. 9, 2015).** In this multi-district class action litigation stemming from a dating website's data breach that resulted in the personal details of millions of users being posted on-line, the Judicial Panel for Multi-District Litigation (the "Panel") transferred the cases pending outside the U.S. District Court for the Eastern District of Missouri to that district. The litigation consisted of five actions, including two actions in Central District of California, and one in Northern District of Alabama, the Eastern District of Missouri, and the Northern District of Texas. The Panel also took note of 13 related class actions pending in eight other districts. *Id*. at *1. With one exception, all responding parties agreed that centralization was warranted, but disagreed about the appropriate transferee district. On the basis of the papers filed, the Panel found that the actions involved common questions of fact, and that centralization in the Eastern District of Missouri would serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. *Id*. at *2-3. Plaintiff in a potential tag-along class action pending in the District of Maryland ("*Russell*") opposed the inclusion of that action in any centralized proceedings because the allegations in

that action were different from those in the remaining actions. *Id*. at *4. Contrary to Plaintiff's argument in *Russell*, the Panel opined that at least five other related class actions asserted similar, if not identical, consumer fraud claims on behalf of putative nationwide classes. *Id*. Thus, the Panel concluded that *Russell* likely would involve common factual questions regarding the data breach and the operation of the Ashley Madison website. *Id*. at *5. The Panel, however, remarked that to the extent that *Russell* involved unique issues, the transferee judge had the discretion to handle those issues through use of appropriate pre-trial devices, such as separate tracks for discovery and motion practice. *Id*. Accordingly, the Panel found that the transfer was appropriate to the Eastern District of Missouri.

***In Re Kmart Corp. Customer Data Security Breach Litigation,* MDL No. 2625 (J.P.M.L. June 9, 2015).** In this multi-district class action litigation, consisting of three actions pending in the Northern District of Illinois, the Eastern District of Louisiana, and the Western District of Pennsylvania, Plaintiffs moved to centralize pre-trial proceedings in the Northern District of Illinois, which the Judicial Panel denied. The Judicial Panel noted that the actions shared factual questions arising from an alleged criminal intrusion into the payment data system at retail stores owned or operated by Defendant that resulted in the electronic theft of payment card information of customers who made purchases. *Id*. at *1. The Judicial Panel, however, remarked that there were only five actions, three of which were pending in the same district. The Judicial Panel noted that *In Re Best Buy Co., Inc., California Song-Beverly Credit Card Act Litigation* (J.P.M.L. 2011), held that centralization under 28 U.S.C. § 1407 should be the last solution after considering review of all other options. *Id*. at *1. Those options included: (i) transfer pursuant to 28 U.S.C. § 1404; and (ii) voluntary cooperation and coordination among the parties and the involved transferee courts to avoid duplicative discovery or inconsistent pre-trial rulings. *Id*. at *2. Here, although, no § 1404 motion to transfer venue was filed in any of those actions, Plaintiffs in both actions pending outside the Northern District of Illinois had indicated that they agreed that this litigation should proceed in that district. *Id*. Accordingly, the Judicial Panel opined that the parties should be able to agree to voluntarily transfer those two actions to Northern District of Illinois. The Judicial Panel observed that if the parties were unable to do so, voluntary cooperation and coordination among the small number of parties would not be feasible. *Id*. Accordingly, the Judicial Panel recommended that the parties employ various alternatives to transfer so as to minimize the potential for duplicative discovery and inconsistent pre-trial rulings in this action.

***In Re Michaels Stores, Inc., Fair Credit Reporting Act Litigation,* MDL No. 2615 (J.P.M.L. April 9, 2015).** In these three putative nationwide class actions, Plaintiffs alleged that Defendant failed to properly disclose that it would access Plaintiffs' credit reports in connection with their employment applications in violation of the Fair Credit Reporting Act ("FCRA") and similar state laws. Plaintiffs filed the actions in the U.S. District Courts for the Western District of Missouri, the District of New Jersey, and the Northern District of Texas. *Id*. at 1. Plaintiffs in the Northern District of Texas action moved under 28 U.S.C. § 1407 to centralize pre-trial proceedings in the Northern District of Texas. Plaintiffs in the District of New Jersey action initially opposed centralization, but at oral argument announced that they did not oppose centralization in the District of New Jersey. The Judicial Panel on Multi-District Litigation transferred the actions to the District of New Jersey. At the outset, the Judicial Panel opined that, because the actions involved common questions of fact – Defendant's failure to disclose its intention to access Plaintiffs' credit reports – centralization of the litigation in the District of New Jersey would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. *Id*. The Judicial Panel also found that centralization would eliminate duplicative discovery, prevent inconsistent pre-trial rulings, and conserve the resources of the parties, their counsel, and the judiciary. Because Defendant had a nationwide presence, Plaintiffs were from numerous states, and Plaintiffs filed the first action in the District of New Jersey, the Judicial Panel concluded that the District of New Jersey was the appropriate transferee district. Accordingly, the Judicial Panel transferred the actions to the District of New Jersey. *Id*. at 1-2.

***In Re National Football League's "Sunday Ticket" Antitrust Litigation,* 2015 U.S. Dist. LEXIS 166043 (J.P.M.L. Dec. 8, 2015).** In this multi-district class action litigation concerning alleged anti-competitive agreements between the NFL and DirecTV, the Judicial Panel centralized and transferred the action to the U.S. District Court for the Central District of California. *Id.* at *1. Plaintiffs in one out of six pending actions in two districts moved to centralize the litigation in the Central District of California. *Id.* All responding

Plaintiffs and Defendants supported the centralization, but disagreed on the transferee district. *Id.* at *2. Plaintiffs in four actions supported centralization in the Central District of California and others supported the Southern District of New York. *Id.* At the outset, the Judicial Panel observed that the actions involved common questions of fact and that centralization would serve the convenience of the parties and witnesses, thus promoting just and efficient conduct of the litigation. *Id.* The Judicial Panel found that the actions shared complex factual questions arising out of allegations that the NFL and DirecTV had entered into anti-competitive agreements granting DirecTV the exclusive right to broadcast certain NFL Sunday afternoon football games through a subscription sports package known as the "NFL Sunday Ticket," outside of a viewer's local television market, in violation of federal and state antitrust law. *Id.* at *2-3. The Judicial Panel further found that the common questions of fact would include whether Defendants entered into the alleged agreements and the terms of the agreements, the effect of the alleged agreements on the relevant market, and whether Defendants had pro-competitive justifications for the alleged conduct and the scope of relief. *Id.* The Judicial Panel noted that since all actions were on behalf of overlapping putative nationwide classes of subscribers to DirecTV's NFL Sunday Ticket service, centralization would eliminate duplicative discovery, prevent inconsistent pre-trial rulings, and conserve the resources of the parties, their counsel and the judiciary. *Id.* Consequently, the Judicial Panel held that the Central District of California was an appropriate transferee district, as fifteen actions were pending in the district and since DirecTV had its headquarters there, and common evidence was likely to be located there. *Id.* Further, the Judicial Panel held that the district also had the support of all Defendants and majority of the responding Plaintiffs and that the Judge was an experienced jurist. *Id.* at *4. Accordingly, the Judicial Panel transferred the action to the Central District of California for coordinated or consolidated pre-trial proceedings.

***In Re Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation,* 2015 U.S. Dist. LEXIS 107022 (J.P.M.L. Aug. 14, 2015).** In this multi-district class action litigation, Plaintiff moved to centralize pre-trial proceedings in the U.S. District Court for the Central District of California. This litigation consisted of ten actions pending in eight districts arising from allegations that Defendants fraudulently concealed a shoulder injury suffered by Emanuel "Manny" Pacquiao one month before a professional boxing match between Pacquiao and Floyd Mayweather, Jr., which was to be broadcasted nationally on a "pay-per-view" basis. *Id.* at *1. Plaintiffs alleged that Pacquiao and Defendants failed to disclose the injury to the public and misrepresented Pacquiao's health prior to the fight, so as not to risk the alleged $300 million in revenue from pay-per-view purchases of the fight. The actions were all brought on behalf of overlapping nationwide or state putative classes of purchasers of the pay-per-view fight. The Judicial Panel found that the actions involved common questions of fact and held that centralization in the Central District of California would be appropriate. *Id.* at *3. The Judicial Panel remarked that in spite of some variations in Plaintiffs' causes of action, all were based upon the theory that members of the public were fraudulently induced to purchase the pay-per-view showing of the fight. *Id.* at *4. The Judicial Panel held that as the Central District of California had the largest number of related actions of any district, and since several Plaintiffs and Defendants supported centralization in this district, it was appropriate to select this district as the transferee district for this litigation. Moreover, the Judicial Panel also found that as Pacquiao suffered the shoulder injury, and sought medical treatment at locations within the district, documentary evidence and witnesses concerning the injury at the center of this dispute likely would be located within the Central District of California. Accordingly, the Judicial Panel ordered that all the actions be transferred to the Central District of California.

***In Re SeaWorld Marketing And Sales Practices Litigation,* MDL No. 2640 (J.P.M.L. Aug. 5, 2015).** In this multi-district litigation, Plaintiffs alleged that Defendants misled the public regarding the conditions and treatment of orcas at SeaWorld parks. Defendants moved to centralize four class actions in the U.S. District Court for the Middle District of Florida. Plaintiffs in all four actions opposed centralization. *Id.* at 1. The Judicial Panel found that although those four actions had the same factual issues, the three Southern District of California actions essentially constituted a single action, as those actions were brought by the same firm, and their factual allegations, proposed classes, and claims were virtually identical. *Id*. Thus, based on the small number of actions and few involved counsel, the Judicial Panel remarked that centralization was not necessary. Accordingly, the Judicial Panel denied Defendants' motion for centralization of the actions.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,* 2015 U.S. Dist. LEXIS 164986 (J.P.M.L. Dec. 8, 2015).** In this multi-district class action litigation, Plaintiffs alleged that certain diesel engines sold by Defendants contained software that enabled the vehicles to evade emissions requirements by engaging full emissions controls only during official emissions testing. *Id.* at *2. The Judicial Panel On Multi-District Litigation (the "Panel") centralized all of the actions for pre-trial proceedings and transferred them to the U.S. District Court for the Northern District of California. The Panel found that all actions involved common factual questions regarding the role of Defendants and related entities in equipping diesel engines with software allegedly designed to engage emissions controls only during official testing. *Id.* at *3. The Panel reasoned that centralization would eliminate duplicative discovery, avoid inconsistent pre-trial rulings, and conserve the resources of the parties, their counsel, and the judiciary. The Panel noted that the litigation was international in scope, and the potentially relevant witnesses and some evidence from Defendants and other entities were located outside the United States. *Id.* at *4. Further, the controversy touched multiple judicial districts across the United States, and the various Defendant entities held ties to many districts. *Id.* at *5. Although no party opposed centralization, the parties advocated for 28 different transferee districts across the nation. The Panel, however, ruled that the Northern District of California was the appropriate transferee district because Plaintiffs had filed 30 actions in that District, including the first-filed case, and Plaintiffs had filed a total of 101 cases in California. *Id.* at *6. Further, the Panel noted that relevant documents and witnesses could be found both in the District and throughout California given the role played by the California Air Resources Board in uncovering Defendants' use of defeat devices on their diesel engines. *Id.* at *6-7. Further, the Panel also concluded that the transferee judge in the Northern District of California was thoroughly familiar with the nuances of complex, multi-district litigation by virtue of having presided over nine MDL dockets, some of which involved numerous international Defendants. *Id.* Accordingly, the Panel transferred the actions to the Northern District of California for coordinated or consolidated pre-trial proceedings.

***In Re Walgreens Herbal Supplements Marketing And Sales Practices Litigation,* 2015 U.S. Dist. LEXIS 75045 (J.P.M.L. June 10, 2015).** In this multi-district litigation, arising out of an investigation into the herbal supplements industry, the Court granted Plaintiffs' motion for centralization in part. Plaintiffs in six class actions sought to centralize their dockets on a retailer-specific basis in various districts. *Id*. at *1. All Defendants and responding Plaintiffs supported centralization, but disagreed on the structure of the proposed dockets and the proposed transferee districts. *Id.* at *2. The issue before the Judicial Panel was whether creation of a single multi-retailer MDL or four retailer-specific MDLs would achieve greater efficiencies. The parties supporting creation of retailer-specific MDLs argued that each Defendant's labeling, marketing, manufacturing, and sourcing practices would raise unique factual issues, the retailer-specific motions could be more efficiently presented and resolved in separate dockets, and Defendants would need to be protected against the disclosure of confidential information. Plaintiffs supporting a single multi-retailer MDL argued that the central factual issues in all four dockets focused on the same investigation and since overlapping discovery and motion practice would be substantial, centralization was necessary to avoid inconsistent rulings and retailer-specific factual issues; and that protection of confidential proprietary information could be addressed by creating separate tracks for each retailer. *Id.* at *4-5. The Judicial Panel opined that a single MDL encompassing all four retailers was necessary to ensure the just and efficient conduct of the litigation since the actions stemmed from the same government investigation and there was significant overlap in the central factual issues, parties, and claims. The Judicial Panel found that although there were certain retailer-specific issues, 28 U.S.C. § 1407 did not require a complete identity of common factual issues or parties as a prerequisite to transfer, the presence of additional facts was not significant where the actions arose from a common factual core, and the transferee judge could employ any number of pre-trial techniques, such as establishing separate discovery and motion tracks, to manage pre-trial proceedings efficiently. *Id.* at *6-7. Subsequently, the Judicial Panel found that the U.S. District Court for the Northern District of Illinois was an appropriate transferee district noting that Walgreens, Wal-Mart, Target, NBTY, and GNC and responding Plaintiffs in over 20 actions also supported this district and Walgreens Defendants were also based there. *Id.* at *8. Accordingly, the Judicial Panel centralized the actions and transferred them to the Northern District of Illinois.

(xxix) Standing Issues In Class Actions

***In Re Horizon Healthcare Services Inc. Data Breach Litigation*, 2015 U.S. Dist. LEXIS 41839 (D.N.J. Mar. 31, 2015).** Plaintiffs, on behalf of putative class members whose personal information was housed in stolen laptops, brought this action alleging that Defendant's wrongful action or inaction placed them at imminent, immediate, and continuing increased risk of harm from identity theft. Defendant provided health insurance products and services to approximately 3.7 million members, and maintained medical information of its members, including names, dates of birth, and social security numbers. *Id*. at *2. In November 2013, two password protected laptop computers containing information of more than 839,000 members were stolen from Defendant's headquarters. Plaintiffs claimed to have sustained economic damages and actual harm for which they were entitled to compensation, and asserted causes of action under the Fair Credit Reporting Act ("FCRA") and several state law causes of action. Defendant moved to dismiss the complaint, and the Court granted the motion. Defendant first contended that Plaintiffs did not demonstrate a cognizable injury sufficient for Article III standing. Defendant argued that Plaintiffs did not allege that their personal information was accessed or misused, that there have been any unauthorized withdrawals from their accounts, or that their identities were stolen. *Id*. at *9. The Court noted that Plaintiffs failed to point out any individual harm suffered by the named Plaintiffs. Instead, they rested on generalized allegations of harm based on: (i) economic injury; (ii) violation of common law and statutory rights; and (iii) an imminent risk of future harm. As to economic injury, Plaintiffs claimed that they paid insurance premiums to Defendant that were, at least in part, allocated for data protection and Defendant did not encrypt all computers. Plaintiffs relied on *Resnick v. AvMed. Inc.*, 693 F.3d 1317 (11th Cir. 2012), where two laptop computers containing members' personal information were stolen. The Court noted that in stark contrast to Plaintiffs here, Plaintiffs in *Resnick* alleged that they were careful in guarding their sensitive information, and they had become victims of identity theft within a year of the laptop larceny. *Id*. at *10. Accordingly, the Court concluded that Plaintiffs did not allege an economic injury sufficient for standing. In addition, the Court found that the named Plaintiffs did not allege any specific harm as a result's of the stolen laptops and therefore, they could not merely rest on violation of common law and statutory rights to have an Article III standing. *Id*. at *13. With respect to an imminent risk of future harm, Plaintiffs contended that despite their lack of injury, identity theft could occur at any moment, and therefore, they had demonstrated standing. The Court reasoned that if there was no misuse of information, there was no harm. Accordingly, the Court dismissed the complaint for lack of standing.

***In Re Zappos.com, Inc. Customer Data Security Breach Litigation,* 2015 U.S. Dist. LEXIS 71185 (D. Nev. June 1, 2015).** Plaintiffs, a group of Zappos customers, brought putative class actions over the alleged theft of their personal identifying information. On January 16, 2012, Defendant sent an e-mail to its customers notifying them that its servers had been breached and that data had been stolen, including customers' names, account numbers, passwords, e-mail addresses, billing and shipping addresses, phone numbers, and the last four digits of their credit card numbers. Defendant moved to dismiss on the basis that Plaintiffs lacked Article III standing. The Court granted the motion. To attempt to establish standing, Plaintiffs alleged that they sought to recover the "substantial value" of their personal information. *Id*. at *9. They alleged that a "robust market" existed for the sale and purchase of consumer data such as the personal information that was stolen during the breach, and that Defendant's security breach deprived Plaintiffs of the "substantial value" of their personal information. *Id.* Plaintiffs also asserted that they suffered an increased threat of future identify theft and fraud as a result of Defendant's security breach. *Id.* at *11-12. The Court found that Plaintiffs failed to allege how their personal information became less valuable as a result of the breach. *Id.* at *12. Further, the Court determined that Plaintiffs could not credibly allege that the threat of future identity theft or fraud was certain, impending, imminent, or immediate because 3.5 years had passed since the incident without any Plaintiff alleging actual or attempted identify theft or financial fraud. *Id.* at *29. Thus, according to the Court, the increased threat of identity theft and fraud stemming from Defendant's security breach did not constitute an injury-in-fact sufficient to confer standing. *Id.* at *25. Plaintiffs claimed that cybercriminals often hold onto stolen personal and financial information for several years before using and/or selling the information to other identity thieves, indicating that the alleged harm is not merely speculative despite the years that passed without an occurrence of theft or fraud. *Id.* at *24. The Court, however, held that a harm that is "not merely speculative" does not constitute an injury-in-fact sufficient to confer standing. *Id.* The Court explained that

the years that had passed without Plaintiffs making a single allegation of theft or fraud demonstrated that the risk was not immediate, and even if Plaintiffs suffer identify theft or fraud at some point in the future, there might be a genuine issue regarding whether Defendant's breach was the reason for the damages then incurred. *Id.* at *25-29. The Court, therefore, concluded that Plaintiffs failed to allege a threat of future harm sufficiently imminent to confer standing. Accordingly, the Court granted Defendant's motion to dismiss without prejudice and granted Plaintiffs leave to "allege instances of actual identify theft or fraud." *Id.* at *34-35.

***Machlan, et al. v. Procter & Gamble Co.,* 2015 U.S. Dist. LEXIS 2599 (N.D. Cal. Jan. 6, 2015).** Plaintiff brought a consumer class action in state court alleging that Defendants deceptively marketed several lines of personal wipes as "flushable" when in fact they were not and asserted claims for false advertising ("FAL"), unfair, unlawful and deceptive trade practices ("UCL), and for violation of the Consumer Legal Remedies Act ("CLRA"). Plaintiff also sought injunctive relief for his CLRA, UCL, and FAL claims. Defendants removed the action under the CAFA, and moved to dismiss, which the Court granted in part. Defendants argued that Plaintiff lacked standing to seek injunctive relief because Plaintiff did not, and could not, allege that such relief would redress a real and immediate threat of repeated injury. Defendants further argued that Plaintiff did not allege that he was likely to purchase those wipes again, and in any event, there was no basis for concluding that he was likely to be misled into making such purchases based on the advertising and labeling that he challenged. *Id*. at *8. The Court remarked that the crux of Plaintiff's case was that he was allegedly deceived about the true nature of the "flushable" wipes that Defendants marketed and sold. *Id*. at *10. Plaintiff paid a premium for the wipes because he thought "flushable" meant "suitable for flushing," but according to his complaint, Plaintiff later learned that those "flushable" wipes were not, in fact, suitable for flushing. *Id*. The Court remarked that even if Plaintiff were to allege that he intended to buy those wipes again, and even if Plaintiff had continued to purchase those wipes daily, the nature of his alleged injury, *i.e.*, deception, was such that he personally could not be harmed in the same way again. Accordingly, the Court found that Plaintiff did not have Article III standing to seek an injunction prohibiting Defendants from continuing to engage in the conduct complained of in the complaint. The Court, however, reasoned that injunctive relief was an important remedy under California's consumer protection laws, and allowing a Defendant to undermine the consumer protection statutes and defeat injunctive relief simply by removing a case from state court was an affront to federal and state comity. *Id*. at *14. As this case was originally filed in the California state court by a California Plaintiff on behalf of a putative class of California residents under California's state law, the Court remanded the case for Plaintiff to assert injunctive relief under the UCL, the FAL, and the CLRA before the state court. *Id*. at *15. Defendants also argued that Plaintiff lacked standing to prosecute any claims on the products that he did not buy, *i.e.*, Plaintiff never bought Charmin Freshmates product, he bought only the Pampers Kandoo product. The Court noted that Defendants allegedly played different roles with respect to the Charmin wipes and the Pampers wipes. *Id*. at *17. For the Pampers wipes, a smaller manufacturer – Nehemaiah – was alleged to have held the license to have developed the product line, and for the Charmin wipes, Plaintiff alleged that Defendants manufactured and marketed them. Because Plaintiff never purchased the Charmin wipes, the Court dismissed the claims. *Id*. at *19. Defendants further contended that Plaintiffs lacked standing to pursue claims for Pampers Kandoo Wipes as well because Defendants shared the responsibility with Nehemaiah for manufacturing and marketing of the product. The Court disagreed and found that an issue that went directly into Defendants' liability could not be resolved on a motion to dismiss. *Id*. at *20. The Court also ruled that despite Defendants' argument that it shared joint liability with Nehemaiah, or if Defendants had no responsibility for the development or manufacturing of Kandoo wipes, Defendants ultimately had the approval rights over the products bearing a licensed mark and on any advertising or promotional materials related to those products. *Id*. at *21. Consequently, the Court rejected Defendants' argument that Plaintiff lacked standing to assert claims as to his purchase of Kandoo Wipes.

***Neale, et al. v. Volvo Cars Of North America, LLC,* 794 F.3d 353 (3d Cir. 2015).** Plaintiffs, a group of consumers from six states, brought a putative class action alleging that Defendants sold certain vehicles with defective sunroof drainage systems. The District Court denied Plaintiffs' motion to certify a nationwide class, but granted Plaintiffs' motion to certify six state-wide classes. Following the Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Defendants moved for reconsideration of

the District Court's order granting class certification. The District Court denied that motion and Defendants appealed. *Id.* at 358. The Third Circuit thereafter vacated the grant of class certification, and remanded the case to the District Court. *Id.* at 375. First, in rejecting Defendants' argument that Plaintiffs did not suffer an injury and therefore lacked Article III standing, the Third Circuit found that so long as a named class representative has standing, a class action presents a valid case or controversy under Article III. *Id.* at 369. As the Third Circuit concluded, "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23." *Id.* However, the Third Circuit held that the District Court failed to identify which precise claims were subject to class treatment in its certification order, thus requiring a remand. *Id.* at 370. Defendants further argued that the District Court erred by certifying six state-wide classes without analyzing whether those claims were subject to common proof. The Third Circuit declined to engage in an analysis of predominance and remanded the issue to the District Court. *Id.* at 373. Finally, Defendants argued that the District Court erred in denying the motion to reconsider the class certification decision in light of *Comcast*, specifically for the proposition that Plaintiffs must show that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). *Id.* at 374. Following Fifth Circuit precedent, the Third Circuit noted that *Comcast* does not preclude certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for class-wide measurement. *Id.* at 375. Accordingly, the Third Circuit vacated and remanded the District Court's class certification decision to allow the District Court to define the class membership, claims, and defenses, and to analyze the predominance requirement. *Id.*

Editor's Note: Rulings in "no-injury" class actions often conflate a number of different Rule 23 issues. In *Neale*, the District Court denied certification of a nationwide class because the case did not present a case or controversy under Article III. The Third Circuit vacated and remanded, clarifying that, while the case before it presented numerous predominance problems, so long as the named Plaintiff has a valid claim, Article III standing is met.

***Oetting, et al. v. Norton,* 2015 U.S. App. LEXIS 13535 (8th Cir. Aug. 4, 2015).** Plaintiff was a representative of a class action lawsuit alleging violations of the federal securities laws for legal malpractice and breach of fiduciary duty against NationsBank Corp. and BankAmerica Corp., for which Defendant was a class counsel. *Id.* at *2. The litigation settled and the District Court appointed Heffler, Radetich & Saitta, LLP ("Heffler") as claims administrator to distribute the settlement funds to class member claimants. During the claims process, one of Heffler's employees conspired to submit fifteen false claims against the fund. In 2010, the District Court denied Defendant's motion for leave to file a complaint against the claims administrator to recover the loss. Plaintiff subsequently filed a separate action against the claims administrator. After two distributions in 2004 and 2009, Defendant moved to have the remaining amount distributed by *cy pres* and requested an additional award in attorneys' fees for post-settlement work. *Id.* at *3. Plaintiff opposed the *cy pres* distribution as it was contrary to the class members' interests, and opposed the award of additional attorneys' fees on the basis that Defendant should disgorge fees for abandoning the class. Plaintiff also filed a separate class action against Defendant. The District Court granted Defendant's motion and granted the supplemental fee award and denied Plaintiff's request for disgorgement. On appeal, the Eight Circuit reversed the *cy pres* award, ordering the District Court to allow an additional distribution to the class and then to consider a *cy pres* award. Further, the Eight Circuit vacated the supplemental fee award as premature prior to completion of additional distributions. *Id.* at *4. On remand, Defendant moved to dismiss the complaint, which the District Court granted. Plaintiff moved to amend the District Court's dismissal order, which was denied in part. While Plaintiff's second motion to amend was pending in the District Court, Plaintiff moved to file a second motion to amend, and appealed from the final judgment and the denial of his first motion to amend. *Id.* at *5-6. On the subsequent appeal, the Eight Circuit concluded that the District Court had no jurisdiction over the case and affirmed the judgment dismissing the complaint. The Eight Circuit found that Plaintiff's lack of personal standing would deprive the District Court of subject-matter jurisdiction over the entire case. *Id.* at *7. Further, the Eighth Circuit found that to show personal standing, Plaintiff had to establish that he had suffered some actual injury that could be redressed. *Id.* at *8. Plaintiff, however, had excluded himself from the class as he alleged no injury other than a loss to his share of the settlement fund, which became zero as Plaintiff did not cash his settlement checks. *Id.* at *9. Thus, the Eighth Circuit held that Plaintiff lacked a personal

claim from the settlement fund and was not a member of the class he sought to represent. The next issue was whether the class had standing. *Id.* at *10. The Eighth Circuit held that Plaintiff's status as class representative in the main action did not allow Plaintiff or the class itself to maintain claims in a separate action. *Id.* at *13. Further, the Eighth Circuit found that if a case had only one class representative and that party did not have standing, then the District Court lacked jurisdiction over the case and it must be dismissed. *Id.* at *13. Plaintiff argued that the District Court erred in not appointing a substitute Plaintiff. *Id.* at *14. The Eighth Circuit found that Plaintiff did not timely amended his complaint and did not move to add a substitute Plaintiff, when he had ample notice that Defendant was asserting lack of standing as a jurisdictional defense. *Id.* at *15. Accordingly, the Eighth Circuit concluded that the District Court had no jurisdiction over the case and affirmed its judgment dismissing the complaint.

***Osborn, et al. v. Visa Inc.,* 2015 U.S. App. LEXIS 13529 (D.C. Cir. Aug. 4, 2015).** In this consolidated class action brought by a group of users and operators of independent (non-bank) ATMs against Visa, MasterCard, and certain affiliated banks, alleging anti-competitive schemes for pricing ATM access fees, the D.C. Circuit found that the District Court erred in concluding that Plaintiffs lacked standing. The crux of Plaintiffs' complaints was that when someone used a non-bank ATM, the cardholder paid a greater fee and the ATM operator earned a lower return on each transaction because of certain Visa and MasterCard network rules that prohibited differential pricing based on the cost of the network that links the ATM to the cardholder's bank in violation of § 1 of the Sherman Act and various state laws. *Id*. at *1-2. The District Court determined that Plaintiffs lacked Article III standing because their allegations showed neither injury nor redressability, and it dismissed the action. Plaintiffs then moved to amend the judgment, which the District Court denied. Plaintiffs contended that in the absence of the access fee rules, ATM operators would offer consumers differentiated access fees at the point of transaction, consumers would then demand multi-bug PIN cards from their banks, their banks would provide these cards, and the market for network services would become more competitive, all resulting in more choice of networks and lower access fees for consumers. *Id*. at *11. The D.C. Circuit observed that two distinct theories of injury were relevant in this case. First, the ATM operators' theory of harm claimed that MasterCard and Visa, working in concert with the member banks, had maximized their own returns on each transaction, thereby minimizing the independent ATM operators' cut. *Id*. at *12. Second, the consumers' theory of harm alleged that they paid inflated access fees when they visit ATMs, and the access fee rules inhibited competition in the network services market for ATM access fees. *Id*. at *13. The D.C. Circuit observed that economic harm, such as that alleged here, was classic form of injury-in-fact. *Id*. Defendants contended that Plaintiffs' allegations were speculative and conclusory, and the District Court agreed. The D.C. Circuit, however, found that at the pleadings stage, a District Court must accept as true all material allegations of the complaint. *Id*. at *14. The D.C. Circuit remarked that Plaintiffs' theories were susceptible to proof at trial. *Id*. Since the economic facts alleged by Plaintiffs were specific, plausible, and susceptible to proof at trial, the D.C. Circuit concluded that they passed muster for standing purposes at the pleadings stage. *Id*. at *17. Further, the District Court had held that Plaintiffs failed to plead adequate facts to establish the existence of concerted activity. *Id*. Plaintiffs alleged that the member banks used the bankcard associations to adopt and enforce a supra-competitive pricing regime for ATM access fees. *Id.* at *20. Defendants argued that since they were publicly held corporations, the public offerings would terminate any possible agreements and conspiracies. *Id.* at *21. The D.C. Circuit found that the agreement, which originated when the member banks owned Defendants, continued even after the public offerings. *Id.* at *24. The D.C. Circuit held that Defendants' anti-competitive conduct had forced the independent operators to pay supra-competitive network fees, which proved injury. *Id.* at *25. Accordingly, the D.C. Circuit vacated and remanded the District Court's judgment denying Plaintiff's motion to amend.

***Peters, et al. v. St. Joseph Service Corp.*, 2015 U.S. Dist. LEXIS 16451 (S.D. Tex. Feb. 11, 2015).** Plaintiff brought a putative class action against Defendants for damages arising from an intrusion into Defendants' computer network and the resulting data breach. Plaintiff alleged violations of the Fair Credit Reporting Act ("FCRA"), and various common law claims. Defendants filed a motion to dismiss, and the Court granted the motion. Defendants contended that the Court lacked subject-matter jurisdiction to hear the claims because Plaintiff did not suffer an injury, actual or imminent, that was traceable to Defendants' conduct, and Plaintiff lacked standing to bring this action. *Id*. at *6. The Court noted that Article III limits

the jurisdiction of federal courts to actual cases and controversies, and one element of the case-or-controversy requirement is that Plaintiffs must establish that they have a standing to sue. *Id*. at *12. The Court noted that to establish standing, two prongs should be satisfied, including: (i) that there is an injury-in-fact; and (ii) there is a causal connection between the injury and the complained of conduct. *Id*. Plaintiff argued that the increased risk of future identity theft and fraud constituted imminent injury. The Court disagreed that Plaintiff faced a "certainly impending" or "substantial" risk of identity theft as Article III required. *Id*. at *13. The Court explained that Plaintiff cited to reports from the Government Accountability Office and the Federal Trade Commission for the proposition that thieves could potentially use the personal information to drain her bank accounts, make charges on her credit cards, or obtain false identification cards. *Id*. at *13-14. The Court opined that Plaintiff's alleged future injuries were speculative, and certainly not imminent. *Id*. at *14. Similarly, the Court ruled that the incidents identified by Plaintiff as evidence of actual identity theft failed to meet the causation and redressability elements of the standing test. The Court explained that Plaintiff essentially argued that her injuries were traceable to the FCRA because they stemmed from Defendants' failure to comply with the requirements of the statute. Plaintiff contended that as a result of this failure, acts of identity theft and fraud were (and continued to be) perpetrated against her, albeit by unknown third-parties, for which Defendants should be held responsible. *Id*. at *21. Although Plaintiff alleged that Defendants' failures proximately caused those injuries, the allegation was conclusory and failed to account for the sufficient break in causation caused by opportunistic third-parties. Accordingly, the Court dismissed Plaintiff's claims.

***Remijas, et al. v. Neiman Marcus Group, LLC*, 2015 U.S. App. LEXIS 12487 (7th Cir. July 20, 2015).** Following a cyber-attack on Defendant's luxury department store in December 2013, which exposed the credit card numbers of approximately 350,000 of its card holders to the hackers' malware, Defendant notified all customers who had shopped at its stores between January 2013 and January 2014 and offered them one year of free credit monitoring and identity-theft protection. *Id.* at *3. Those disclosures prompted the filing of a number of class action complaints alleging negligence, breach of implied contract, unjust enrichment, unfair and deceptive business practices, invasion of privacy, and violation of multiple state data breach laws. *Id.* at *4. Following consolidation, Plaintiffs filed a first amended complaint, and Defendant moved to dismiss the complaint for lack of standing. The District Court granted the motion. The Seventh Circuit, however, reversed the District Court's decision. *Id.* at *6. To prove standing, Plaintiffs pointed to several injuries they suffered, including: (i) lost time and money resolving the fraudulent charges; (ii) lost time and money protecting themselves against future identity theft; (iii) the financial loss of buying items at Defendant's stores that they would not have purchased had they known of the store's careless approach to cybersecurity; and (iv) lost control over the value of their personal information. *Id.* at *7. Plaintiffs also alleged that they had standing based on two imminent injuries, *i.e.*, an increased risk of future fraudulent charges and greater susceptibility to identity theft. *Id.* at *8. The Seventh Circuit addressed the alleged imminent injuries first. The Seventh Circuit cited *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013), wherein the U.S. Supreme Court held that allegations of future harm could establish Article III standing if that harm was certainly impending, but allegations of possible future injury were not sufficient. *Id.* at *8. The Seventh Circuit, however, found that, unlike Clapper, where there was no evidence that any communications either had been or would be monitored, in this case, there was no need to speculate as to whether customers' information had been stolen and what information was taken. *Id.* at *11. In addition to the alleged future injuries, Plaintiffs asserted that they already had lost time and money protecting themselves against future identity theft and fraudulent charges. *Id.* at *13. The Seventh Circuit noted that Defendant did not contest the fact that the initial breach took place, and offered one year of credit monitoring and identity-theft protection to all customers for whom it had contact information and who had shopped at their stores between January 2013 and January 2014. *Id.* at *14. The Seventh Circuit opined those credit-monitoring services came at a price that was more than *de minimis* and that easily qualified as a concrete injury. *Id.* at *14-15. The Seventh Circuit found the other asserted injuries more problematic. Defendant argued that Plaintiffs could not trace their injuries to the data incursion at the company rather than to one of several other large-scale breaches that took place around the same time. *Id.* at *19. The Seventh Circuit held it was enough at that stage of the litigation that Defendant admitted that 350,000 cards might have been exposed and that it contacted members of the class to tell them they were at risk. Those admissions and actions by Defendant adequately raised

Plaintiffs' right to relief above the speculative level. *Id.* at *20. Defendant further argued that Plaintiffs' injuries could not be redressed by a judicial decision because Defendant already had reimbursed them for the fraudulent charges. The Seventh Circuit pointed out that, because reimbursement policies varied, a favorable judicial decision could redress any of Plaintiffs' injuries caused by less than full reimbursement of unauthorized charges. *Id.* at *22. Accordingly, the Seventh Circuit concluded that injuries associated with resolving fraudulent charges and protecting against future identity theft were sufficient to confer Article III standing.

***Silha, et al. v. ACT, Inc.*, 2015 U.S. App. LEXIS 19996 (7th Cir. Nov. 18, 2015).** Plaintiffs, a group of former information exchange program participants, brought a putative class action alleging that Defendants deceived them and concealed the sale of licensing of the students' personally identifiable information ("PII") under the cover of the information exchange programs. Defendants were national testing agencies that administered the American College Test ("ACT") and the Scholastic Aptitude Test ("SAT") college entrance exams. *Id*. at *2. Plaintiffs contended that in connection with the examinations, Defendants offered optional programs to facilitate the exchange of information between the student test-takers and colleges and universities. *Id*. Plaintiffs contended that the test-takers were required to affirmatively respond "yes" to authorize Defendants to share certain PII with participating educational groups. *Id*. According to Plaintiffs, Defendants sold their PII to educational organizations for profit. *Id*. The District Court granted Defendants' motion to dismiss, finding that Plaintiffs did not establish Article III standing. On Plaintiffs' appeal, the Seventh Circuit affirmed. At the outset, the Seventh Circuit noted that in order to have Article III standing, Plaintiffs must allege personal injury fairly traceable to Defendants' allegedly unlawful conduct that is likely to be redressed by the requested relief. *Id.* at *7. Plaintiffs alleged that Defendants had deceived them by not disclosing the sale of their PII and seeking damages from the income Defendants derived from the alleged deception. *Id.* at *10. The Seventh Circuit remarked that Plaintiffs alleged that they took the tests that Defendants administered, they consented to participate in the information exchange programs that Defendants offered, and they did not know at the time of their examinations that Defendants profited from those information exchange programs. *Id*. The Seventh Circuit opined that Plaintiffs actually benefited from participation in the information exchange. *Id*. at *13. Accordingly, the Seventh Circuit concluded that Plaintiffs' pleading did not establish an injury-in-fact, and therefore, the District Court lacked subject-matter jurisdiction over the case.

***State Of Mississippi, et al. v. Johnson,* 2015 U.S. App. LEXIS 5573 (5th Cir. April 7, 2015).** Plaintiffs, a group of immigration and customs enforcement agents and deportation officers and the State of Mississippi, brought an action against Defendants, the Secretary of the Department of Homeland Security ("DHS") and its directors, challenging the 2012 Deferred Action for Childhood Arrivals program (the "DACA program"), which allowed certain immigrants who entered the country as children to delay deportation and work in the country for at least two years. Plaintiffs alleged that the DACA program caused additional aliens to remain in the State and, as a result, caused the State to spend money on providing social services. *Id.* at *3. Plaintiffs sought declaratory and injunctive relief attacking the constitutional and statutory validity of the DACA program. The District Court dismissed Plaintiffs' claims for lack of subject-matter jurisdiction, as Plaintiffs lacked standing. Although Plaintiffs asserted that the cost to the State in providing support services to DACA beneficiaries was an adequate injury to support standing, the District Court found that Plaintiffs produced no studies or other evidence tending to establish that the DACA program added to the state's already existing costs. *Id.* at *13. On Plaintiffs' appeal, the Fifth Circuit affirmed, agreeing that Plaintiffs lacked standing to maintain the suit. The Fifth Circuit noted that Article III standing principles mandate that Plaintiffs show a "concrete and particularized" injury that is "fairly traceable" to the DACA, and Plaintiffs failed to carry this burden. *Id.* at *17. Because Plaintiffs' claim of injury was not supported by any facts, the Fifth Circuit agreed with the District Court that Plaintiffs' injury was purely speculative. *Id.* Plaintiffs asserted that they suffered an injury-in-fact because enforcing the DACA required them to violate their oaths of office. The Fifth Circuit held that the violation of such an oath was an insufficient injury to support standing. *Id.* at *20. Plaintiffs also asserted that the burden of compliance with the DACA qualified as a sufficient injury to satisfy the requirements of constitutional standing. In particular, Plaintiffs alleged that they inevitably altered their current processes to ensure that they deferred action with respect to DACA-eligible aliens. The Fifth Circuit, however, agreed with the

District Court that the burden of compliance with the DACA was insufficient to satisfy the injury requirements of standing. *Id.* at *20-21. Plaintiffs did not point to any cases where a Plaintiff had standing to challenge a department policy merely because it required employees to change their practices and failed to allege with any specificity how their practices changed in a substantial way. *Id.* at *21. Finally, Plaintiffs alleged that they suffered an injury-in-fact by virtue of being threatened with employment sanctions if they failed to comply with the terms of the DACA directive. The Fifth Circuit, however, held that Plaintiffs provided no evidence that Defendants sanctioned agents or threatened them with employment sanctions for detaining an alien and refusing to grant deferred action under the DACA. *Id.* at *22. Although Plaintiffs alleged in their complaint that an agent received a non-disciplinary letter admonishing him for refusing to follow his supervisor's instruction to defer action under the directive, the Fifth Circuit found that it did not support Plaintiffs' claim that Defendants threatened them with employment sanctions for failing to exercise their discretion to grant deferred action to an alien who satisfied the DACA's criteria. *Id.* at *22-23. The Fifth Circuit explained that Plaintiffs' reading of the DACA directive that it always required them to grant deferred action without detaining an alien who met the directive's criteria was erroneous, as the directive made clear that Plaintiffs could exercise their discretion in deciding to grant deferred action and could do so on a case-by-case basis. *Id.* at *23. The Fifth Circuit, therefore, concluded that Plaintiffs failed to allege a sufficient injury-in-fact to satisfy constitutional standing requirements, and accordingly, affirmed the District Court's dismissal of Plaintiffs' claims.

***Storm, et al. v. Paytime, Inc.,* 2015 U.S. Dist. LEXIS 31286 (M.D. Pa. Mar. 13, 2015).** In this consolidated class action brought by Plaintiffs, a group of victims of a security breach of Defendant's computer systems in which an unknown third-party allegedly accessed Plaintiffs' confidential, personal, and financial information, the Court granted Defendant's motion to dismiss for lack of standing. Plaintiffs included current and former employees of companies that used Defendant, a national payroll service company, for their payroll processing service. In order to facilitate payroll processing, Plaintiffs provided confidential personal and financial information to their employers. In April 2014, unknown third-parties gained unauthorized access to Defendant's computer systems, and consequently, to Plaintiffs' confidential personal information. Plaintiffs alleged that over 233,000 individuals had their personal and financial information "misappropriated" as a result of this data breach, and they would need to spend time and money to protect themselves from identity theft. *Id.* at *8-9. Plaintiffs asserted claims for negligence, breach of contract, and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The Court found that Plaintiffs failed to allege an actual injury. *Id.* at *17. The Court noted that based on relevant precedent, standing in data breach cases depended on well-pled allegations that Plaintiffs' information was actually misused or its misuse was "certainly impending." *Id.* at *12-13. Although Plaintiffs alleged that they were at increased risk of identity theft and suffered other harms as a result of the breach, the Court determined that the risks were too speculative and uncertain to establish actual, imminent injury sufficient to confer Article III standing. Particularly, the Court noted that Plaintiffs nowhere alleged that the hacker caused a new bank account or credit card to be opened in any of Plaintiffs' names, or any other form of identity theft, and thus alleged no actual "misuse" of the data. *Id.* at *18. Plaintiffs contended that they have alleged actual injury based on harm to their privacy interests, in having their confidential personal information accessed by an unauthorized third-party. The Court, however, pointed out that it "cannot be in the business of prognosticating whether a particular hacker was sophisticated or malicious enough to both be able to successfully read and manipulate the [stolen] data and engage in identify theft." *Id.* at *22. Since Plaintiffs did not allege that the unidentified hacker was actually able to view, read, or otherwise understand the data it accessed or that their information was exposed in such a way to make it easily viewed, the Court concluded that it would be speculative to find that the hacker "read, copied, or understood the data." *Id.* at *23-24. The Court therefore held that Plaintiffs failed to plead specific facts to demonstrate injury and standing, and accordingly, granted Defendant's motion to dismiss.

(xxx) Application Of Tolling Principles In Class Actions

***Ewing Industries Corp., et al. v. Bob Wines Nursery, Inc.,* 2015 U.S. App. LEXIS 13484 (11th Cir. Aug. 3, 2015).** In 2010, Aero Financial, Inc. ("Aero") filed a class action complaint in Florida state court alleging that Defendants sent unsolicited facsimile advertisements to the putative class in violation of the Telephone Consumer Protection Act. The claims were governed by a four-year statute of limitations and

over three years had passed between the alleged conduct and the filing of the complaint. In 2013, the Florida state court granted summary judgment in favor of Defendants on the basis that Aero did not have standing. The Florida state court did not rule on the issue of class certification, but held that the defect was due to the class representative. *Id.* at *2. Plaintiff filed a similar class action complaint in federal court against Defendants containing similar allegations. As four years had passed since the alleged conduct, Plaintiff alleged that the statute of limitations was tolled during the pendency of Aero's purported class action. In 2014, Defendants filed a motion to strike the class allegations in Plaintiff's complaint, contending that the claims were barred by the statute of limitations. The District Court relied upon the decision in *Griffin v. Dugger*, 17 F.3d 356, 359 (11th Cir. 1994) ("*Griffin II*"), and concluded that the pendency of Aero's purported class action did not toll the statute of limitations for Plaintiff's class action and denied Plaintiff's pending motion for class certification. *Id.* at *3. On appeal, the Eleventh Circuit affirmed the judgment of the District Court. Plaintiff argued that *Griffin II* addressed different facts and that the statute of limitations was tolled due to the inadequacy of the class representative and not due to the defects in the class complaint itself. *Id.* at *4. At the outset, the Eleventh Circuit found that the pendency of a previously filed class action did not toll the limitations period for additional class actions by putative members of the original asserted class. *Id.* at *8. Further, the Eleventh Circuit, relying upon *Griffin II,* found that it did not matter whether the first purported class action failed due to the inadequacy of the class representative or due to defects in the class itself. *Id.* at *9. Finally, the Eleventh Circuit held that Plaintiff could not piggy-back one class action onto another and engage in endless rounds of litigation. *Id.* at *9. Accordingly, the Eleventh Circuit affirmed the judgment of the District Court.

***Phipps, et al. v. Wal-Mart Stores, Inc.*, 2015 U.S. App. LEXIS 11616 (6th Cir. July 7, 2015).** Plaintiffs, the unnamed class members in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), brought an action in Tennessee alleging individual and class claims under Rule 23(b)(2) and Rule 23(b)(3), on behalf of current and former female employees of Wal-Mart. *Id*. at *2. On June 8, 2001, six named Plaintiffs filed suit under Title VII in the Northern District of California on behalf of all former and current female employees nationwide. *Id.* at *2-3. Plaintiffs sought certification of a nationwide class of current and former female employees under Rule 23(b)(2), or alternatively, under Rule 23(b)(3). *Id.* at *3. In 2004, the District Court certified a nationwide class under Rule 23(b)(2). *Id.* In 2007, the Ninth Circuit affirmed the District Court's certification of a nationwide class under Rule 23(b)(2) for current employees and remanded for the District Court to consider certification of punitive damages classes under Rule 23(b)(2) or Rule 23(b)(3) and certification of former employees classes under Rule 23(b)(3). *Id.* The U.S. Supreme Court subsequently granted *certiorari* and, in June 2011, issued its landmark decision, reversing certification of a nationwide class of current employees under Rule 23(b)(2). The Supreme Court held, among other things, that Plaintiffs did not demonstrate questions of law or fact common to the class because they failed to provide "significant proof" of a nationwide policy or other "specific employment practice" that affected 1.5 million class members in the same way. *Id.* at *4. Thereafter, Plaintiffs promptly filed a motion in the District Court in California to extend tolling of the statute of limitations. The District Court granted the motion and directed all class members who had not filed administrative charges with the EEOC to do so on or before May 25, 2012. Plaintiffs then amended their California case to narrow the scope of the proposed class to current and former female employees who had been subjected to gender discrimination within California regions. *Id.* at *5. In addition, Plaintiffs filed class actions in four other jurisdictions – including Tennessee, Texas, Florida, and Wisconsin – to bring individual and class claims concerning other Wal-Mart regions. *Id.* In Tennessee, three unnamed class members filed their own lawsuit asserting individual and putative class claims under Rule 23(b)(2) and Rule 23(b)(3) on behalf of current and former female employees in Defendant's "Region 43," a region allegedly centered in Middle and Western Tennessee, and including portions of Alabama, Arkansas, Georgia, and Mississippi. Plaintiffs had filed administrative charges with the EEOC within the deadline ordered by the District Court, and then filed suit within 90 days of receiving right-to-sue letters. Defendant moved to dismiss the putative class claims under Rule 12(b)(6), arguing that Sixth Circuit precedent prohibited tolling for any purported class action brought after a previous denial of class certification. The District Court agreed and dismissed the class claims with prejudice, but certified its decision for interlocutory appeal. *Id.* at *6. The timely filing of a class action complaint normally tolls the statute of limitations for all members of the putative class until a ruling that the suit is not appropriate for class treatment. *Id.* at *7. At that point, the putative class members can move to intervene

as Plaintiffs in the pending action or can file their own lawsuits. *Id.* Defendant argued that, because the Supreme Court already had rejected class certification of Plaintiffs' claims in *Wal-Mart*, tolling was not available for Plaintiffs' rebooted class theory. The Sixth Circuit disagreed. With respect to Plaintiffs' Rule 23(b)(3) claims, the Sixth Circuit found that, when Plaintiffs initiated their action in Tennessee, no order in any jurisdiction had denied certification of a Rule 23(b)(3) class of current and former female employees. *Id.* at *13. Indeed, the original motion for class certification under Rule 23(b)(3) filed by Plaintiffs in *Wal-Mart* remained pending in the District Court in California after the Supreme Court issued its decision. *Id.* at *15. With respect to Plaintiffs' Rule 23(b)(2) claims, the Sixth Circuit held that the issue was not whether the class action was timely filed but whether Plaintiffs' class claims were precluded by the Supreme Court's decision in *Wal-Mart*. It found no preclusion. Plaintiffs, for the first time, sought certification of a regional class under Rule 23(b)(2) for themselves and all other current employees in Region 43. *Id.* at *18. The Sixth Circuit observed that "[t]hese" substantive claims are within the scope of those asserted by the nationwide class in *Dukes*, . . . but the class seeks neither re-litigation nor correction of the earlier class claims." *Id.* The Sixth Circuit rejected Defendant's argument that it is unfair to permit absent class members to "stack" one class action onto another, noting that "this form of argument flies in the face of the rule against non-party preclusion." *Id.* at *21. The Sixth Circuit reasoned that "existing principles in our legal system, such as stare decisis and comity among courts, are suited to and capable of address these concerns." *Id.* Accordingly, the Sixth Circuit reversed and remanded the action.

***Sparkle Hill, Inc., et al. v. Interstate Mat Corp.*, 2015 U.S. App. LEXIS 9236 (1st Cir. June 3, 2015).** Plaintiff brought a putative class action alleging violations of the Telephone Consumers Protection Act ("TCPA"). Plaintiff alleged that, in May 2006, Defendant paid a marketing firm to fax a one-page advertisement to 10,000 potential customers, including Plaintiff and another company, West Concord. More than three and a half years later, West Concord filed a putative class action in Massachusetts state court. *Id.* at *2. More than a year after West Concord filed suit, Plaintiff – represented by the same counsel – filed this putative class action alleging the same violation. *Id.* at *3. The District Court certified a class of all persons to whom Defendant successfully sent a fax in May 2006. The District Court then granted Defendant's motion for summary judgment, holding that Plaintiff's claim was time-barred. In ruling on Plaintiff's motion, the District Court considered whether the putative class action filed in state court tolled the statute of limitations for Plaintiff's subsequent class action under *American Pipe & Construction Company v. Utah*, 414 U.S. 538, 553 (1974), which established the principle that the commencement of a class suit tolls the running of the statute for all purported class members who make timely motions to intervene after the suit is deemed inappropriate for class certification. *Id.* at *6. The District Court, however, concluded that *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998), which held that the "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely" foreclosed the application of *American Pipe* tolling to sequential class actions, as opposed to individual actions. *Id.* Thereafter, Plaintiff moved under Rule 60(b)(6) to vacate the District Court's order. Plaintiff argued that, even if *American Pipe* tolling did not apply to its class action, tolling still might apply to the individual claims of Plaintiff and other class members, and that the District Court should have decertified the class and allowed class members to pursue individual tolling arguments, instead of entering judgment for Defendant. *Id.* at *8. The District Court denied the motion. On Plaintiff's appeal, the First Circuit affirmed. The First Circuit noted that, in its opening brief, Plaintiff did not challenge the express grounds upon which the District Court prominently relied in entering judgment. Without expressing any view on the correctness of the District Court's denial of *American Pipe* tolling to a second class action, the First Circuit noted that it did not perceive the District Court's reasoning on the issue as clearly or obviously wrong. *Id*. at *12. Further, although the First Circuit agreed with Plaintiff that, rather than entering judgment against the entire class, the District Court should have decertified the class, the First Circuit read the District Court's orders as doing just that. The District Court denied Plaintiff's request for permission to send notice to the absent class members, and absent such notice, no members of a Rule 23(b)(3) damages class could have been bound by the judgment. *Id.* at *13. Accordingly, the First Circuit affirmed the order granting summary judgment against Plaintiff.

(xxxi) Exhaustion Principles In Class Actions

***Ellis, et al. v. Costco Wholesale Corp.,* 2015 U.S. Dist. LEXIS 67284 (N.D. Cal. May 22, 2015).** In this Title VII class action alleging gender discriminations in promotions, one of the named Plaintiffs, Elaine Sasaki, claimed that Defendant failed to promote her from the position of Assistant General Manager to General Manager because of her gender, and that Defendant retaliated against her after making an internal complaint about gender discrimination with the California Department of Fair Employment & Housing ("DFEH"). *Id*. at *3. Defendant moved for partial summary judgment, arguing that Sasaki's claim was time-barred. Sasaki filed a charge of discrimination with the DFEH on or about March 1, 2005, and according to Defendant, her disparate treatment claims were viable only for events that took place 300 days prior to that date, or May 5, 2004. Sasaki disagreed and argued that she could challenge any GM promotion filed on or after January 3, 2002 because the original named Plaintiff, Shirley Rae Ellis, who initiated this action, filed an administrative complaint 300 days after that date, and thus Sasaki could "piggy-back" on Ellis' original charge. *Id.* at *5-6. The Court agreed with Sasaki and stated that the Ninth Circuit had held, in *Harris v. County of Orange,* 682 F.3d 1126 (9th Cir. 2012), that where one class member had timely filed an administrative complaint, then other members of that class might piggy-back on that administrative complaint, thereby satisfying the exhaustion requirement. *Id.* at *6. The Court thus found that because Ellis filed a class action and timely filed an administrative complaint, other members of the class, including Sasaki, might piggy-back on Ellis' administrative complaint. *Id.* Defendant attempted to distinguish *Harris,* and argued that unlike the other class members in *Harris,* Sasaki had filed her own administrative complaint. The Court, however, found that filing her own administrative compliant did not mean that Sasaki abandoned her charge because she had joined Ellis' action before receiving her right-to-sue letter, and thus initiating a new lawsuit was not necessary. *Id.* at *8-9. The Court therefore rejected Defendant's contention that Sasaki's claim for disparate treatment was partially time-barred. The Court, however, agreed with Defendant that Sasaki's claim for retaliation was time-barred. Defendant pointed out that Sasaki filed an administrative complaint with the DFEH on March 3, 2013, and thus any retaliation claim preceding May 7, 2012 was time-barred. *Id.* at *10. The Court noted that Sasaki filed her administrative complaint for disparate treatment on or about March 1, 2005, and she gave no indication for approximately eight years that she intended to follow up on or pursue a retaliation claim. *Id.* at *15. The Court held that Sasaki had effectively waived the benefit of the "reasonably related" rule when she failed to follow up on any retaliation claim for approximately eight years, and only those failures to promote that took place 300 days prior to her administrative complaint for retaliation were actionable. *Id.* at *17-21. Accordingly, the Court granted in part and denied in part Defendant's motion for partial summary judgment. Defendant also moved for summary judgment on the merits of Sasaki's claim arguing that Sasaki offered no evidence to support a *prima facie* case and that it denied her promotion for the non-discriminatory, non-pretextual reason that she was not qualified. *Id.* at *24. The Court, however, found evidence sufficient to raise a genuine dispute regarding Sasaki's qualifications and temporal proximity for the actionable retaliation, and therefore denied Defendant's motion for summary judgment.

(xxxii) Appointment And Selection Of Counsel In Class Actions

***Haley, et al. v. Kolbe & Kolbe Millwork Co., Inc.,* 2015 U.S. Dist. LEXIS 42584 (W.D. Wis. April 1, 2015).** Plaintiffs, a group of consumers, brought a class action and alleged that Defendant sold them defective windows. Defendant had purchased general liability insurance policies from several insurance companies, which provided that the insurers had the "right and duty to defend the insured against suit seeking damages." *Id.* at *4-5. Plaintiffs brought this action in February 2014, and subsequently, Defendant tendered its defense to the insurers and forwarded the complaint to them. Defendant also notified the insurers about its choice of Foley & Lardner LLP to represent it in the litigation. Because the insurers did not object to that choice, Defendant proceeded with the defense of the action, while the insurers investigated coverage, and Defendant's counsel began to work on the action. On June 18, 2014, the insurers wrote to Defendant stating that they would "agree to the appointment" of one of two other law firms. By then, Defendant's counsel had performed substantial work on the case including answering the original complaint, preparing initial disclosures, filing a motion for a protective order, conducting internal interviews, reviewing Plaintiffs' discovery responses, and initiating discovery requests. *Id.* at *8. Defendant therefore responded that the insurers had forfeited their right to choose counsel. The insurers then filed a

motion to intervene in this action, which the Court granted on December 10, 2014, stating that the insurers could file a motion for summary judgment on the issue of Defendant's choice of counsel. The parties then filed cross-motions for summary judgment on the issue. Denying summary judgment to the insurers, the Court found that, even assuming that insurers had a right to choose counsel even when they defend an insured under a reservation of rights, Defendant was entitled to summary judgment because the insurers lost whatever right they had through their own inaction. *Id.* at *13. Although Defendant tendered its defense to the insurers the day after Plaintiffs filed their complaint, the Court noted that the insurers did not object or otherwise place any restrictions on Defendant with respect to their choice of counsel over the course of four months despite Defendant's regular updates on the matter. Even when the insurers informed Defendant, after four months, that they did not want Defendant's chosen counsel, they provided no information about the two law firms they proposed, except for their names. *Id.* at *14. Further, the insurers did not cite any evidence that they gave Defendant any indication that they wanted to select different counsel until April 22, 2014, when one insurer wrote to Defendant that it was in contact with other carriers to coordinate the defense and discuss the retention of independent counsel, and even then, it did not tell Defendant that its retained counsel would be expected to withdraw in the future. *Id.* at *16-17. According to the Court, the prejudice to Defendant was not simply a matter of not knowing that the insurers might choose another firm, but rather that the insurers failed to make a selection until Defendant's counsel had already invested significant time and resources into the case. *Id.* at *17. The Court pointed out that by the time that the insurers filed their motion for summary judgment on the selection of counsel issue, the case had been proceeding for more than ten months. *Id*. at *21. The Court thus held that it would be impossible to grant the insurers' motion without causing substantial prejudice to Defendant or completely resetting the case's schedule, and it would not be fair to Defendant, or Plaintiffs, to allow the insurers to stall the proceedings by substituting new counsel. *Id.* at *22. Accordingly, the Court granted Defendant's motion for summary judgment.

***In Re Enzymotec Ltd. Securities Litigation,* 2015 U.S. Dist. LEXIS 25720 (D.N.J. Mar. 3, 2015).** In this securities class action alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, the Court granted Plaintiff Enzymotec Investor Group's ("EIG") motion for appointment as lead Plaintiffs and approval of their selection of counsel, and denied Plaintiff 3B Communications' ("3B") competing motion. *Id*. at *2. The Court noted that the Private Securities Litigation Reform Act ("PSLRA") creates a detailed procedure that must be followed by any party seeking to be named lead Plaintiff in a securities class action. In lieu of that rule, the PSLRA requires the Court to adopt a rebuttable presumption that the most adequate Plaintiff is the group or group of persons that has the largest financial interest in the outcome of the litigation and otherwise satisfies the requirements of Rule 23. *Id*. at *4. The Court found no dispute that 3B possessed the largest financial interest in the outcome of the litigation, and that 3B made a *prima facie* showing of the typicality and adequacy requirements of Rule 23. *Id*. at *5. EIG, however, argued that 3B's certification, which 3B filed with its motion pursuant to 15 U.S.C. § 78u-4(a)(2)(A), was defective because it failed to demonstrate the authority of the signer to take action on 3B's behalf. *Id*. at *6. EIG posited that 3B's deficient certification would subject it to a unique defense that rendered 3B incapable of adequately representing the class, and thus 3B was not the presumptively most adequate lead Plaintiff. *Id*. The Court agreed with EIG, and observed that 3B's certification could be subject to attack because it provided no indication that its signer was authorized to sign the certification on 3B's behalf. *Id*. at *6-8. Further, the Court observed that nowhere in 3B's certification did the signer identify himself or provide any indication of his role within 3B. *Id*. at *8-9. The Court found that EIG met the threshold elements required to demonstrate entitlement to the PSLRA's rebuttable presumption. *Id*. at *10. Specifically, the Court found that EIG possessed the second largest financial interest in the litigation, EIG's claims were typical of the class, and that EIG would adequately represent the class. Although 3B argued that the members of EIG bore no relation to one another, the Court relied on the proposition that there is nothing in the PSLRA preventing even a group of unrelated persons from serving as lead Plaintiff. *Id*. at *10-11. In addition, 3B identified no defense unique to EIG that would render them inadequate lead Plaintiffs. The Court also found EIG's selection of counsel clearly acceptable, as the firm's biographies disclosed a wealth of experience in litigating securities class actions. *Id*. at *12. Accordingly, the Court granted EIG's motion for appointment as lead Plaintiff and approval of its selection of counsel.

***Lusk, et al. v. Life Time Fitness, Inc.,* Case No. 15-CV-1911 (D. Minn. July 10, 2015).** Plaintiff brought a putative class action alleging that Defendants undervalued Life Time Fitness Inc.'s stock shares in a transaction in which the company was going private, in violation of the Securities Exchange Act of 1934. Plaintiff Matthew Lusk and movant St. Clair County Employees' Retirement System had each filed a motion to be appointed lead Plaintiff in the case. Lusk commenced the action in federal court in April, 2015. Movant St. Clair had not filed a separate case in federal court, but had filed a state action in Minnesota, also alleging claims arising out of the same transaction. *Id*. at 2. Both parties owned shares with Defendants prior to the transaction. Matthew Lusk was an individual shareholder and St. Claire was an institutional investor. *Id*. at 3. St. Claire had a significantly greater financial stake in the outcome of the action. Lusk contended St. Clair was not the most adequate Plaintiff because St. Clair started the state court action in the name of Defendants as a shareholder derivative action. *Id*. at 3-4. Thus, Lusk argued that St. Clair and its counsel acted on behalf of Defendants in the state case, but sought to litigate against the company in this federal action, creating an inherent conflict of interest. *Id*. at 4. St. Clair asserted that that the rebuttal argument was illusory because Defendants had already been merged out of existence, effectively terminating the equity interests of shareholders and mooting any derivative claims. St. Clair also contended that none of the class members presented any proof of conflict, and that it would dismiss the state court action in the event of its appointment as lead Plaintiff in this case. *Id*. Lusk alternatively moved for his appointment as co-lead Plaintiff and approval of his selected law firms as co-lead counsel and liaison counsel, arguing that the combination of an individual investor and an institutional investor would insure representation for all class members. *Id*. The Magistrate Judge found that although St. Clair was presumptively the most adequate Plaintiff due to its significantly greater financial interest in the outcome of the case, both Lusk and St. Clair satisfied the typicality and adequacy prerequisites of Rule 23. The Magistrate Judge observed that despite that presumption, St. Clair faced a possible conflict of interest defense which might well become manifest at the class certification stage of the action. *Id*. The Magistrate Judge remarked that it was not the Court's intent to foreclose arguments against class certification, but the Court had an interest in managing and maintaining the orderly progression of the case. *Id*. at 4-5. Thus, the Magistrate Judge held that the appointment of Lusk and St. Clair as co-lead Plaintiff would best protect the interests of both individual and institutional class members and deter any interruption in the litigation arising out of a conflict of interest challenge to class representation. *Id*. at 5. The Magistrate Judge concluded that a combination of investors as co-lead Plaintiffs would represent a broader range of shareholder interests than if only one or the other type of investor was appointed. *Id*. at 7.

***Microsystems Development Technologies, Inc., et al. v. Panasonic Corp.*, Case No. 15-CV-3820 (N.D. Cal. Dec. 21, 2015).** Plaintiffs, a group of direct and indirect purchasers, brought an antitrust class action against several Defendants alleging violation of the Sherman Act, the Cartwright Act, California's Unfair Competition Law, and other states' laws by conspiring to raise, fix, or stabilize the price of resistors. Plaintiffs sub-divided their class claims for both direct purchasers and indirect purchasers. Plaintiffs requested appointment of two separate lead counsel to represent both the direct purchaser Plaintiffs and the indirect purchaser Plaintiffs. Multiple law firms sought appointment as lead counsel. After a hearing, the Court appointed the law firms of Cohen Milstein Sellers & Toll PLLC and Hagens Berman Sobol Shapiro LLP as lead counsel for the direct purchaser Plaintiffs, and Cotchett, Pitre & McCarthy, LLP as counsel for the indirect purchaser Plaintiffs. Pursuant to Rule 23(g), the Court found that the three law firms were highly skilled in complex litigation, and had conducted extensive investigations of the antitrust claims in the litigation. *Id.* at 4-5. The firms also had submitted "a prosecution plan with specific case management proposals to minimize duplication of efforts and ensure oversight." *Id*. at 6. Based on the available resources and their proposals to simplify case management and minimize costs, the Court selected the three law firms as lead counsel.

(xxxiii) Workplace RICO Class Actions

***Brink, et al. v. Continental Insurance Co.,* 2015 U.S. App. LEXIS 9112 (D.C. Cir. June 2, 2015).** Plaintiffs, a group of civilian government contractor employees, brought a putative class action alleging that Defendants engaged in an elaborate and fraudulent scheme to deny Defense Base Act ("DBA") medical benefits to thousands of civilian contractor employees for the injuries they suffered in Iraq and Afghanistan. Plaintiffs also alleged that Defendants discriminated or retaliated against them for asserting such claims in

violation of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and several state laws. The District Court dismissed Plaintiffs' claims. The District Court held that Plaintiffs' state law causes of action arose out of their underlying claims to DBA benefits and, therefore, the exclusive scheme set forth in the DBA and LHWCA barred those claims. *Id*. at *6. The District Court similarly held that the comprehensive statutory scheme barred Plaintiffs' RICO claims as well as their discrimination and retaliatory discharge claims arising under the LHWCA. *Id*. On appeal, the D.C. Circuit affirmed the dismissal of Plaintiffs' RICO and LHWCA claims. The dismissal, however, did not preclude any individual Plaintiffs from bringing independent claims outside of the DBA's statutory scheme. *Id*. at *2. At the outset, the D.C. Circuit found that the statutory scheme of the DBA and LHWCA contained exclusive remedies, which left no room for Plaintiffs' RICO claims. *Id*. at *14. Although Plaintiffs alleged that Defendants violated RICO by conspiring to misrepresent information related to DBA claims, and by denying claims using fraud, the D.C. Circuit found that § 931 of the LHWCA (which the DBA incorporated) already provided a remedy for the alleged misconduct. *Id*. Plaintiffs further alleged that Defendants violated RICO by conspiring to delay payments to providers or to claimants and to stop payments on checks. *Id*. at *15. The D.C. Circuit, however, found that § 914 of the LHWCA, as incorporated by the DBA, already provided a penalty for employers who make untimely payments. Thus, there was no room for a RICO claim based on delayed or stopped compensation payments. *Id*. Further, even if the statutory scheme left room for Plaintiffs' RICO claims, the D.C. Circuit agreed with the District Court that Plaintiffs failed to state a cause of action under RICO. *Id*. at *15-16. The D.C. Circuit found that Plaintiffs did not allege any facts establishing required elements of a RICO enterprise, including: (i) a common purpose among the participants; (ii) organization; and (iii) continuity. *Id*. at *16. Plaintiffs also failed to plead predicate acts with particularity to satisfy Rule 9(b). *Id*. Neither Plaintiffs' mail nor wire fraud claims contained any reference to specific fraudulent statements, who made the statements, what was said, when or where the statements were made, and how or why the alleged statements were fraudulent. *Id*. The D.C. Circuit concluded that the District Court did not err in dismissing Plaintiffs' RICO claims, and accordingly, affirmed the District Court's order of dismissal.

***Torres, et al. v. S.G.E. Management, LLC,* 2015 U.S. App. LEXIS 17974 (5th Cir. Oct. 16, 2015).** Plaintiffs, a group of Independent Associates ("IAs"), brought a class action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") alleging that Defendants induced them to participate in an illegal pyramid scheme causing them to suffer monetary losses. *Id.* at *2-3. Plaintiffs paid a fee to participate in Defendant Ignite's multi-level marketing program to market Defendant Stream Energy's electricity services to potential customers. *Id.* at *3-4. An IA's success depended primarily on recruiting other IAs who, in turn, recruit other IAs and customers into the Ignite program. *Id.* at *5. Plaintiffs alleged that they were defrauded into thinking that Ignite was a legitimate enterprise, but it was instead an illegal pyramid scheme, whereby the real aim was not to sell Stream Energy products and services, but to recruit others to become IAs and collect fees. *Id.* at *8-9. Alleging that Defendants violated the RICO, Plaintiffs moved to certify a class action for victims of the alleged pyramid scheme. The District Court certified the class, concluding that, although Plaintiffs could not establish class-wide reliance on any particular misrepresentation, the jury could infer reliance based on the fraudulent and illegal nature of Defendants' pyramid scheme. *Id.* at *8. On Defendants' appeal, the Fifth Circuit disagreed and decertified the class. While Plaintiffs' theory of reliance depended on the premise that a pyramid scheme was a unique type of fraud, the Fifth Circuit found that reliance could not be inferred merely because a business was alleged to be a pyramid scheme, particularly when the record suggested that Defendants told the investors that it was a pyramid scheme. *Id.* at *21-25. The Fifth Circuit held that Plaintiffs' evidence did not support a sufficient inference of reliance. The Fifth Circuit reasoned that an investor could reasonably choose to knowingly invest in a pyramid scheme in the hope that they would make make money as a pyramid scheme provides an opportunity for those at the top of the pyramid to profit from their investments. While many IAs might have decided to invest in the scheme in the belief that it was legal, the Fifth Circuit noted that it was equally possible that many of the IAs chose to invest in the scheme in the belief that, legal or illegal, it provided them with an opportunity to make money. *Id.* at *35-36. The Fifth Circuit thus found that Plaintiffs would have to rely upon individualized proof to establish reliance. As to Plaintiffs' argument that class members would not have knowingly joined an illegal scheme, the Fifth Circuit observed that Plaintiffs cited no case law that has adopted such an elevated view of human nature, and thus there could be no class-wide

inference that, merely because the enterprise was an alleged pyramid scheme, no individual would have rationally joined it had he or she known about the scheme. *Id.* at *34. The Fifth Circuit therefore concluded that the District Court erred in the certifying the class and accordingly vacated the certification order.

(xxxiv) Public Employee Class Actions

***Bargsley, et al. v. United States,* 2015 U.S. Claims LEXIS 454 (Fed. Cl. April 17, 2015).** Plaintiffs, a group of military veterans, brought a putative class action pursuant to the Tucker Act, alleging that the Department of the Navy failed to promptly implement a Department of Defense directive requiring it to determine "combat-related" separation of sailors and marines. Prior to 2008, the law prohibited veterans of the U.S. military from receiving both disability severance pay and the disability compensation of the U.S. Department of Veterans Affairs ("VA"). However, in 2008, the National Defense Authorization Act, 10 U.S.C. § 1212(d), required the military to determine if any disabilities leading to separation from service were "combat-related," and provided that, if found combat-related, then the veterans would be entitled to both disability severance payment and monthly disability compensation from the VA. *Id.* at *5-6. The Army and Air Force promptly implemented the law, but the Navy and Marine Corps did not. By the time they began to implement it on a prospective basis, they had medically separated many sailors and marines, including Plaintiffs, without determining their combat-related disability, and consequently, the VA improperly recouped Plaintiffs' disability severance pay from their VA disability compensation. Plaintiffs alleged that their separation was due to combat-related disabilities, and that their separation forms did not reflect this. Plaintiffs sought correction of the forms and the repayment of the funds withheld from their VA disability compensation. Plaintiffs premised their sole claim for relief on § 1212(d), which describes when, how, and from whom the government can recoup an award of disability severance pay. *Id*. at *35. Defendant moved to dismiss asserting lack of jurisdiction, and the Court of Federal Claims granted the motion. The Court of Federal Claims agreed with Defendant that § 1212(d) concerned the reduction of disability compensation awarded by the VA, and that only the VA was statutorily authorized to adjudicate claims related to veterans' benefits. *Id.* at *38. The Court of Federal Claims rejected Plaintiffs' argument that § 1212(d) concerned the reduction and ultimate recoupment of the disability severance pay awarded by the military and not the reduction of disability compensation awarded by the VA. *Id.* The Court of Federal Claims noted that, under the plain language of § 1212(d), the only amounts subject to reduction were amounts the VA awarded, and thus it could not be read to protect the reduction of anything other than compensation paid by the VA, including the reduction of disability severance pay. *Id.* at *39. Because Plaintiffs' premised their sole claim for relief on § 1212(d), the Court of Federal Claims determined that the appropriate forum for Plaintiffs' claim was VA. According to the Court of Federal Claims, the comprehensive, integrated scheme for the administrative and judicial review of claims for veterans' benefits set forth in Title 38 of the United States Code preempted the Court of Federal Claims' jurisdiction to entertain claims concerning the reduction of VA disability compensation pursuant to § 1212(d). *Id.* at *47. The Court of Federal Claims therefore concluded that it lacked jurisdiction over the § 1212(d) claim, and accordingly, granted Defendant's motion to dismiss.

***Medici, et al. v. City Of Chicago,* 2015 U.S. Dist. LEXIS 145655 (N.D. Ill. Oct. 27, 2015).** Plaintiffs, a group of patrol officers with the Chicago Police Department (the "CPD"), brought an action alleging that the City of Chicago infringed on their First Amendment rights in violation of 42 U.S.C. § 1983. Plaintiffs claimed that the CPD changed its uniform policy, requiring the on-duty officers representing the CPD, whether in uniform, conservative business attire, or casual dress, to cover any tattoos on the hands, face, neck, and other areas not covered by clothing, with skin tone adhesive bandages or tattoo covers (the "Tattoo Policy"). *Id*. at *2. Plaintiff sought a declaratory judgment that the Tattoo Policy violated the First Amendment. The City moved to dismiss the complaint, which the Court granted. At the outset, the Court noted that a government employer can enact certain restraints on the speech of its employees that would be unconstitutional if applied to the general public. *Id*. at *6. The Court found that Plaintiffs' tattoos were a form of personal expression, and not a form of speech on matters of public concern. *Id*. at *7. The Court observed that when an individual decides to place a symbol or design on his or her body, he or she is engaging in the form of personal expression, rather than a form of commentary on the interests of the public. *Id*. Under the circumstances of this case, the Court found that when an on-duty police officer publicly displays any tattoo, it might cause members of the public to question whether allegiance to their

welfare and safety was paramount. *Id*. at *11. Thus, the Court concluded that the Tattoo Policy furthered the CPD's interest in ensuring that professionalism and uniformity was maintained. *Id*. Accordingly, the Court granted the City's motion to dismiss.

(xxxv) Injunctions In Class Actions

***Addington, et al. v. US Airline Pilots Association,* Case No. 13-CV-471 (D. Ariz. Sept. 22, 2015).** Plaintiffs brought an action challenging Defendant's ability to combine the East and West pilots into a single seniority regime after the America West/US Airways merger and sought for an injunction to prevent any person or entity acting on behalf of former US Airway pilots from advocating something other than the Nicolau Award – a precedent from a previous arbitration ruling – in the pending seniority integration arbitration. *Id.* at 1. The National Mediation Board had certified the Allied Pilots Association ("APA") as the exclusive collective bargaining representative for all pilots for the merged airline, called New American. New American pilots could not agree on an integrated seniority list and therefore the seniority matter proceeded to arbitration, and the APA designated separate committees to advocate on behalf of discrete groups of pilots in the arbitration proceeding. *Id.* at 2. Accordingly, the American Airlines Pilots Seniority Integration Committee, the USAPA Merger Committee, and the West Piltos' Merger Committee were set to participate in the seniority list integration arbitrations. On June 26, 2015, the Ninth Circuit found that the USAPA violated its duty of fair representation in conducting the seniority integration of US Airways and enjoined USAPA from participating in the McCaskill-Bond seniority integration proceedings, including any seniority-related discussions leading up to those proceedings, except to the extent that USAPA advocated the Nicolau Award. *Id.* Consequently, the USAPA Merger Committee sent notice to the arbitration panel that USAPA would no longer be participating in the arbitration. The APA then appointed a new East Pilots Merger Committee and scheduled arbitration proceedings for September 29, 2015. Plaintiffs sought to enjoin USAPA, APA, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from taking any action on behalf of legacy US Airways East pilots in the McCaskill-Bond proceedings, including any seniority-related discussions leading up to those proceedings, except to the extent that they advocated the Nicolau Award. *Id.* at 5. Defendants, including APA, opposed the proposed injunction as too broad. Whereas the District Court found that an injunction prohibiting USAPA from participating in the arbitration unless it advocated the Nicolau Award appeared necessary pursuant to the Ninth Circuit's mandate, it disagreed that the injunction explicitly should reach parties other than USAPA. *Id.* at 8-9. Although the new East Pilots Merger Committee was using the same lawyers and experts that the USAPA Merger Committee had planned to use, the Court found no evidence in the record to show that the new East Pilots Merger Committee was USAPA with a different nametag, or that it was directly or indirectly operating under USAPA's control. *Id.* at 10. Plaintiffs argued that, regardless of any connection between the new committee and USAPA, the new committee should be prohibited from arguing something other than the Nicolau Award. The Court disagreed, pointing out that the Ninth Circuit explicitly had refused to order such relief while entering an injunction against USAPA for its clear misdeeds, and Plaintiffs failed to explain why they were entitled to an injunction against non-parties to remedy USAPA's harmful activity. *Id.* at 10-11. The Court explained that an injunction against every representative of the East Pilots would be an injunction requiring a remedy against entities and individuals with no connection to USAPA beyond past membership. *Id.* at 11. The Court, therefore, concluded that the injunction should not explicitly reach non-parties but only members of the new committee, if any, working in concert with USAPA. *Id.* at 12. Accordingly, the Court denied Plaintiffs' request for a broad injunction.

***Melendres, et al. v. Arpaio,* 2015 U.S. App. LEXIS 6110 (9th Cir. April 15, 2015).** In this class action brought against Defendants, the Sheriff and the Maricopa County Sheriff's office, Plaintiffs alleged that Defendants maintained a custom, policy, and practice of racially profiling Latino drivers and passengers, and of stopping them pre-textually under the auspices of enforcing federal and state immigration-related laws, in violation of federal constitutional and statutory law. The Ninth Circuit affirmed the District Court's post-trial injunction against Defendants. After a bench trial, the District Court had concluded that Defendants employed an unconstitutional policy of using race as a factor in determining where to conduct patrol operations, in deciding whom to stop and investigate for civil immigration violations, and in prolonging the detentions of Latinos while confirming their immigration status. *Id.* at *6. The District Court

therefore had permanently enjoined Defendants from detaining, holding, or arresting Latino occupants of vehicles in Maricopa County using race or Latino ancestry as a factor and detaining them for a period longer than reasonably necessary. *Id.* at *7. A supplemental permanent injunction required Defendants to increase training, improve traffic-stop documents, develop an early identification system for racial profiling problems, enhance supervision and evaluation of deputies, and improve reporting of misconduct complaints. *Id.* at *9. The supplemental injunction also directed the appointment of an independent monitor to assess and report on Defendants' implementation of the original and supplemental injunctions. *Id.* The injunction applied across the board to all law enforcement activity within Defendants' office. Defendants appealed, challenging the scope of the injunction insofar it applied to Defendants' conduct outside saturation patrols. Defendants maintained that the evidence did not support the District Court's finding that Defendants' constitutional violations occurred during regular, non-saturation patrols. *Id.* at *10. Defendants also asserted that several terms of the injunction were broader than necessary to cure the constitutional violations found by the District Court, that the named Plaintiffs lacked standing to represent the claims of unnamed class members stopped, detained, searched or questioned outside of a saturation patrol, and that the class should be partially decertified and limited to Latino vehicle occupants stopped, detained, searched, or questioned during a saturation patrol. *Id.* at *10-11. The Ninth Circuit found that Plaintiffs had standing because their claims did not implicate a significantly different set of concerns than the unnamed Plaintiffs' claims. *Id.* at *18-19. The Ninth Circuit noted that the operative set of concerns was that the constitutional violations flowed from Defendants' policies that the District Court found to apply across the board to all traffic stops, not just to those conducted during saturation patrols. *Id.* at *20. Because the impermissible activity extended beyond saturation patrols and amounted to system-wide constitutional violations, the Ninth Circuit held that it was proper to extend the injunction to all patrols, and that the District Court did not err in holding that the named Plaintiffs had standing to assert the claims of absent class members whom Defendants stopped during non-saturation patrols. *Id.* at *22-23. The Ninth Circuit also ruled that the injunction was not overbroad because the District Court had the discretion to develop policies that would remedy conditions that did not explicitly violate the Constitution or did not flow from such a violation. *Id.* at *26-29. Accordingly, the Ninth Circuit affirmed the District Court's order granting an injunction against Defendants.

(xxxvi) FACTA And FDCPA Class Actions

***Altman, et al. v. J.C. Christensen & Associates, Inc.*, 2015 U.S. App. LEXIS 7980 (2d Cir. May 14, 2015).** Plaintiff brought a class action alleging that Defendant, a debt collector, violated the Fair Debt Collections Practices Act ("FDCPA") by offering to settle his debt for less than the full amount without warning him that his total savings might be reduced by an increase in his tax liability. Plaintiff received a letter from Defendant, which stated that Plaintiff's Bank of America FIA Card Services N.A. account had an outstanding balance of $6,068,13 and Defendant was contracted for the recovery efforts of his delinquent account. *Id* at *2. The letter also stated that to resolve the matter, Defendant was authorized to negotiate generous settlement terms and offered to: (i) settle the account for a lump-sum payment of $3,155.43, which was a savings of 48% on the outstanding account balance; (ii) extend the time and settle the account in three payments of $1,314.76, which was a savings of $2,123.85 on the outstanding account balance; or (iii) further extend the time and pay the balance in full in 12 payments of $505.68. *Id* at *3. Plaintiff alleged that the language in the letter was deceptive because the forgiven debt might be taxable under the Internal Revenue Code, and any savings could be less than the amount represented in the letter once taxes were taken into account. The District Court found that Defendant need not warn of possible tax consequences when making a settlement offer for less than the full amount owed to comply with the FDCPA. On Plaintiff's appeal, the Second Circuit affirmed. *Id*. at *2. The Second Circuit noted that the FDCPA bars the use of false or misleading representations or means in connection with the collection of debt. *Id*. at *5. Plaintiff argued that by specifying that the savings that he would enjoy if he accepted one of the choices set forth in the letter without warning him that any savings might be off-set by possible tax consequence, Defendant violation the FDCPA. Plaintiff relied on *Ellis v. Cohen & Slamowitz, LLP*, 701 F. Supp. 2d 215 (N.D.N.Y. 2010), which allowed a similar claim to survive a motion to dismiss. In *Ellis*, Plaintiff argued that a letter from a debt collector offering to discount or give forgive part of debt, without notifying him of the possible tax consequences, violated the FDCPA. The Second Circuit found that *Ellis* was unpersuasive because the letter at issue here stated that the percentage saved was on his outstanding account balance.

Id. at *6. The Second Circuit explained that the fact that a debtor may have to pay tax on the amount saved was simply not deceptive in the context of what the savings were on a debtor's outstanding account balance. *Id*. The Second Circuit cited to case law authority that held that the language of the FDCPA does not require a debt collector to make any affirmative disclosures of potential tax consequences when collecting a debt. *Id*. at *7. Accordingly, the Second Circuit affirmed the District Court's order of dismissal.

***Beauvoir, et al. v. Israel,* 2015 U.S. App. LEXIS 12535 (2d Cir. July 24, 2015).** Plaintiffs alleged that Defendant, an attorney representing National Grid New York ("National Grid"), sent them a letter stating that National Grid referred the matter to him for the purposes of collection of a debt based upon the consumption of unmetered gas at their residence. Plaintiffs alleged that although the letter advised them of their right to dispute the claim, it did not advise them that they had 30 days to do so or state the amount of the debt. *Id*. at *2. Plaintiffs contended that these omissions violated the Fair Debt Collection Practices Act ("FDCPA"). Separately, National Grid sued Plaintiffs in the state court alleging that Plaintiffs diverted and consumed unmetered natural gas. *Id*. at *4. Defendant moved to dismiss, asserting that Plaintiffs had failed to state an FDCPA claim because Defendant initiated an action concerning an alleged theft of natural gas, and thus, it did not concern a debt as that term is defined in the statute. *Id*. at *5. The District Court granted the motion, holding that obtaining natural gas through meter tampering was theft, and was outside the scope of the FDCPA. *Id*. On appeal, the Second Circuit affirmed the District Court's decision. The Second Circuit noted that the FDCPA defined a debt as any obligation or alleged obligation of a consumer to pay money arising out of transaction in which money, property, insurance, or services were the subject of the transaction. *Id*. at *6-7. The Second Circuit reasoned that liability from theft or torts did not constitute debt within the meaning of the FDCPA. *Id*. at *7. The Second Circuit thus concluded that Plaintiffs had not plausibly alleged a "debt" within the meaning of the FDCPA. *Id*. at *8-9. Accordingly, the Second Circuit affirmed the District Court's order that granted the motion to dismiss.

***Buchanan, et al. v. Northland Group, Inc.*, 2015 U.S. App. LEXIS 517 (6th Cir. Jan. 13, 2015).** Plaintiff filed a putative class action under the Fair Debt Collection Practices Act ("FDCPA"). Plaintiff claimed that Defendant made a settlement offer to Plaintiff to resolve an unpaid debt without disclosing that the statute of limitations had run on the debt and, thereby, falsely implied that Defendant could enforce the debt by law. *Id.* at *4. Plaintiff also claimed that Defendant failed to disclose that a partial payment on a time-barred debt restarts the statute of limitations under Michigan law. *Id.* The District Court granted Defendant's motion to dismiss, concluding that the letter was not misleading as a matter of law. On appeal, the Sixth Circuit reversed. The Sixth Circuit noted that the FDCPA bans all false, deceptive, or misleading debt collection practices and protects all consumers from practices that would mislead the reasonably unsophisticated consumer. *Id.* at *5-6. First, the Sixth Circuit held that whether the letter is misleading raised a question of fact and that the District Court should have rejected such a fact-based claim only after drawing all reasonable inferences in Plaintiff's favor and concluding that Plaintiff failed to allege a plausible theory of relief. *Id.* at *7-8. The Sixth Circuit found that Plaintiff's theory was sufficiently plausible such that she deserved an opportunity to prove her case. Plaintiff identified an expert in the area, Dr. Timothy E. Goldsmith, a professor of psychology, who planned to testify about consumers' attitudes toward, and their understanding of, time-barred debt. The Sixth Circuit concluded that the District Court should have ascertained on summary judgment – not through a motion to dismiss – whether it should resolve Plaintiff's claim as a matter of law. *Id.* at *9. Second, the Sixth Circuit opined that Plaintiff offered a plausible theory of consumer deception and confusion that nudged her claims across the line from conceivable to plausible. Formal and informal dictionaries alike contain a definition of "settle" that refer to concluding a lawsuit, and Wiktionary defines "settlement agreement" as a contractual agreement between parties to actual or potential litigation by which each party agrees to a resolution of the underlying dispute. *Id.* at *12. The Sixth Circuit, therefore, found it plausible that a settlement offer falsely could imply that the underlying debt was enforceable by law. *Id.* Another problem with the letter was that an unsophisticated debtor who could not afford the settlement demand nevertheless could assume from the letter that some payment was better than no payment. The general rule in Michigan, however, is that partial payment restarts the statute of limitations, giving the creditor a new opportunity to sue for the full debt. Therefore, paying anything less than the settlement demand would expose a debtor to substantial new risk. *Id.* at *13. The Sixth Circuit noted that this point almost assuredly was not known to most people, whether

sophisticated, reasonably unsophisticated, or unreasonably unsophisticated, and it was not hard to imagine how attempts to collect time-barred debt might mislead consumers into trying their best to repay. *Id.* at *13-14. Accordingly, the Sixth Circuit reversed the District Court's order dismissing the complaint.

***Foley, et al. v. Buckley's Great Steaks, Inc.,* 2015 U.S. Dist. LEXIS 46477 (D.N.H. April 9, 2015).** In this putative class action, Plaintiff alleged that Defendants issued approximately 32,000 electronically printed point-of-sale credit card receipts that included the card's expiration date in violation of the Fair and Accurate Credit Transactions Act. Plaintiff moved for class certification, which the Court denied. Defendants first argued that Plaintiff did not satisfy the adequacy requirement of Rule 23(a)(4). Defendants did not suggest that there was a conflict of interest between Plaintiff and the other members; instead, they focused on: (i) Plaintiff's lack of knowledge and her passivity as a litigant; and (ii) a lack of credibility that manifested itself at her deposition. *Id*. at *6-7. With regard to Plaintiff's knowledge, Defendants pointed to her testimony that her communications with counsel had been limited to two telephone conversations and two e-mails; she did not learn until her deposition that her complaint had been amended; she engaged in no research to determine her counsel's qualifications; and she knew nothing about the terms of a proposed settlement agreement before it was submitted to Defendants and the Court until it was produced at her deposition. *Id*. at *7. Defendants relied on *Berger v. Compaq Computer Corp.*, 257 F.3d. 475 (5th Cir. 2001), which applied a test for the adequacy requirement focusing on the zeal and competence of the class representative's counsel, and the willingness and ability of the class representative to take active role in and control the litigation to protect the interests of the absent class members. *Id*. at *7-8. The Court noted that in *Carrier v. American Bankers Life Assurance Co. of Florida*, 2008 U.S. Dist. LEXIS 8603 (D.N.H. Feb. 1, 2008), the Court observed that the *Berger* standard had not been adopted in the First Circuit. In *Carrier*, the Court found that the class representative need not have expert knowledge of the subject matter of the suit as long as the representative had not abdicated control of the case to counsel, and maintained sufficient involvement in the case. *Id*. at *8-9. In *Carrier*, the Court held that two Plaintiffs failed to demonstrate that they understood how to fulfill their duty to protect the interests of the class because the witnesses failed to answer questions such as what they would do if there was a conflict of interests between the class counsel and the class. *Id*. at *9. Similarly, in this case, the Court noted that Plaintiff was not aware of the full extent of her responsibilities, or her duty to protect the class against conflicting interests. *Id*. at *11-12. Moreover, the Court opined that Plaintiff's deposition testimony demonstrated that she had minimal involvement in her case. *Id*. at *12. In sum, the Court concluded that even under the less stringent standard in *Carrier*, rather than the *Berger* standard, Plaintiff failed to satisfy the adequacy requirement. Defendants next argued that a class action was not superior to individual litigation because the threat of the exorbitant damages that Plaintiff sought would leave Defendants with no choice but to shut down their operations, and destroy a business that provided livelihood to 50 individuals. *Id*. at *16. The Court accepted Defendant's position. It ruled that Plaintiff failed to demonstrate that a class action was superior because the proposed class would be difficult to manage because it was not ascertainable that a successful individual action would provide her with costs and attorneys' fees, and the proposed class action appeared to be substantially more attorney-driven than client-driven. *Id*. at *24. Accordingly, the Court declined to certify the class action.

***Legg, et al. v. Laboratory Corp. Of America Holdings*, Case No. 14-CV-61543 (S.D. Fla. Nov. 10, 2015).** Plaintiff brought a class action alleging that Defendant systematically printed debit and credit card transaction receipts that revealed the expiration dates of the cards used in transactions in willful violation of the Fair and Accurate Credit Transaction Act ("FACTA"), 15 U.S.C. § 1681c(g)(1). Plaintiff alleged that Defendant violated the FACTA by printing the credit and debit card information on receipts after customers paid for their lab tests. As a result, Plaintiff asserted that he and the class members were exposed to higher risk of identity theft. After discovery, the parties agreed to a class settlement of $11 million, and Plaintiff filed a motion for preliminary approval and certification of a settlement class. The Court granted Plaintiff's motion.

Editor's Note: The settlement class in *Legg* was estimated at 665,000 class members. The $11 million settlement is believed to be the largest cash settlement ever under the FACTA.

***McMahon, et al. v. LVNV Funding,* 2015 U.S. App. LEXIS 21223 (7th Cir. Dec. 8, 2015).** Plaintiff brought a class action alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") by seeking to collect or settle debts that were not legally enforceable because the statute of limitations had run. Plaintiff sought to certify a class of people who had received misleading dunning letters from Defendant, which the District Court denied. *Id.* at *1. On appeal, the Seventh Circuit vacated and remanded the District Court's order. *Id.* The Seventh Circuit noted that Plaintiff had first appealed in *McMahon v. LVNV Funding, LLC,* 744 F.3d 1010 (7th Cir. 2014) ("*McMahon I*"), challenging the District Court's dismissal of his class claims under Rule 12(b)(6) and the conclusion that his individual claims were rendered moot by a settlement offer. *Id.* In *McMahon I*, the Seventh Circuit reversed the District Court's judgment that Plaintiff's individual claims were moot and further concluded that the class allegations had been incorrectly dismissed. *Id.* Here, Plaintiff argued that the District Court erred by ruling that the need for individual damages determinations justified denying class certification. *Id.* at *6. At the outset, the Seventh Circuit noted that the need for individual proof alone did not necessarily preclude class certification. *Id.* at *7. The Seventh Circuit observed that, if a case required determinations of individual issues of causation and damages, a District Court may bifurcate the case into a liability phase and a damages phase. *Id.* at *8. The Seventh Circuit also rejected the District Court's analysis that the amount of each class member's actual damages were capable of ministerial determinations, yet the question of causation was not. *Id.* The Seventh Circuit found that a Plaintiff must prove causation under the FDCPA to establish actual damages. *Id.* Consequently, the Seventh Circuit held that since actual damages were capable of ministerial determination, causation likewise must be capable of ministerial determination. *Id.* at *9. Defendant defended the District Court's denial of class certification as a ruling that merely recognized that class certification was problematic where determining membership in the class required an assessment of individual class members. *Id.* The Seventh Circuit observed that although the class included people who made payments after receiving a dunning letter in violation of the FDCPA, the definition of the proposed class said nothing about their reason for doing so; thus, membership in the sub-class did not hinge on causation. *Id.* at *10. The Seventh Circuit further held that since the FDCPA is a strict liability statute, members of the class would be entitled to statutory damages for a violation of the law regardless of any actual damages. *Id.* Accordingly, the Seventh Circuit vacated and remanded the District Court's order.

***O'Brien, et al. v. Airport Concessions, Inc.*, 2015 U.S. Dist. LEXIS 5515 (D. Colo. Jan. 16, 2015).** Plaintiff, a customer, brought an action alleging that he received a computer-generated cash register receipt from Defendant's store displaying the expiration date of his credit card, which violated the Fair and Accurate Credit Transactions Act ("FACTA"). Subsequently, the parties settled, and the District Court granted final approval to the settlement. Plaintiff moved for attorneys' fees and an incentive award, which the Court granted in part. The settlement provided each class member a 25% discount off their purchase at Defendant's stores on certain days with a maximum discount per class member of $100 per transaction or per day. As the settlement did not provide a common fund to compensate the class members, the Court applied the lodestar method to determine reasonable attorneys' fees. *Id.* at *3. Regarding a reasonable hourly rate, the Court ordered Plaintiff to explain why it should award more than the rate customarily paid to attorneys in cases brought under the Fair Debt Collection Practice Act ("FDCPA"), and noted that FACTA cases were fundamentally similar to FDCPA cases. *Id*. at *6. Although, Plaintiff argued that FDCPA cases were typically settled early without significant motions practice, the Court noted that this case also resulted in an early settlement before the filing of a motion for summary judgment or to dismiss. *Id.* at *7. The Court, however, agreed with Plaintiff that the claim here did merit a greater hourly rate than what was typically awarded in FDCPA litigation, since Plaintiff sued on behalf of a larger class action and the settlement negotiations were relatively complex. Accordingly, the Court used a rate of $250 per hour and adjusted the fee upward to compensate for the novelty and complexity in this case. *Id.* at *10. Regarding the reasonableness of hours expended on the action, the Court held a hearing and distributed redline comparisons of several filings from this case and another Plaintiff's counsel previously litigated in the U.S. District Court for the Northern District of Illinois. The Court found substantial similarities between these pleadings and asked Plaintiff's counsel to explain why he required 30 hours to draft documents when it appeared he used a similar template from a previous case. Plaintiff justified the facially excessive billing, arguing that the issues here required substantial amounts of extra research. The Court, however, declined

to accept that these revisions took Plaintiff's counsel 30 hours to complete, especially considering counsel's professed 18 years of experience in commercial class action litigation and the fact that electronic research allows attorneys to quickly determine whether cases have been overruled. *Id.* at *12. The Court also opined that Plaintiff's counsel did not exercise good billing judgment in charging for 16 hours of work on the original motion for attorneys' fees, and found examples of duplicative billing where the associate charged for the same tasks as Plaintiff's counsel. Accordingly, the Court made adjustments to the total hours spent by Plaintiff's counsel, and awarded $73,266 in fees and $2,252.93 in costs. Regarding the incentive award, the Court remarked that the class representative was an average consumer, only familiar with the FACTA truncation requirements from a previous lawsuit, and Plaintiff's counsel did not need any information from the class representative apart from an oral account of the transaction at issue and a receipt that showed a FACTA violation. *Id*. at *18. Further, the class representative incurred no personal risk by becoming a named Plaintiff. Thus, the Court reduced the class incentive award from $5,000 to $2,500.

***Powers, et al. v. Credit Management Services, Inc.,* 2015 U.S. App. LEXIS 486 (8th Cir. Jan. 13, 2015).** Plaintiffs, a group of consumers, brought a class action alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") and the Nebraska Consumer Protection Act ("NCPA") by using standard-form pleadings to commence consumer debt collection actions in state courts. Plaintiffs alleged, among other things, that Defendant improperly alleged that more than 90 days had elapsed since the presentation of the claim to the consumer and sought pre-judgment interest. The District Court certified four classes of persons sued by Defendant in state courts using standard-form complaints and discovery requests. On Defendant's appeal, the Eighth Circuit reversed, finding that the District Court abused its discretion by failing to conduct the rigorous analysis that Rule 23 requires. First, Plaintiffs alleged that Defendant improperly sought pre-judgment interest pursuant to §§ 45-104 and 25-1801 of the Nebraska Revised Statutes. *Id.* at *7. Plaintiffs alleged that Defendant's standard-form allegations violated § 1692f(1) of the FDCPA because § 45-104 did not apply if the consumer contested the collection lawsuit, in which case Defendant had an unliquidated claim and could not recover pre-judgment interest under § 45-103.02. *Id.* at *7-8. The Eighth Circuit found that, if Plaintiffs' interpretation of § 45-104 was wrong, then Plaintiffs would lose on this theory, and prompt resolution of the pending cross-motions for summary judgment would have obviated the need for class certification of these claims. On the other hand, if Plaintiffs' state law theory was correct, many individualized inquiries would be required to resolve the class members' claims. The Eighth Circuit reasoned that the records pertaining to every state court collection suit would have to be reviewed to determine: (i) whether Defendant claimed pre-judgment interest under § 45-104; (ii) if claimed, whether Defendant recovered pre-judgment interest under § 45-104, making the alleged violation of FDCPA § 1692f(1) material; (iii) for every material violation, whether the underlying consumer transaction reflected that Defendant had a legitimate claim under § 45-104; and (iv) whether Plaintiffs' legal theory was litigated by the class member and resolved by the state court for issue preclusion purposes. *Id.* at *9. Second, Plaintiffs alleged that Defendant's standard-form complaints violated § 1692f(1) because Defendant alleged that more than 90 days had elapsed since the presentation of the claim when, in fact, Defendant had not presented the claim but relied on the original creditor's billing statement. *Id.* at *13. Even though every standard-form complaint apparently included the 90-day allegation, the Eighth Circuit noted that, if Plaintiffs' state law theory was correct, individualized inquiries would be required. Each class member's state court collection suit would have to be examined to determine whether: (i) Defendant sought pre-judgment interest under § 25-1801; and (ii) if so, whether Defendant personally provided the 90-day presentation or relied on an assignor's billing statement or demand for payment; (iii) Defendant recovered pre-judgment interest, thereby making the alleged FDCPA violation material; and (iv) Plaintiffs' legal theory was litigated by the class member and resolved by the state court for issue preclusion purposes. Accordingly, the Eighth Circuit concluded that the standard-form complaint classes did not meet the commonality, predominance, or superiority requirements of Rule 23. Further, Plaintiffs alleged that Defendant's standard-form discovery instructions confused and misled unsophisticated consumers as to their rights in answering the discovery and demanded irrelevant and highly personal financial information. The Eighth Circuit noted that, where an attorney is interposed as an intermediary between a debt collector and a consumer, it was assumed that the attorney, rather than the FDCPA, would protect the consumer from a debt collector's fraudulent or harassing behavior. *Id.* at *17.

Thus, applying the competent lawyer standard to discovery requests served on represented debtors during the course of litigation, the Eighth Circuit opined that Plaintiffs' facial invalidity claims did not meet the commonality and predominance requirements of Rule 23. Accordingly, the Eighth Circuit reversed the District Court's order granting class certification.

***Sykes, et al. v. Mel S. Harris And Associates*, 2015 U.S. App. LEXIS 2057 (2d Cir. Feb. 10, 2015).** Plaintiffs brought separate actions alleging that Defendants obtained default judgments against them in New York City civil courts between 2006 and 2010, without serving them a summons and complaint. *Id*. at *6. Defendants included a debt buyer, a law firm, and a process server. Plaintiffs contended that Defendants obtained those default judgments by: (i) obtaining charged-off consumer debt; (ii) initiating a debt collection action by serving summons and complaint on the purported debtor; and (iii) submitting fraudulent documents in order to obtain a default judgment. *Id*. Plaintiffs' actions asserted claims under the Fair Debt Collections Practices Act ("FDCPA"), the New York General Business Law ("GBL"), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). After the actions were consolidated, the District Court certified the class. On Defendants' appeal, the Second Circuit affirmed. At the outset, the Second Circuit noted that the FDCPA was enacted to eliminate abusive debt collection practices by debt collectors. Defendants challenged the District Court's conclusion that liability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt in question. Defendants contended that individual issues would predominate over common issues in this case because the District Court would be forced to confront individual issues with respect to damages, timeliness, and service. *Id*. at *36. Plaintiffs' complaint sought three kinds of damages, including statutory damages, actual and/or compensatory damages in an amount to be proven at trial, and incidental damages. It was undisputed that statutory damages under GBL § 349 can be assessed on the basis of common proof, as they were capped at $50. *Id*. at *38. Similarly, the Second Circuit noted that the FDCPA caps class damages at $500,000, and accordingly provides common proof to consider the scope of violations of the FDCPA. *Id*. The Second Circuit therefore noted that the only individualized damages inquiries that may exist were those related to the return of the money extracted from the class as a result of fraudulent judgments, as well as incidental damages. The Second Circuit remarked that the inquiries into alleged damages were not sufficient grounds on which to conclude that the District Court's determination was an abuse of discretion in finding that individualized damages issues would not predominate in this case. *Id*. Defendants also suggested that the District Court did not engage in a rigorous analysis of the Rule 23 requirements required at the class certification stage. Defendants contended that the District Court's statement that individualized questions did not preclude a finding of predominance under Rule 23(b)(3) was insufficient to make out the opposite conclusion, *i.e.*, that common questions predominated. The Second Circuit disagreed, and found that the District Court did factor in the individualized questions and had ruled that it did not outweigh other common issues. *Id*. at *41. The Second Circuit also found that the class action was the superior method of adjudication, and affirmed the order certifying the class.

***Walker, et al. v. Greenspoon Marder, P.A.*, Case No. 13-CV-14487 (S.D. Fla. Jan. 5, 2015).** Plaintiffs, a group of debtors, brought a class action alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") by attaching misleading notices to foreclosure complaints. Plaintiffs moved for certification of a class of all persons with an address in a county in Florida who were subject to and served with a state court debt collection lawsuit filed by Defendant and issued a notice identical to the notice attached to Plaintiffs' complaint. *Id.* at 2. The District Court granted the motion. First, the Court concluded that Plaintiffs established numerosity. Plaintiffs asserted that Defendant served complaints containing the improper notice to more than 500 individuals residing in Florida, and they provided materials identifying 2,606 Florida residents who received a notice from Defendant. Second, the Court found that the class consisted of individuals who shared a common question of law, *i.e.*, whether the notices identical to that attached to Plaintiffs' complaint violated the FDCPA. Each class member's claim depended on the resolution of that common contention. *Id.* at 5. Third, the Court determined that Plaintiffs demonstrated typicality. The Court noted that typicality requires special consideration of whether there is a nexus between the class representative's claims or defenses and the common questions of fact or law that unite the class. *Id.* The Court found that the class included individuals who, like Plaintiffs, received a form notice in connection with Defendant's efforts to foreclose on their properties and that this nexus was sufficient to

render Plaintiffs' FDCPA claim typical of the FDCPA claims of the class members. Fourth, the Court ruled that Plaintiffs met the adequacy requirement because Plaintiffs had no substantial conflict of interest with the class and that they would adequately prosecute the action on behalf of the class. Fifth, the Court opined that predominance was satisfied. The Court noted that the allegations of consumer fraud under the FDCPA centered around a common question of fact, namely the receipt of Defendant's form notice, and a common question of law, namely whether that notice violated the FDCPA. *Id.* at 7. The Court found that no individual questions overshadowed these common questions. Finally, the Court observed that the large number of potential claims – along with the relatively small statutory damages, the desirability of adjudicating these claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of these claims – all indicated that class treatment was the superior method of adjudication. *Id.* Accordingly, the Court found that Plaintiffs satisfied both Rule 23(a) and Rule 23(b) requirements and certified Plaintiffs' proposed class.

***Zarichny, et al. v. Complete Payment Recovery Services, Inc.,* 2015 U.S. Dist. LEXIS 6556 (E.D. Pa. Jan. 21, 2015).** Plaintiff, a college student, brought a putative class action against Defendants, Complete Payment Recovery Services ("CPRS") and its parent company, Fidelity National Information Services ("FIS"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act ("TCPA"). Plaintiff alleged that she rented college textbooks and began receiving a series of calls on her cell phone that were recorded messages from CPRS to collect overdue amounts on two textbooks she had rented but not returned. Plaintiff alleged that she had returned the books and did not owe any money. Plaintiff also alleged that FIS, acting as debt collector, provided her with no information about the alleged debt, placed calls to her through CPRS at unusual and inconvenient times, and did so repeatedly and continuously with the intention of harassing her. *Id.* at *8-9. Plaintiff brought the lawsuit as a nationwide class action on behalf of all those who allegedly received calls on their cell phones from Defendants to whom Defendants did not send a written notice pursuant to FDCPA, and on behalf of those people who received calls from Defendants without their prior consent as required by the TCPA. *Id.* at *2. Defendants moved to dismiss, arguing that Plaintiff had failed to allege that FIS placed any calls to her as the TCPA required or acted as a debt collector as the FDCPA defines the role. *Id.* at *11. Defendants also argued that CPRS' acts might not be imputed to its parent company because Plaintiff had failed to allege that FIS dominated CPRS or that CPRS was either an instrumentality of FIS or a sham corporation. *Id.* Defendants further maintained that Plaintiff's FDCPA claim against CPRS included only rote recitals of the statute's sub-parts and therefore must be dismissed. *Id.* at *12. The Court partly granted Defendants' motion. First, the Court granted Defendants' motion to dismiss FIS. The Court noted that Plaintiff alleged no factors that could make FIS responsible for its subsidiary's acts under either the FDCPA or the TCPA. Plaintiff not only had failed to allege that FIS was a debt collector, but also failed to allege that FIS enlisted CPRS to call her or that CPRS acted as FIS' agent in placing the alleged telephone calls. *Id.* at *14-15. Further, Plaintiff's generalized allegations about FIS' business conduct, including tax collection, call-center operation, and shared executives with CPRS, fell short of the intrusive control required to hold a parent corporation accountable for its subsidiary's action. *Id.* at *16. The Court therefore dismissed FIS from the action. The Court also granted Defendants' motion to dismiss Plaintiff's claim against CPRS pursuant to the FDCPA to the extent Plaintiff had not sufficiently alleged that the calls were placed at a statutorily defined "inconvenient" time. *Id*. at *19. Plaintiff had conceded that all of the phone calls she received occurred within the statutorily permissible time and offered nothing to support that CPRS was aware of her idiosyncratic circumstances that made those times inconvenient for her. *Id.* at *20-21. The Court therefore dismissed Plaintiff's claim based on the "inconvenient" time theory. *Id.* Finally, the Court dismissed Plaintiff's claim that CPRS violated the FDCPA by causing her telephone to ring repeatedly or continuously with the intent to annoy, and her claim that CPRS' voice-mail was confusing and misleading. *Id.* at *21-22. The Court opined that Plaintiff had failed to meet the threshold level to support a reasonable inference that she has made a plausible claim of an annoying call, and her allegations were devoid of any communications from CPRS that could be reasonably interpreted as anything other than a request that she contact the company about the debt. *Id.* The Court, however, denied Defendants' motion to dismiss Plaintiff's claim that CPRS violated the written notice provision of the FDCPA. The Court ruled that the alleged recorded message left for Plaintiff was plainly a communication, and CPRS should have sent follow-up written notice within five days as the FDCPA required. *Id.* at *26. Since CPRS did not do

so, the Court denied Defendants' motion to dismiss Plaintiff's claim based on the FDCPA written notice. Accordingly, the Court partly granted and partly denied Defendants' motion to dismiss.

(xxxvii) TCPA Class Actions

***Anderman, et al. v. Sprint Spectrum L.P.*, 2015 U.S. App. LEXIS 7727 (7th Cir. May 11, 2015).** Plaintiffs, a group of mobile phone service subscribers, brought a class action under the Telephone Consumer Protection Act ("TCPA") alleging that Defendant made unsolicited phone calls advertising its offers and devices to fit Plaintiffs' needs. Plaintiffs obtained mobile phone service from U.S. Cellular under a renewable two year contract, which was renewed for the last time in 2012, and the contract included an arbitration clause. *Id.* at *1-2. The contract also provided that U.S. Cellular might assign this agreement without notice to Plaintiffs. *Id*. at *2. Defendant Sprint Spectrum L.P. ("Sprint") was a mobile service provider. In 2013, U.S. Cellular sold Plaintiffs' service contract to Sprint without any notice. Several months later, Sprint sent a letter to Plaintiffs informing them of the sale and that their mobile service would be terminated on January 31, 2014, because U.S. Cellular's cellphones were not compatible with Sprint's network. After Sprint made several phone calls to Plaintiffs regarding the expiration of the service and about a set of offers, Plaintiffs brought this action. Sprint moved to compel arbitration, which the District Court denied. The District Court reasoned that, since Sprint's contract with Plaintiffs terminated before the phone calls, the legality of the calls could not have arisen from or related to the contract. *Id.* at *5. *Id.* On appeal, the Seventh Circuit reversed and remanded. The Seventh Circuit remarked that in order to prevent the loss of all those customers, Sprint made calls to the customers about a set of offers and services available, and, as a result, the calls gave rise to the dispute. Thus, the Seventh Circuit opined that, by stepping into U.S. Cellular's shoes, Sprint established a business relationship that would have been disrupted had it told Plaintiffs only that their services were going to be cut-off, as opposed to calling them an making an offer to substitute an equivalent service. Plaintiffs neither took any of Sprint's calls nor called back; instead, they signed on with another service provider. *Id.* at *9-10. The Seventh Circuit, therefore, concluded that Sprint's motion to order arbitration should have been granted. Accordingly, the Seventh Circuit reversed and remanded the judgment of the District Court.

***Grok Lines, Inc., et al. v. Paschall Truck Lines, Inc.,* 2015 U.S. Dist. LEXIS 124812 (N.D. Ill. Sept. 18, 2015).** Plaintiff brought a putative class action alleging that Defendant, a freight-carrier, sent unsolicited faxes to Plaintiff and numerous other unwilling recipients in violation of the TCPA. *Id.* at *2. The violation of TCPA is punishable by actual damages or statutory damages of $500 per violation. *Id.* The Court previously dismissed Plaintiff's state law claim for failure to state an adequate claim, and rejected Defendant's argument that the faxes did not constitute unlawful advertisement. *Id.* The discovery that followed showed that Defendant sent one junk fax to about 180 recipients. *Id.* The parties eventually engaged in settlement negotiations, and agreed that Defendant would take steps to avoid TCPA violations, but no money would be paid to the class. *Id.* at *3. The parties also agreed to the payment of attorneys' fees of $98,500 to Plaintiff's counsel and an incentive award of $1,500 to the named Plaintiff, and sought settlement approval from the Court. The Court denied approval, finding the proposed settlement unfair, unreasonable, and inadequate. The Court found that the request of Plaintiff's counsel for the entire settlement fund, except for the $1,500 incentive award to the named Plaintiff, solely on the basis of proposed injunctive relief, offered no prospect of meaningful impact on either the class members' interests or Defendant's future behavior. *Id.* at *9. While the Court acknowledged that an injunction could be a powerful, long lasting tool secured by a settlement in circumstances where it bars a party from doing something harmful that it has been doing in the past, it pointed out that Plaintiff's counsel missed a fundamental point regarding the action, *i.e.*, that Defendant was accused of sending one junk fax to a large number of companies, not a repeated pattern of behavior that required the Court's intervention. *Id.* at *10. The record showed that there was no reason to believe that Defendant would send out bulk advertising faxes again, and Plaintiff's counsel was unable to identify any tangible risk of repeated harm to the class. *Id.* The Court therefore found that the injunction failed to meet a minimal threshold of reasonableness and adequacy for its supposed beneficiaries, the class members. *Id.* at *18. Beyond the weakness of the injunction, the Court found it unacceptable to allocate zero settlement dollars to class members. *Id.* at *19. Plaintiff's counsel maintained that meaningful monetary relief under the TCPA was simply not feasible based on Defendant's size and resources. The Court, however, noted that Defendant appeared willing to

pay regardless of the recipient, and at $500 per violation and a recipient list of 180, Defendant would be on the hook for $90,000 in statutory damages if the entire class submitted claims, which would mean that $100,000 settlement would fully cover the damages. *Id.* at *20-21. While the Court acknowledged that leaving just $8,500 for legal fees would be unfair, it also noted that giving the lawyers $98,500 and the class members nothing would be equally unfair. *Id.* at *21. The Court held that the parties would need to craft an agreement that allocated the settlement fund between Plaintiff's counsel and class members in a manner consistent with legal precedent. *Id.* at *32-34. Accordingly, the Court denied Plaintiff's motion for approval of the class action settlement.

***Imhoff Investment, LLC, et al. v. Alfoccino, Inc.,* 2015 U.S. App. LEXIS 11617 (6th Cir. July 7, 2015).** Plaintiff Avio, Inc. (substituted for original Plaintiff Imhoff Investment, LLC), brought a class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by hiring Business to Business Solutions ("B2B") to send unsolicited facsimile advertisements to Plaintiff and a class of similarly-situated individuals. The District Court granted Defendant summary judgment based on: (i) lack of standing because Plaintiff failed to show that anyone actually printed or viewed the faxes; and (ii) Plaintiff's inability to prove Defendant's vicarious liability for B2B's transmission of the faxes. *Id.* at *5. On Plaintiff's appeal, the Sixth Circuit reversed. The Sixth Circuit found that Plaintiff, as the recipient of Defendant's unsolicited advertising faxes, alleged an injury sufficient to meet Article III standing requirements. *Id.* at *7-8. The Sixth Circuit found guidance in a recent TCPA case – *American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*, 757 F.3d 540 (6th Cir. 2014) – where it expressly rejected the proposition that only the "owner" of the fax machine who received the unsolicited fax had standing to sue. *Id.* at *8-10. The Sixth Circuit noted that Congress might "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Id.* at *12. The Sixth Circuit explained that, in *American Copper,* it found that Congress, through the TCPA, intended to remedy a number of problems associated with junk faxes, including the cost of paper and ink, the difficulty of the recipient's phone line being tied up, and the stress on switchboard systems. *Id*. The Sixth Circuit, therefore, concluded that printing a fax advertisement was not necessary to suffer a violation of the statutorily-created right to have one's phone line and fax machine free of the transmission of unsolicited advertisements. *Id.* at *12-13. The Sixth Circuit noted that its decision was consistent with recent TCPA decisions issued by the Eleventh, Seventh, and Eighth Circuits. As to vicarious liability, the Sixth Circuit held that, because Defendant, as a sender of an unsolicited fax advertisement, was subject to direct liability under the TCPA, Plaintiff need not prove vicarious liability. *Id.* at *15-16. Based on the U.S. Federal Communications Commission's definition of "sender" as the "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement," the Sixth Circuit explained that direct TCPA liability attaches to the entity whose goods and services are advertised. *Id.* at *16-17. Because evidence showed that the unsolicited advertisements Plaintiff received from B2B on two occasions in late 2006 advertised or promoted Defendant's goods and services, the Sixth Circuit ruled that Defendant could be directly liable as the sender of the faxes. *Id.* at *17. Accordingly, the Sixth Circuit reversed the District Court's order granting summary judgment to Defendant.

***In Re Capital One Telephone Consumer Protection Act Litigation,* 2015 U.S. Dist. LEXIS 17120 (N.D. Ill. Feb. 12, 2015).** Plaintiffs brought a class action alleging that Defendant violated the TCPA by using an automatic telephone dialing system and/or an artificial pre-recorded voice to call cell phones in connection with an attempt to collect on a credit card debt without the prior express consent of the recipients. The parties eventually settled the action wherein Defendant agreed to pay $75,455,099 into a settlement fund out of which all eligible class members who made a timely claim would receive their *pro rata* share. The value of the settlement to class members amounted to $47,700,569, after subtracting notice and administration costs of $5,093,000, requested service awards of $25,000 for the five named Plaintiffs, and requested attorneys' fees of $22,636,530. *Id*. at *12. The settlement achieved an estimated $34.60 recovery per claimant. Finding the settlement fair, reasonable, and adequate, the Court granted final approval of the class action settlement. The Court noted that the $34.60 per claimant did not seem so miniscule in light of the fact that class members did not suffer any actual damages beyond a few unpleasant phone calls, which they received ostensibly because they did not pay their credit card bills on

time. *Id.* at *20. A group of objectors then contended that class counsel's requested fee was excessive. Class counsel sought an award of attorneys' fees equal to 30% of the settlement fund, and argued that their requested fee was less than the 33.3% fee consistently awarded in TCPA and non-TCPA class action litigation. *Id.* at *32. The Court disagreed, recalculated the percentage fee sought by class counsel, and found that class counsel sought slightly above 32%, which exceeded the market rate. The Court noted that each of the potential impediments to establishing Defendant's liability, including the class members' alleged consent to be called, only affected class counsel's ability to prove their case on liability and once the risk resulting from such impediments was overcome, class counsel's ability to obtain a large recovery was no longer materially affected by that risk. *Id*. at *60-61. The Court determined that the risk premium related to class counsel's fees should apply only to the attorneys' fees associated with the initial recovery tier negotiated between class counsel and the sophisticated class members before the case was filed. *Id*. The Court then analyzed each benchmark set by the Seventh Circuit to estimate the market fee, including data from similar common fund cases where fees were privately negotiated, and it concluded that 20% of the settlement fund would be the appropriate percentage for the class counsel's fee. *Id*. at *66-67. The Court therefore awarded class counsel $15,668,265 or 20.77% of the entire settlement fund toward attorney fees. The Court also granted requested incentive awards of $5,000 each to the named Plaintiffs finding it consistent with the awards granted by other courts in similar litigation. *Id*. at *67. Accordingly, the Court granted Plaintiffs' motion for final approval of the class action settlement.

***Meinders, et al. v. Unitedhealthcare, Inc.,* 2015 U.S. App. LEXIS 15501 (7th Cir. Sept. 1, 2015).** Plaintiff brought a putative class action in Illinois state court alleging that Defendant sent him and a number of similarly-situated persons unsolicited faxes advertising Defendant's services in violation of the Telephone Consumer Protection Act ("TCPA") and the Illinois Consumer Fraud and Deceptive Practices Act. *Id.* at *2. Defendant removed the case and then moved to dismiss the complaint for improper venue. Defendant argued that the alleged junk fax that it allegedly sent Plaintiff was related to a provider agreement entered by Plaintiff with a Defendant-owned entity, ACN Group, Inc., and the provider agreement required Plaintiff to arbitrate his claim in Minnesota. *Id.* at *2-3. In response, Plaintiff argued that Defendant could not enforce the agreement's arbitration provision because it was neither a party nor a signatory to the provider agreement. *Id.* at *7. Plaintiff also contended that Defendant did not provide evidentiary support for its claim of ownership of ACN Group and that, even if it had, its ownership theory did not itself confer a right upon Defendant to enforce the arbitration provision. *Id.* at *8. In its reply, Defendant conceded that it was not a signatory to the Provider argument, but argued that it was entitled to enforce the agreement based on a contractual theory of assumption, and Defendant introduced a declaration of its Chief Executive Officer ("CEO") stating that ACN Group became its wholly-owned subsidiary in 2003 and assumed important obligations under the provider agreement, such as ACN Group's obligation to coordinate and transmit payments to providers. *Id.* at *4-5. Plaintiff then moved to strike or, in the alternative, for leave to file a sur-reply addressing the assumption theory. The District Court denied Plaintiff's motion, concluding that Defendant was entitled to enforce the agreement's arbitration clause because it assumed important obligations under the provider agreement. *Id*. After Plaintiff appealed, the Seventh Circuit reversed. Although Defendant submitted a declaration stating that ACN Group became its wholly-owned subsidiary in 2003, and assumed important obligations under the provider agreement, the Seventh Circuit found that Plaintiff did not have a fair and reasonable opportunity to respond to Defendant's reply that introduced the new evidence. According to the Seventh Circuit, once the District Court permitted Defendant to file its reply, it should have granted Plaintiff leave to file a sur-reply responding to Defendant's novel assumption theory and the CEO's declaration. *Id.* at *10. Accordingly, the Seventh Circuit reversed the District Court's dismissal order and remanded the action to allow discovery to the extent necessary for Plaintiff to submit a full response to Defendant's declaration and assumption theory. *Id.* at *12.

***Palm Beach Golf Center-Boca, Inc., et al. v. Sarris*, 2015 U.S. App. LEXIS 3630 (11th Cir. Mar. 9, 2015).** Plaintiff, a golf equipment store, brought a putative class action alleging that Defendant, a dental practitioner, sent unsolicited fax advertisements in violation of the TCPA. Plaintiff hired a marketing manager, who in turn hired a Business to Business ("B2B") solution, which allegedly sent 7,085 successful transmissions of an advertising promotion for the dental practice. The District Court granted summary

judgment to Defendant, relying on *In Re Dish Network, LLC,* 28 FCC Rcd. 6574 (2012), where the Federal Communications Commission ("FCC") held that an unsolicited fax constitutes a TCPA violation only by the actual sender of the fax. In other words, the District Court found that Defendant was liable for the acts of its marketing manager under the TCPA on a theory of vicarious liability only if it were established he was an employee acting within the scope of his employment. *Id*. at *4. Because Plaintiff failed to plead vicarious liability, the District Court concluded that the claim was defective. *Id*. at *5. On Plaintiff's appeal, the Eleventh Circuit reversed and remanded. Plaintiff first challenged the District Court's finding that it lacked Article III standing. For Plaintiff, the specific injury targeted by the TCPA was the sending of the fax and resulting occupation of the recipient's telephone line and fax machine, and not the fact that no one at Plaintiff's facility actually read or printed the fax. The Eleventh Circuit noted that the TCPA's legislative history showed that the prohibition against sending unsolicited fax advertisements was intended to protect citizens from the loss of the use of their fax machines during the transmission of fax data. *Id*. at *10. Such types of telemarketing shifted some of the costs of the advertising from the sender to the recipient, and it occupied the recipient's fax machines so that it was unavailable for legitimate business messages while processing and printing the junk fax. *Id*. Here, although the fax advertisement was neither seen nor printed by any of Plaintiff's employees, the unrefuted record showed that the fax advertisement was successfully transmitted by B2B's fax machine and that the transmission occupied Plaintiff's telephone line and fax machine during that time. *Id*. at *11-12. This occupation of the fax machine was one of the injuries contemplated under TCPA. *Id*. at *12. Accordingly, the Eleventh Circuit concluded that Plaintiff had Article III standing. The Eleventh Circuit solicited the FCC's position regarding liability for violations of the TCPA's ban on junk faxes in the context of this action. The FCC submitted a letter stating that the *Dish Network* ruling applied only to the liability for telemarketing calls and neither addressed nor altered its pre-existing regulatory treatment of unsolicited fax advertisements. *Id*. at *17. Because *Dish Network* did not address the TCPA's junk-fax ban provision, the Eleventh Circuit ruled that the District Court's reliance on it was misplaced. The Eleventh Circuit observed that the record contained sufficient evidence to support having a jury decide whether the fax was sent on behalf of Defendant. The record showed that Defendant hired a marketing manager to market its dental practice and gave him free reign to do so. *Id*. at *26. Further, the record demonstrated that Defendant's marketing manager contracted with B2B to initiate a fax advertisement campaign on behalf of the dental practice. *Id*. Accordingly, the Eleventh Circuit ruled that the District Court erred in granting summary judgment to Defendant.

***Roberts, et al. v. Paypal, Inc.,* 2015 U.S. App. LEXIS 18836 (9th Cir. Oct. 29, 2015).** Plaintiff, a customer, brought a putative class action alleging that after adding his cellular telephone number to his PayPal account, Plaintiff received text messages in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff alleged that the TCPA restricted calls using an automatic telephone dialing system without prior express consent. *Id*. at *2. The District Court granted summary judgment to Defendant, finding that Plaintiff had expressly consented to receiving text messages by knowingly providing his cellphone number to Defendant. *Id*. On appeal, the Ninth Circuit affirmed. The Ninth Circuit observed that the Federal Communications Commission's ("FCC's") 1992 Report and Order specified that persons who knowingly release their phone numbers have, in effect, given their permission to be called at the number which they have given, absent instructions to the contrary. *Id*. The Ninth Circuit found that Plaintiff had expressly consented to text messages from Defendant when he provided his cell phone number. *Id*. at *3. Furthermore, the Ninth Circuit held that even if Plaintiff believed that Defendant only would contact him on his cell phone about problems with his on-line transactions, that limitation did not apply because he failed to communicate it to Defendant. *Id*. Defendant contended that the FCC's 1992 Report and Order limited the consent expressed by release of a phone number to normal business communications. *Id.* The Ninth Circuit reasoned that the FCC's Report was not meant to limit its interpretation of prior express consent, but merely as a support of that interpretation. *Id*. Finally, the Ninth Circuit remarked that the FCC has since changed its approach to the prior express consent in recent years, but those changes occurred subsequent to the text message and therefore they did not apply retroactively. *Id*. at *4. Accordingly, the Ninth Circuit affirmed the District Court's order.

(xxxviii) The *Cy pres* Doctrine In Class Actions

***Oetting, et al. v. Green Jacobson, P.C.*, 2015 U.S. App. LEXIS 306 (8th Cir. Jan. 8, 2015).** Plaintiffs, a group of shareholders, filed numerous class actions alleging violations of federal and state securities laws after NationsBank and BankAmerica merged to form Bank of America Corp. The District Court certified two classes of NationsBank shareholders and two classes of BankAmerica shareholders, and subsequently, approved a $490 million global settlement. *Id.* at *1. The District Court also ordered that any remaining balance of the settlement fund shall be distributed *cy pres* to the Legal Services of Eastern Missouri, Inc. ("LSEM"). Class representatives appealed the *cy pres* distribution order, arguing that a further distribution to the classes was feasible, and LSEM was unrelated to the classes or the litigation and was therefore an inappropriate *cy pres* recipient. The Eighth Circuit agreed and reversed the *cy pres* award. First, the Eighth Circuit observed that a *cy pres* distribution to a third-party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members, except where an additional distribution would provide a windfall to class members with liquidated damages claims that were 100% satisfied by the initial distribution. *Id.* at *6-7. Here, because class counsel advised the District Court that the claims administrator would distribute the remaining settlement fund free of charge, the Eighth Circuit opined that a further distribution to the class was clearly feasible. The claims administrator's cost estimate confirmed that lists of class members who received and cashed prior distribution checks existed and would form the basis of a further distribution to the classes. The District Court had previously ordered that no further search needed to be made for class members whose checks were returned undelivered, so that potentially burdensome expense was eliminated. Accordingly, the Eighth Circuit opined that the District Court erred in finding that further distributions would be costly and difficult so as to preclude a further distribution, and that it was appropriate to order a *cy pres* distribution to unrelated third-party charities. *Id*. at *8. Further, the Eighth Circuit noted that a *cy pres* distribution is not authorized by declaring that all class members submitting claims have been satisfied in full, and disagreed that class members with unliquidated damage claims in the underlying litigation are fully compensated by payment of the amounts allocated to their claims in the settlement. *Id.* at *10. The settlement notice to the class stated that the settling parties disagreed as to both liability and damages, and did not agree on the average amount of damages per share that would be recoverable by any of the classes. Thus, the Eighth Circuit remarked that the notion that class members were fully compensated by the settlement was speculative. Further, the Eighth Circuit observed that a *cy pres* distribution must be for the "next best use" for indirect class benefits, and for uses consistent with the nature of the underlying action and with the judicial function. *Id.* at *14. The Eighth Circuit opined that although the LSEM was a worthy charity, it was not the next best recipient of unclaimed settlement funds. When approving LSEM, the District Court had found that there was no immediately apparent organization that would indirectly benefit the class members, and that LSEM sufficiently approximated the interests of the class because it served victims of fraud. The Eighth Circuit, however, reasoned that it was not sufficient to find that no next best recipient was immediately apparent, and that a District Court should instead weigh all considerations, and make a thorough investigation into whether a recipient can be found that most closely approximates the class' interests. *Id.* at *15. Accordingly, the Eighth Circuit reversed the award of *cy pres* distribution.

(xxxix) Impact Of Unethical Conduct In Class Actions

***Adams, et al. v. United Services Automobile Association*, Case No. 14-CV-2013 (W.D. Ark. Dec. 21, 2015).** Plaintiffs brought a class action against Defendant in Arkansas state court claiming that Defendant had improperly applied depreciation under certain homeowners insurance policies. On January 15, 2014 Defendants removed the case to federal court, where it remained for 17 months. *Id.* at 1. On June 19, 2015, the parties entered a stipulation of dismissal and the case was dismissed 3 days later on June 22, 2015. *Id.* The next day, the parties re-filed the case in Arkansas state court along with a motion to preliminarily approve a class action settlement. *Id.* The settlement agreement was dated June 16, 2015 (while the matter was still pending in federal court) and defined the "court" as the state court. *Id.* When the federal judge became aware of this case, he issued a *sua sponte* order to show cause for sanctions based on apparent forum-shopping on behalf of the parties. *Id.* at 3-4. The Court had previously indicated concern with the settlement terms in a related case and there were terms in the new proposed settlement that might have been disapproved of by the federal judge. These included a claims-made recovery

provision with attorneys' fees adding up to 50% of the potential settlement, regardless of the level of claims made by class members. *Id.* at 4. In addition, the settlement included a clear sailing provision, onerous claims requirements, and a reversionary fund. *Id.* at 4. The federal judge expressed concern that the parties had had an improper purpose in removing the case and had manipulated the legal process and wasted the Court's resources in doing so. *Id.* at 5-6. The Court accordingly set a hearing for counsel to respond to the order to show cause.

Editor's Note: The ruling in *Adams* is extraordinary. The Court noted – at footnote 2 of its decision – that the state proceeding came to his attention by way of a newspaper article. In issuing the show cause order, the Court reasoned that "the ethical problem presented in this case is compounded by counsel's abuse of process in using the Court and its exercise of jurisdiction as a bargaining chip in the negotiation of the ultimately questionable settlement." *Id.* at 5.

***In Re American Express Anti-Steering Rules Antitrust Litigation,* 2015 U.S. Dist. LEXIS 102714 (E.D.N.Y. Aug. 4, 2015).** In this multi-district class action litigation against American Express ("AmEx") over the inclusion of "anti-steering" rules in its merchant acceptance agreements that expressly prohibited merchants from steering transactions to less costly payment cards, the Court rejected Plaintiffs' motion for final approval of the class settlement agreement on the grounds that the leading lawyer for the merchant class compromised the fairness of the settlement. *Id.* at *3. After the consolidation of series of class actions filed by merchants and consumers against Defendant's anti-steering rules, the Court appointed Gary Friedman, along with two other attorneys, as interim lead counsel for the putative class of merchants. *Id.* at *17. Friedman also represented certain Plaintiffs in another antitrust suit concerning the credit and charge card industry – a case entitled *In Re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation* – which alleged that Visa U.S.A. Inc. and MasterCard Inc. conspired to fix interchange fees. *Id.* at *20-21. In February 2014, the Court granted preliminary approval to the settlement of the claims of the proposed class of AmEx merchants and provisionally certified a class for settlement purposes. The settlement provided no monetary relief to the merchants, but allowed them to impose a surcharge on AmEx users, thereby potentially treating those cardholders differently from other customers. *Id.* at *23-24. The agreement further allowed class counsel to ask for up to $75 million in fees and expenses. A sizeable number of class members, constituting approximately 20% of the class in terms of charge volume, filed objections to the settlement. *Id.* at *28. Plaintiffs eventually sought final approval of the class settlement agreement and class counsel moved for an award of attorneys' fees. Before the Court could rule on the fairness of the settlement agreement, new developments came to light. The disclosure ensued as a result of Keila Ravelo's arrest on December 22, 2014 for defrauding two law firms of several million dollars; Ravel, a partner of Willkie, Farr & Gallagher LLP, had served as MasterCard's defense lawyer. *Id.* at *34. In the course of an internal audit of Ravelo's conduct, Willkie discovered documents in Ravelo's possession that were subject to protective orders entered in this action and various communications with Friedman. These materials showed that Friedman improperly sent e-mails containing confidential information of AmEx that was subject to protective orders to Ravelo, who was counsel for MasterCard, AmEx's major competitor and not a party to the protective orders. *Id.* at *52. Friedman also improperly disseminated confidential information and attorney work-product of Plaintiffs to Ravelo and consulted with her on strategic issues, including the negotiations for the proposed settlement. *Id.* at *55. The Court found that these disclosures violated the fiduciary duty owed by Friedman to the class members and showed him to be an inadequate representative of the class. *Id.* at *55-56. The Court further found that Friedman's decision to exchange confidential and privilege information with MasterCard's counsel and bringing Ravelo into the negotiations process created a conflict between class members and class counsel, and a risk that Friedman negotiated settlement terms that were worse for the class than terms he might have negotiated absent the conflict. *Id.* at *68-73. The Court concluded that this risk required it to deny approval of the settlement. Furthermore, because the proposed settlement provided class members with only injunctive relief of questionable value while class counsel requested up to $75 million in attorneys' fees, the Court found that the communications between Friedman and Ravelo were blatant collusion, in which the class counsel proposed to work together with Defendant to achieve a result contrary to the best interests of the class. *Id.* at *79-80. Accordingly, the Court denied Plaintiffs' motion for final approval of the settlement.

Editor's Note: The unethical conduct at issue may well have been the most costly in 2015, inasmuch as it derailed a potential $75 million fee award.

(xl) Objectors In Class Actions

***Hill, et al. v. State Street Corp.*, 2015 U.S. App. LEXIS 12868 (1st Cir. July 24, 2015).** Plaintiffs, a group of individuals and entities who purchased publicly traded common stock of Defendant State Street Corp., brought a class action asserting claims for violation of various securities laws against Defendants. In settling the case, Plaintiff's counsel agreed with Defendants that some class members would be deemed uninjured, and that others who were injured in amounts less than $10 would be paid nothing. *Id*. at *1. Notices were sent to approximately 7,000 potential class members on August 18, 2014, and notice was implemented in a manner that ensured that all large investors got ample notice of their right to opt-out or object. *Id*. at *2. As there were foreseeable delays as to small investors, the District Court continued the final settlement hearing from October 27, 2014 to November 20, 2014. *Id*. at *3. The distributed notices, however, continued to publish an objection deadline of October 6, 2014 and a hearing date of October 27, 2014. *Id*. Class members who objected to the settlement raised no complaint about the substance of the settlement or the notice, but they claimed that they were given too little time to register objections. The objectors appealed the order approving the settlement, and the First Circuit affirmed the District Court's order. In rejecting the objections, the District Court cited to *Scklonick v. Harlow*, 820 F.2d 13 (1st Cir. 1987), which affirmed use of Rule 7 to bar objectors from appealing unless they posted a bond in amount of $75,300. *Id*. at *4. *Scklonick* had justified this order by finding that any appeal from rulings on the objections would be frivolous, and the bond amount would ensure there would be funds available to pay the Plaintiffs' counsel for their fees in defending the frivolous appeal. *Id*. In *Scklonick*, the First Circuit conducted a preliminary examination of merits, and concluded that it could not say that the District Court abused its discretion in judging the appeal to be frivolous. *Id*. at *5. Here, the First Circuit, noted that the objectors received written notices around October 4, and they filed their objections in writing on November 4, and the District Court held its rescheduled approval hearing on November 20 to consider all objections on merits. *Id*. at *7. In addition, the First Circuit noted that the District Court had allowed the objectors' counsel the right to appear at the approval hearing by telephone. *Id*. The First Circuit also rejected the objectors' challenge of the order as to attorneys' fees, finding that they did not have a standing to challenge the fee award.

***Rodriguez, et al. v. West Publishing Corp.,* 2015 U.S. App. LEXIS 3901 (9th Cir. Mar. 12, 2015).** In this action, the District Court had approved a nationwide class action settlement and awarded attorneys' fees and expenses. A group of objectors challenged the settlement, and the District Court overruled the objections and denied their request for attorneys' fees. Following a remand from the Ninth Circuit to calculate the appropriate amount of attorneys' fees that should be awarded to the objectors in light of the benefit they conferred on the class, the District Court reduced the lodestar amount to $315,516.37, and by applying a 0.75 multiplier (*i.e.*, a 25% reduction) to the adjusted lodestar amount, further reduced the ultimate fee award to $236,637. *Id*. at *2-3. Counsel for a group of objectors appealed, and the Ninth Circuit reversed and remanded with instructions. First, the objectors' counsel contended that the District Court had abused its discretion when it awarded fees using the lodestar method, and had disobeyed the Ninth Circuit's earlier mandate in this regard. The Ninth Circuit found that the District Court was well within its discretion to choose the lodestar method to calculate the fee award, rather than awarding a percentage of the benefit conferred to the class because there was no requirement in its mandate about how to set fees. *Id*. at *3. The Ninth Circuit maintained that in its earlier order, it had found that certain objectors were eligible for fees, but never expressed its opinion how to calculate fees. *Id*. The objectors also argued that the District Court erred in applying the lodestar method. The Ninth Circuit found that the District Court abused its discretion in applying the 0.75 multiplier to the adjusted lodestar amount because neither of its explanations had sufficient support in the record to warrant its adjustment. *Id*. at *5. Accordingly, the Ninth Circuit reversed the District Court's award and remanded with instructions to award $315,516.37 in fees, representing its original, unadjusted calculation of counsel's lodestar. *Id*. at *5-6.

***Rose, et al. v. Bank Of America Corp.*, 2015 U.S. Dist. LEXIS 64780 (N.D. Cal. May 18, 2015).** Plaintiffs, a group of consumers, brought a class action alleging that Defendants violated the Telephone

Consumer Protection Act ("TCPA") by engaging in a systematic practice of calling or texting consumers' cellphones using automatic dialing systems and/or an artificial or prerecorded voice without their prior express consent. The parties reached a settlement. A group of objectors challenged the settlement, arguing that the compensation offered to the class members was too low, the injunctive relief did not benefit the class, the attorneys' fees were excessive, and the "quick pay" fee provision elevated class counsel's interests over those of the class. *Id*. at *3. The Court nevertheless granted final approval of the class action settlement, and granted in part Plaintiffs' motion for attorneys' fees. *Id*. at *4. The objectors then filed a motion seeking $393,311.24 in attorneys' fees and an incentive award of $2,000 each. The Court denied the motion. The objectors contended that their objections to the settlement agreement materially benefitted the class in three ways, including: (i) the Court agreed with their assessment that the injunctive relief provided little in the way of real benefit to class members; (ii) they drew the Court's attention to the low recovery as compared to other TCPA cases and the settlement's indicia of unfairness and collusion; and (iii) they pointed out class counsel's high attorneys' fees. *Id*. at *6. The Court found the objectors' fee request unwarranted because the objectors' participation was limited to filing an eight-page brief, and there was no indication that the objectors attended the final hearing to advance their objections. *Id*. at *7. Significantly, the Court noted that it did not rely on the objectors' arguments in issuing its decision; in fact, the objectors admitted that the Court's rationale differed from their own objections. *Id*. Further, the objectors' counsel failed to comply with Civil Local Rule 54-5(b), which requires a motion for attorneys' fees to include a statement of services rendered by each person for whom fees are claimed. *Id*. at *8. The Court, therefore, deemed attorneys' fees unwarranted. Similarly, the Court found the objectors' request for incentive pay and their request to enjoin the quick pay provision unsubstantiated. The Court, accordingly, denied the objectors' motion.

(xli) Privacy Class Actions

***Allen, et al. v. Schnuck Markets, Inc.,* 2015 U.S. Dist. LEXIS 113892 (S.D. Ill. Aug. 27, 2015).** In this class action brought by a group of grocery store customers, the Court denied Defendant's motion to dismiss and motion to transfer venue. Plaintiffs contended that hackers gained access to Defendant's credit/debit card processing systems in December 2012, and managed to obtain customers' personally identifying information ("PII") and confidential financial data ("CFD"). *Id*. at *4. Plaintiffs asserted that although Defendant received reports from banks that customers who had used their cards at its stores had incurred fraudulent charges by mid-March 2013, it continued to accept cards, and did not warn its customers of the risks of an unauthorized PII/CFD disclosure until March 30, 2013. *Id*. Plaintiffs sued Defendant under various theories, including negligence, breach of implied contract, and violation of the Illinois' Personal Information Protection Act. In its motion to dismiss, Defendant challenged the sufficiency of Plaintiffs' complaint. The Court, however, noted that Plaintiffs' complaint passed the plausibility threshold. The Court explained that despite Defendant's assertions that Plaintiff failed to properly allege damages, the Court opined that the pleadings contained more than unsupported, conclusory allegations. *Id*. at *8. The Court reasoned that Plaintiffs alleged that they had suffered and would continue to suffer financial losses caused by fraudulent charges to their compromised cards and bank fees associated with the data breach. *Id*. at *9. The Court found that this was sufficient to state a claim. Accordingly, the Court denied Defendant's motion to dismiss. The Court also denied Defendant's motion to transfer venue to the U.S. District Court for the Eastern District of Missouri, finding that access to resources and sources of proof was effectively the same in each forum. *Id*. at *11.

***Burrow, et al. v. Sybaris Clubs International, Inc.,* 2015 U.S. Dist. LEXIS 53781 (N.D. Ill. April 24, 2015).** Plaintiff, a reservations desk employee, brought a class action alleging that Defendants recorded all inbound and outbound phone calls from the reservations desks without anyone's consent, in violation of the Federal Wiretap Act (the "Act") and related Indiana and Wisconsin statutes. Defendants purchased a telephone system called "ShoreTel," which allowed them to record the phone calls made to and from phones at the various reservations desks. *Id.* at *1-2. Plaintiff sought to certify a class consisting of all persons who made a telephone call into or out of the reservation telephone lines at Defendants' five locations between March 19, 2012, and April 11, 2013, which the Court granted. *Id.* at *2. First, the Court noted that the Act prohibits the recording of telephone conversations, unless one party consents to the recording. The Act, however, does not impose any intent requirement. *Id.* at *4. Here, there was no

dispute that Defendants intended to record phone calls and in fact did record phone calls. Defendants argued, however, that they received implied consent when they generally informed their employees of the new ShorTel system and those employees chose to continue working for them by taking phone calls on the recorded lines. *Id.* at *8-9. The Court disagreed that knowledge of something generally was synonymous with consent. *Id.* at *9. Hence, the Court found that although Defendants claimed that the individual issues related to employee consent precluded class certification, the evidence related to that defense was common to the class. The Court remarked that just because a class might "go down in flames on the merits" did not mean that a Court should refuse certification. *Id.* at *11. Moreover, the eighteen individual affidavits that Defendants submitted in support of its consent defense accounted for less than one-third of all the potential class members. Thus, the Court maintained that even if those affidavits conclusively established consent for those specific class members, it could not deny class certification as to the other potential class members who might have given no form of consent. *Id.* at *12. Therefore, the Court found that concentrating the case into a single forum was more desirable than thousands of cases all hearing the same claim involving the same recording system. *Id.* at *13. The Court held there was no problem in identifying potential class members because every guest with Defendants must be a "member" and pay an annual fee in order to stay at the hotel. *Id.* at *14-15. Further, Defendants assigned each member a unique identification number that could identify customers who made reservations during the class period, and Defendants' phone logs along with those customers' own phone records could determine if they called in to make the reservations. *Id.* at *15. The Court observed that the number of potential Plaintiffs was in the thousands, which was sufficiently numerous for Rule 23(a) purposes. *Id.* at *17. Accordingly, the Court certified the proposed class.

***Coulter-Owens, et al. v. Time, Inc.*, Case No. 12-CV-14390 (E.D. Mich. July 27, 2015).** Plaintiff brought a putative class action alleging that Defendant improperly disclosed the private information of individuals who subscribed to its magazines through third-party websites in violation of the Video Rental Privacy Act ("VRPA"). Plaintiff alleged that Defendant sent subscriber information to marketing database vendor Axiom Corp. and third-party database cooperative Wiland Direct without customers' written consent. *Id.* at *1-2. Plaintiff moved to certify a class consisting of all Michigan residents who between March 31, 2009, and November 15, 2013, purchased a subscription to Time, Fortune, or Real Simple magazines through a third-party website such as www.magazines.com. The Court granted the motion. Defendant argued that the proposed class definition turned on whether a person was a purchaser as opposed to a subscriber, and, therefore, the Court would have to look to the third-parties from whom magazine subscriptions were purchased to determine if a person fell within the proposed class definition. *Id.* at *3. Plaintiff responded that the proposed class members all purchased magazine subscriptions from Defendant's authorized agents, and Plaintiff could obtain the information from the third-party agents in discovery because the third-parties, under contract with Defendant, were required to maintain the records of purchasers for a period of six years. *Id*. The Court agreed with Plaintiff, reasoning that the question was not, as Defendant framed it, whether records of purchasers were within its possession; rather, the inquiry in determining if the proposed class was ascertainable was whether it was defined in a way that made it administratively feasible for the Court to determine whether a particular individual was a member. *Id.* Defendant also contended that it was unable to determine who a purchaser was in every circumstance because a purchaser was not always a subscriber and that information was not always provided to Defendant. For example, many people purchased subscriptions as gifts for their spouses or parents. *Id.* Defendant contended that there was no way of knowing who the purchaser was in those instances. *Id.* The Court rejected Defendant's argument, pointing out that it could determine whether a purchaser was also a subscriber by comparing the billing information and the subscriber information, which could be obtained from Defendant's third-party agents. *Id.* Defendant further argued that there was no way to determine whether a magazine subscription was purchased from a third-party agent using the Internet as opposed to mail orders or via telephone. *Id.* The Court was not persuaded and found that, to the extent that information was not available in the records of the third-party agents, which would seem unlikely, the individual purchasers might be in possession of evidence to support the fact that a magazine subscription was purchased using the Internet. *Id.* Finally, Defendant argued that the proposed class members did not purchase magazine subscriptions "at retail," as defined in the VRPA, because they bought the subscriptions from third-party agents. *Id.* The Court concluded that, while Defendant's argument may have some merit, it was an affirmative defense, and not

an attack on the ascertainability of the proposed class. *Id.* at *4. The Court, accordingly, granted Plaintiff's motion for class certification.

***In Re Facebook Internet Tracking Litigation,* 2015 U.S. Dist. LEXIS 145142 (N.D. Cal. Oct. 23, 2015).** In this consolidated multi-district class action brought by and on behalf of individuals with active Facebook accounts seeking more than $15 billion in damages and injunctive relief for Defendant's purported tracking of their on-line activities, the Court granted Defendant's motion to dismiss on the grounds that Plaintiffs failed to articulate a cognizable basis for standing pursuant to Article III. In their complaint, Plaintiffs claimed that Facebook's use of "tracking" or "persistent" cookies to track and transmit a user's browsing history without the user's consent after the user logged-off of Facebook violated numerous state and federal laws, including the Federal Wiretap Act, the Stored Communications Act ("SCA"), the Computer Fraud and Abuse Act ("CFAA"), and California's Unfair Competition Law ("UCL"), Computer Crime Law ("CCCL"), Invasion of Privacy Act ("CIPA"), and Consumer Legal Remedies Act ("CLRA"). *Id.* at *24-25. Plaintiffs also raised common law claims that Facebook's tracking practices amounted to an invasion of privacy, intrusion upon seclusion, trespass to chattels, and conversion. *Id.* Arguing that Defendant wrongly profited from its improper tracking practices, Plaintiffs asserted that the data has massive economic value, that a market exists for the sale of such information, and that profits to Defendant are tantamount to billions of dollars in fees. *Id.* at *21-22. Seeking dismissal, Defendant argued that Plaintiffs lacked standing to pursue all claims. Although Plaintiffs asserted that the information Facebook collected from its tracking activities was valuable, Defendant argued that they did not allege that anyone was willing to pay for their personal information or that its purported conduct lessened the value of that information or affected its marketability. *Id.* at *26. The Court agreed with Defendant. The Court found that, although Plaintiffs showed some degree of intrinsic value to their personal information, they could not establish constitutional standing as to any of the claims presented because they failed to adequately connect this value to a realistic harm or loss that was attributable to Facebook's alleged conduct. *Id.* at *30. The Court explained that the complaint did not demonstrate that any Plaintiff personally lost the opportunity to sell their information or the value of the information was diminished by Facebook's tracking practices, and that the complaint alluded to injury that was "conjectural or hypothetical." *Id.* at *30-31. The Court therefore concluded that Plaintiffs failed to articulate a cognizable basis for standing pursuant to Article III. *Id.* at *32. Under the same rationale, the Court also dismissed all of Plaintiffs' common law claims, which require economic harm related to the loss of personal information as an element of damages, as well as Plaintiffs' UCL, CLRA, and CCCL claims, which also required a plausible economic injury. *Id.* at *33-35. Because economic injury was not a prerequisite for Plaintiffs' Federal Wiretap Act, SCA, or CIPA claims, the Court found that the allegations alone were sufficient to establish standing as to those claims. *Id.* at *35. The Court then reviewed the sufficiency of each claim and held that Plaintiffs might never be able to state an actionable Wiretap Act claim because they failed to plead that Facebook intercepted the "contents" of an electronic communication, and their argument on the issue was unpersuasive. *Id.* at *40-41. The Court further dismissed the SCA claims as deficient, noting that the language and legislative history of "electronic storage" under the SCA makes clear that the SCA is "targeted at communications temporarily stored by electronic communication services incident to their transmission," as opposed to cases as this one which involved personal information permanently stored in users' personal web browsers. *Id.* at *41-42. Finally, the Court dismissed Plaintiffs' CIPA claim for failure to state a claim, accepting Defendant's arguments that Plaintiffs failed to plead facts showing Facebook used a "machine, instrument, or contrivance" to obtain the contents of communications. *Id.* at *44-45. Accordingly, the Court granted Defendant's motion to dismiss but permitted Plaintiffs leave to file an amended complaint.

***In Re Hulu Privacy Litigation,* 2015 U.S. Dist. LEXIS 43157 (N.D. Cal. Mar. 31, 2015).** Plaintiffs, a group of on-line users, brought a putative class action alleging that Defendant violated the Video Privacy Protection Act ("VPPA") by disclosing information about users' identities and videos viewed on Facebook, a third-party social-networking website. Defendant moved for summary judgment arguing that it did not "knowingly" send Facebook information that could identify users and that it did not know that Facebook might read the information it sent so as to yield personally identifiable information ("PII") under the VPPA. *Id.* at *3. The Court granted Defendant's motion, finding no genuine issue of material fact regarding whether Defendant knowingly disclosed Plaintiffs' information. The VPPA prohibits a video tape service

provider from knowingly disclosing PII that "included information which identifies a person as having requested or obtained specific video materials or services" from the provider. *Id.* Defendant's conduct regarding Facebook consisted of inserting "like" buttons on its web pages. Plaintiffs alleged that, in order to implement the "like" button on pages where Plaintiffs watched videos, Defendant separately sent Facebook the page's URL, in which it embedded the video's title and a "c_user" cookie that could contain an on-line user's Facebook ID in a numeric format. *Id.* at *8-10. Plaintiffs alleged that this transmission enabled Facebook to link information identifying the user and the user's video choices to other information about the particular user. *Id.* at *11. Defendant argued that providing these two data points separately to Facebook did not constitute a disclosure under the VPPA and that it had no knowledge that Facebook would link them to determine that a specific user had requested or obtained the video from that watch page. The Court agreed with Defendant that neither the c_user cookie nor the URL qualified as a prohibited disclosure under the VPPA because neither piece of information, by itself, identified an individual and the video materials or services that the individual requested. *Id.* at *17. The Court found that Plaintiffs had to show more than the mere fact that Defendant disclosed such information to Facebook. Rather, Plaintiffs had to demonstrate a "connection of the two" pieces of information that could create the disclosure of PII. *Id.* at *19. Because there was no evidence that Defendant knew that Facebook might combine the two pieces of information, the Court held that Plaintiffs failed to prove that Defendant knowingly disclosed PII. *Id.* The Court rejected Plaintiffs' argument that Defendant knew that Facebook could combine the two pieces of information together to tie a user to the videos he or she watched finding that Plaintiffs could not show that Defendant worked together with Facebook to communicate this information in separate forms. *Id.* at *21. The Court also rejected Plaintiffs' arguments that Defendant knew that it was disclosing user identities through the c_user cookies while acknowledging that proof of this element, without proof of a connection to a user's viewing history, could not form the basis for a VPPA claim. *Id.* at *25-26. The Court dismissed Plaintiffs' reliance on evidence regarding the presence of the c_user cookie during Defendant's internal testing, noting that Plaintiffs lacked proof that Defendant saw this or generally knew what c_user signified. *Id.* at *34-35. Finally, the Court rejected Plaintiffs' reliance on Defendant's internal e-mails regarding cookies and Defendant's privacy policy finding that these generalized communications did not address "the Like button, the c_user cookie, the watch-page URLs, or any connection among these things." *Id.* at *37-38. Accordingly, the Court granted Defendant's motion for summary judgment.

***In Re Nickelodeon Consumer Privacy Litigation,* 2015 U.S. Dist. LEXIS 6428 (D.N.J. Jan. 20, 2015).** Plaintiffs brought a multi-district consolidated class action on behalf of a putative class of minors under the age of 13. Plaintiffs alleged that Defendants Viacom and Google violated their privacy rights by gathering information from children who registered and used Viacom's Nick.com, Nickjr.com, and Neopet.com websites. Plaintiffs alleged that Viacom created a record when a user viewed a video or played a video game by placing a cookie in the user's browser that allowed Viacom to collect a range of information, including the user's gender and age, without his or her consent, shared this information with Google, and allowed Google to place its own cookies on the user's browser. *Id*. at *6. Plaintiffs asserted, among other things, violations of the Video Protection and Privacy Act ("VPPA") and the New Jersey Computer Related Offenses Act ("CROA"). The Court found that Plaintiffs' VPPA claim against Viacom failed because Plaintiffs did not allege that Viacom disclosed personally identifiable information ("PII"). The Court determined that Plaintiffs' CROA claim failed because Plaintiffs did not allege that they suffered any "business or property" damage. *Id*. at *7. The Court held that Plaintiffs' intrusion upon seclusion claim failed because Plaintiffs did not allege an intrusion that would be highly offensive to a reasonable person. *Id*. Subsequently, Plaintiffs filed a second consolidated class action complaint ("SAC") alleging additional facts to attempt to cure these deficiencies. Defendants moved to dismiss, asserting that Plaintiffs' SAC suffered from the same fundamental defects. *Id*. at *8. The Court agreed. The Court found that Plaintiffs still did not allege that Defendants could identify the individual Plaintiffs in the case, as opposed to identifying people generally, nor that Defendants had identified any Plaintiffs. Plaintiffs argued that, with the information that Google collects about the users of its services in hand, Google could take the information Viacom supplies and ascertain personal identities. *Id*. at *10-11. The Court observed that, even if it considered what Google could do with the information, rather than the nature of the information itself, Plaintiffs' claim still failed because it was entirely theoretical. *Id*. at *11. According to Plaintiffs, in

order for Google to connect the information with the identity of an individual Plaintiff, such a Plaintiff would need to have registered on one of Google's servers, but Plaintiffs failed to allege that they registered with Google. Indeed, the Court noted that Google would not allow a child under the age of 13 to register for its services, which would rule out the entire class of Plaintiffs. *Id*. at *12. The Court, therefore, dismissed Plaintiffs' VPPA claim with prejudice. *Id*. at *12-13. As to Plaintiffs' CROA claim, the Court noted that, because the law targets computer hacking, it is dubious whether it would cover situations like that alleged by Plaintiffs in which Plaintiffs' computers had not been hacked and their information had not been stolen. *Id.* at *13. Assuming the statute applied, Plaintiffs still failed to allege "business or property" damage stemming from Defendants' conduct. *Id.* Although in the SAC Plaintiffs rhetorically framed their damages in terms of unjust enrichment in a quasi-contractual setting, Plaintiffs pointed to the same concepts set forth in their initial complaint. *Id*. at *14. The Court, therefore, dismissed the CROA claim with prejudice. Finally, regarding Plaintiffs' common law privacy claims, the Court noted that, although Plaintiffs highlighted statistics suggesting that a large majority of the public opposed tracking children's on-line activity, such a statistic did not answer the relevant inquiry of what a reasonable person finds "highly offensive." *Id*. at *17. The Court cited an example that a large majority of voters could disapprove of a given politician's job performance, but that would not indicate that a reasonable person finds the politician's performance "highly offensive." *Id*. The Court, therefore, dismissed Plaintiffs' common law privacy claims with prejudice.

***In Re Target Corp. Customer Data Security Breach Litigation*, 2015 U.S. Dist. LEXIS 123779 (D. Minn. Sept. 15, 2015).** Plaintiffs, a group of consumers, brought a class action alleging that they suffered economic damage from Defendant's 2013 data breach that allegedly compromised their personal information. The massive data breach occurred during the 2013 holiday shopping season when computer hackers stole credit and debit-card information and other personal information of approximately 110 million customers of Defendant's retail stores. Plaintiffs moved for class certification, and the Court granted the motion. Defendant accepted that class-wide proof was available as to the existence of a duty and breach of that duty, but contended that Plaintiffs could not rely on class-wide proof to establish injury or causation. Defendant also argued that Plaintiffs' injuries were the risk of future harm that were not cognizable or susceptible of class-wide proof. The Court noted in the record a 2014 survey by American Bankers Association survey, which stated that banks reissued nearly every card that was subject to an alert after Defendant's data breach. *Id.* at *11. Thus, the Court opined that Plaintiffs' harm was not a future harm, and that it was a cost borne at the time of the breach, and as a result of the breach. Accordingly, the Court opined that Plaintiffs established that they had suffered an injury proximately caused by the data breach for the purposes of the class certification inquiry. Plaintiffs also claimed that Defendant violated the Minnesota Plastic Card Security Act ("PCSA"). The Court noted that after being notified that its cards were involved, a financial institution took action, at least in part, to protect the institution's customers' information and to provide service to those customers. Thus, the Court opined that the PCSA claim was susceptible of class-wide proof, and that class certification of this claim was appropriate. The Court noted that Plaintiffs' claims were typical as they arose from the same event or practice or course of conduct that gave rise to the claims of other class members, and were based on the same legal theory. The Court also opined that class action was a superior method of adjudicating the claims considering the number of financial institutions involved and the similarity of all class members' claims. Accordingly, the Court granted class certification.

***Pavone, et al. v. The Law Offices Of Anthony Mancini Ltd.*, Case No. 15-CV-1538 (N.D. Ill. July 28, 2015).** Plaintiffs brought an action on behalf of a class of similarly-situated individuals against Defendant, a law firm, alleging that it obtained Illinois traffic crash reports and used the information in those reports to send targeted solicitations to persons involved in car accidents, in violation of the Driver's Privacy Protection Act ('DPPA'). Defendant sent various documents to Plaintiff, including a solicitation letter and a copy of a crash report that listed his name, date of birth, address, license plate number, driver's license number, and his car's make and model. *Id.* at *1. Defendant moved to dismiss and the Court denied the motion. First, the Court observed that the DPPA prohibits knowingly obtaining, disclosing, or using personal information, from a motor vehicle record, for a purpose not permitted under the statute. *Id.* at 2. Defendant argued that DPPA did not apply in this case because it excluded accident reports from the definition of protected "personal information." *Id.* The Court conceded that based on the plain language of the statute, the exclusion referred to information about vehicular accidents, driving violations, and driver's

status. *Id.* at 2-3. The Court pointed out, however, that the exclusion did not cover personal information such as the driver's address, license number, and plate number included in the accident report. *Id.* at 3. Moreover, case law precedent supported the conclusion that information in crash reports could constitute personal information. *Id.* The Court also rejected Defendant's argument that crash reports were not motor vehicle records under the DPPA. *Id.* The Court noted that an accident report is not a motor vehicle record according to the language of the statute. *Id.* at *4. Nevertheless, the Court observed that the DPPA also protects any personal information obtained from a motor vehicle record; thus, even if a document was created by the police, the DPPA protects any information in the report that the police obtained from the motor vehicle record. *Id.* The Court maintained the key question was whether the Illinois Secretary of State was the original source of the information, as the DPPA proscribes only the publication of personal information that had been obtained from motor vehicle records, thus, the origin of the information was crucial to the illegality of its publication. *Id.* at *4-5. The Court reasoned that Plaintiffs had plausibly alleged that the information listed on the crash reports came from motor vehicle records produced by the Secretary of State. Plaintiffs alleged that Defendant knowingly obtained a copy of the report from the Schaumburg Police Department, and/or the Illinois Secretary of State directly and/or through a private entity supplier of such motor vehicle records as part of Defendant's regular practice and procedure of obtaining such records for advertising and solicitation purposes. *Id.* at *5. The Court remarked that even if the Secretary of State did not share that information with private parties, it was also plausible that officers obtained the information on the crash reports from a Secretary of State's database. *Id.* Moreover, even if that information was not directly supplied by the Secretary of State, it was plausible that officers who wrote the crash reports copied the name, license number, and address from the driver's license, which was a motor vehicle record. *Id.* Finally, the Court was also not persuaded by Defendant's argument that the law firm's use of the accident report fell under an exception in the DPPA that allows personal information to be used if it is related "to the operation of a motor vehicle or public safety." *Id.* at *5-6. Defendant argued that because the crash reports were created after an accident, they were related to the operation of a motor vehicle. *Id.* at *6. The Court pointed out that Defendant's use of the report was not related to the operation of a motor vehicle; instead, Defendant obtained the crash reports and used their contents to solicit business. *Id.* Accordingly, the Court concluded that Defendant's use did not fall within the § 2721(b)(14) exception and denied the motion to dismiss. *Id.*

***Peterson, et al. v. Aaron's, Inc.,* 2015 U.S. Dist. LEXIS 72062 (N.D. Ga. June 4, 2015).** Plaintiffs, a group of computer leasers and purchasers, brought an invasion of privacy action alleging that Aspen Way Enterprises, Inc., a franchisee of Aaron's, Inc., remotely accessed their computers and retrieved private information through the PC rental agent software. *Id.* at *2. Defendants moved to dismiss, and the Court denied the motion. The Court observed that to show the tort of unreasonable intrusion, a Plaintiff must show a physical intrusion which is analogous to a trespass, which can be met by showing that Defendant conducted surveillance on Plaintiff or otherwise monitored Plaintiff's activities. *Id.* at *6. Here, Plaintiffs alleged that Aspen leased/sold computers to them which, without Plaintiffs' knowledge, contained software that allowed Aspen to access their private information. Aspen argued that it installed the software so as to track down a lost or stolen computer or a computer whose lessee was in default and that this did not constitute an unreasonable intrusion. The Court, however, noted that Aspen did not use the software for only this limited purpose, but instead allegedly used the software to access Plaintiffs' computers without permission and collect private information. *Id*. at *8. The Court thus denied Aspen's motion to dismiss Plaintiffs' common law intrusion of privacy claim. The Court also examined whether Plaintiffs asserted a plausible common law invasion of privacy claim. Plaintiffs argued that Aaron's, Inc. was liable because it conspired with Aspen to access their computers and collect their private information. The Court observed that the essential element of the alleged conspiracy is proof of a common design establishing that two or more persons in any manner, either positively or tacitly, arrive at a mutual understanding as to how they will accomplish an unlawful design. *Id.* at *9. Here, however, Plaintiffs failed to adequately allege that Defendants agreed to engage in the alleged unlawful acts, and besides a conclusory conspiracy allegation, the complaint contained no other supporting factual matter. Plaintiffs argued that because Aaron's, Inc. aided and abetted Aspen's surveillance of its customers, it was liable for tort claims asserted against the latter. The Court noted that Plaintiffs adequately alleged that Aaron's, Inc. knew that Aspen was invading its customers' privacy and provided substantial assistance that aided Aspen's unlawful acts. The complaint

alleged that Aaron's, Inc. promoted the software to Aspen, trained Aspen's personnel on the use of the software, and granted Aspen permission to use the software websites by opening a portal on the Aaron's intranet, allowing Aspen to access and use the software and thereafter illegally spy on its customers. *Id.* at *11. Further, Aaron's, Inc. allegedly provided Aspen with assistance with the use of antivirus software in relation to the PC rental agent. *Id.* To establish scienter, Plaintiffs alleged that several employees informed Aaron's, Inc. that the software which Aspen was using was very intrusive, key-logging all the customer's key strokes, transmitting images of the customers' screenshots, and transmitting photographs of computer users taken through the customers' webcams. The Court remarked that the aiding and abetting argument was a means by which Aaron's, Inc. may be found jointly liable for the invasion of privacy claim asserted against Aspen, and that Plaintiffs need not establish an independent aiding and abetting claim. *Id.* at *12-13. Accordingly, the Court denied Defendants' motion to dismiss Plaintiffs' invasion of privacy claim.

(xlii) Choice-Of-Law Issues In Class Actions

***Bobbit, et al. v. Milberg LLP,* 2015 U.S. App. LEXIS 16082 (9th Cir. Sept. 10, 2015).** Plaintiffs, a group of class members from a previously-filed securities class action, brought an action against their attorneys alleging malpractice for failing to meet discovery requirements. Plaintiffs named four law firms and their lawyers, all residents of different states, as Defendants. Plaintiffs moved for class certification, and the District Court denied the motion based on choice-of-law principles. *Id.* at *3. The District Court found that Plaintiffs failed to meet the predominance requirement because the law applicable to each class member's claim was the law of that class member's domicile state. *Id*. at *4. Because Plaintiffs' claims implicated the laws of up to 50 states, and Plaintiffs failed to meet their burden to show that conflicts between 50 states' laws did not defeat the predominance requirement, the District Court denied class certification. *Id*. Subsequently, Plaintiffs moved for voluntary dismissal of their individual claims, and the District Court granted the motion. On appeal, the Ninth Circuit reversed and remanded. Plaintiffs argued that the District Court erred in holding that the law of each class member's home state governed his or her individual claim, rather than the law of Arizona where the alleged malpractice occurred. The Ninth Circuit found that the place of injury was Arizona because the class members were injured by Defendants' negligence in an Arizona legal proceeding. *Id.* at *6. Further, the Ninth Circuit reasoned that the center of the relationships among the parties also supported application of Arizona law because the relationships between the class members and their lawyers existed in Arizona. *Id.* at *9. Finally, the Ninth Circuit held that, because the class members were scattered in different states, the laws of all of those states could not be applied. *Id.* at *11. Accordingly, the Ninth Circuit vacated the District Court's order denying class certification and remanded for further proceedings.

***David, et al. v. Signal International, LLC, et al.,* 2015 U.S. Dist. LEXIS 73159 (E.D. La. June 4, 2015).** Plaintiffs brought a class action alleging that Defendants recruited them to work as temporary workers and forced them to pay inbound travel expenses, visa expenses, and other recruiting expenses. Plaintiffs also claimed that Defendants discriminated against them and forced them to work as welders, pipefitters, and marine fabrication workers. Plaintiffs initially filed their action in Mississippi, and the Court transferred it to Louisiana under the "first-to file" rule. *Id*. at *202. Defendants moved for summary judgement on choice-of-law issues. The threshold question was whether Mississippi law or the law of Louisiana governed the choice-of-law analysis. *Id*. The Court found that Louisiana law governed the choice-of-law analysis. The Court noted that the Supreme Court in *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), held that, when a case is transferred under 28 U.S.C. § 1404(a) due to a change of venue for the convenience of parties and witnesses and in the interest of justice, the Court may apply the choice-of-law rules that prevailed in the transferor jurisdiction. Plaintiffs contended that the "*Van Dusen rule*" applied, and, therefore, Mississippi's choice-of-law principles controlled. *Id*. at *203. Plaintiffs first argued that a transfer order under the first-to-file rule was effectuated through § 1404(a) as a matter of law. The Court, however, found that the first-to-file rule is a distinct procedural mechanism for transferring venue. *Id*. Second, Plaintiffs argued that, even if this case was transferred under the first-to-file rule, the logic and holdings of both *Van Dusen* and *Ferens* should apply. The Court observed that the Fifth Circuit had not addressed this issue, and, of the other four case authorities that had addressed whether the *Van Dusen* rule applied to first-to-file transfers, one held that it did not, and the other three expressed skepticism. *Id.* at *204-05. Finding this reasoning persuasive,

the Court opined that, because the policy justifications underlying § 1404(a) and the first-to-file rule are often in tension, it made little sense to apply the *Van Dusen* rule – a rule developed to govern § 1404(a) transfers – to a first-to-file transfers. *Id.* at *205. Accordingly, the Court concluded that, because the *Van Dusen* rule was inapplicable, Louisiana law governed the choice-of-law analysis. Therefore, the Court held that Mississippi law governed the claims for breach of contract and agency.

***In Re Yahoo Mail Litigation*, 2015 U.S. Dist. LEXIS 68585 (N.D. Cal. May 26, 2015).** Plaintiffs brought a putative class action seeking declaratory and injunctive relief against Defendant for its alleged practice of scanning and analyzing e-mails of non-Yahoo e-mail subscribers in violation of the federal Stored Communications Act ("SCA") and the California Invasion of Privacy Act ("CIPA"). Plaintiffs were individuals who did not use Yahoo's e-mail service ("Yahoo Mail") but sent e-mails to Yahoo Mail subscribers from non-Yahoo e-mail addresses. *Id*. at *2. Plaintiffs contended that Defendant intercepted and scanned Yahoo Mail subscribers' e-mails, copied the entirety of the e-mails, extracted keywords from the bodies of the e-mails, reviewed and extracted links and attachments, and classified the e-mails based on their content. *Id*. at *4. Plaintiffs sought certification of a nationwide class of persons who were not Yahoo Mail subscribers who had sent e-mails to or received e-mails from a Yahoo Mail subscriber or who would send e-mails to or receive e-mails from a Yahoo Mail subscriber in the future. The Court granted the motion in part. First, the Court noted that, to establish standing for prospective injunctive relief, a Plaintiff must demonstrate that he or she suffered or was threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he or she would be wronged again in a similar way. *Id*. at *18. Defendant challenged Plaintiffs' standing to seek injunctive and declaratory relief under Rule 23(b)(2), arguing that Plaintiffs consented to its actions because Plaintiffs continued to send e-mails to Yahoo subscribers after they learned that Defendant allegedly scanned, stored, and used those e-mails. *Id*. at *17. The Court rejected this proposition as overly narrow. The Court found that, if Article III standing was as narrow as Defendant contended, it would be precluded from enjoining false advertising under California consumer protection laws. *Id*. at *22. Defendant also opposed certification, arguing that the issue of whether putative class members consented to Yahoo's interception, disclosure, and use of their e-mails was a key question that defeated commonality. *Id*. at *31. Defendant relied on *In Re Google Inc. Gmail Litigation*, 2014 U.S. Dist. LEXIS 36957 (N.D. Cal. Mar. 18, 2014), wherein the Court concluded that individualized questions with respect to consent were likely to overwhelm any common issues. *Id*. The Court found the case distinguishable. It noted that, unlike *Gmail*, Plaintiffs here did not seek to certify a class under Rule 23(b)(3), that Defendant in *Gmail* did not challenge whether Plaintiffs satisfied the commonality requirement, and that *Gmail* turned on Plaintiffs' failure to demonstrate predominance. *Id*. at *32. The Court concluded that, even if Defendant might be correct that consent could present individualized legal and factual questions, that fact did not preclude Plaintiffs from identifying other common legal and factual questions that were significant to Plaintiffs' claims and capable of class-wide resolution. *Id*. at *33. The Court considered whether applying California law to a nationwide class was appropriate as to Plaintiffs' CIPA claim. The Court found that the actual interception and scanning of e-mail occurred in data centers located throughout the country and the physical location of the sender or receiver did not necessarily determine whether an e-mail would be intercepted in one state or the other. *Id*. at *72. Accordingly, the Court concluded that, for non-California class members, other states' interests would be more impaired by applying California law than would California's interest by applying other states' laws. Therefore, it found that certification of the nationwide class under California law would be improper. Each non-resident class member's state law claims should be governed by and decided under the wiretapping laws of the state in which the class members resides. Because adjudication of the state law claims would require application of the laws of 50 states, the Court found that a nationwide class would not satisfy the cohesiveness requirements under Rule 23(b)(2). However, the Court granted Plaintiffs' alternative request to certify a California-only sub-class as to the CIPA claim. *Id*. at *78. Accordingly, the Court granted Plaintiffs' motion to certify a nationwide class as to Plaintiffs' SCA claim, denied Plaintiffs' motion to certify a nationwide class as to Plaintiffs' CIPA claim, and granted Plaintiffs' motion to certify a California-only sub-class as to Plaintiffs' CIPA claim. *Id.* at *79.

(xliii) Insurance-Related Class Actions

***Littleton, et al. v. State Farm Mutual Automobile Insurance Co.*, 2015 U.S. Dist. LEXIS 2788 (W.D. Ark. Jan. 8, 2015).** Plaintiff, an insured, brought a class action alleging that Defendant, an auto insurer, paid reduced rates by improperly tapping into so-called "PPO network reductions," which were negotiated by doctors and third-party re-pricers on behalf of health insurance providers. *Id.* at *2-3. As a result, Plaintiff allegedly remained personally liable to his medical providers for the difference between the bills he actually incurred and the reduced amounts Defendant paid, even though his insurance coverage limits were not exhausted. *Id.* at *3. Plaintiff authorized his medical care providers – Washington Regional Medical Center ("WRMC') and Blair Masters ("Masters") – to collect medical payments directly from Defendant. In turn, Defendant forwarded Plaintiff's bills to a re-pricing company, Mitchell International, which recommended payment of discounted in-network PPO rates for the medical services provided. *Id.* at *4. In support of the discounted rates, Defendant produced a contract between WRMC and USA Managed Care Organization ("USAMCO"), and a contract between Masters and Integrated Health Plan, Inc. ("IHP"). Defendant asserted that it did not enter into a contract directly with WRMC or Masters, was not a signatory to either contract, and that it instead had contracted with a third-party, Cofinity, Inc., which had entered into agreements with USAMCO and IHP on its behalf. *Id.* at *4-5. The parties cross-moved for summary judgment, and the Court denied both motions. Defendant contended that both medical providers accepted its reduced rates as payment in full. The Court, however, found a genuine dispute of material fact as to whether Masters refused to accept the reduced rates and demanded payment from Plaintiff. Alternatively, Defendant argued that, because Plaintiff assigned the payment of benefits to Masters, he no longer maintained an injury-in-fact. The Court, however, noted that, even if Plaintiff permitted Masters to bill Defendant directly for medical care costs, this designation of procedure for collection did not equate to a contractual assignment of rights under the Policy, nor did such an assignment prohibit the medical provider from collecting residual balances from its patient. *Id.* at *11. The Court opined that Plaintiff still would remain personally liable for any medical debt claimed by his medical providers that Defendant refused or otherwise failed to pay. *Id.* The Court also found a material issue of disputed fact as to whether the payment of reduced rates could be considered "reasonable" under the terms of Defendant's own Policy. *Id.* at *11-12. In order to be "reasonable," rates must be agreed by the medical care providers, and here there was a genuine issue of disputed fact as to what Masters agreed. The Court, therefore, denied summary judgment to Defendant. Plaintiff further argued that the payment of reduced network rates was illegal and violated the express terms of the Policy. The Policy defined the payment of "reasonable expenses" as the fees agreed by both the insured's healthcare provider and Defendant. *Id.* at *12. Thus, even in the absence of a direct contract between Defendant and the medical care providers, the Court opined that Defendant's payment of reduced rates could be deemed reasonable if some other means of agreement could be demonstrated. *Id.* at *12-13. The Court noted that it was at least arguable that WRMC and Defendant came to a constructive agreement to accept reduced rates, as evidenced by WRMC's actual acceptance of payment from Defendant, followed by WRMC's release of Plaintiff's medical lien and its affirmation that no further debt was owed. *Id.* at *13. Because WRMC's example was evidence that Defendant's policy might be reasonable under the Policy's terms, the Court refrained from holding that Defendant's practice of paying reduced rates breached the Policy's terms. Accordingly, the Court denied summary judgment to Plaintiff.

***McDonough, et al. v. Horizon Blue Cross Blue Shield Of New Jersey,* 2015 U.S. App. LEXIS 16841 (3d Cir. Sept. 17, 2015).** In this class action arising under the ERISA relating to employer-sponsored healthcare benefit plans insured or administered by Defendants, the Third Circuit affirmed the District Court's grant of final approval to a class action settlement and awarded Plaintiffs attorneys' fees and costs. This case stemmed from two putative class action lawsuits filed in 2009 and 2010 in which Defendant's Horizon Blue Cross Blue Shield of New Jersey ("Horizon") subscribers and providers claimed that its use of two flawed databases – Ingenix and Top of Range (or "TOR") – caused it to systematically underpay both subscribers and providers for out-of-network healthcare services. *Id.* at *2. The two class actions were later consolidated. *Id.* After the parties settled, approximately 2.7 million of the 2.8 million class members received the Court-approved notice. *Id.* Six objectors filed their objections to the settlement. *Id.* A group of objectors sought a continuance of the hearing, which the District Court denied, and it approved the settlement. *Id.* at *4. On appeal, the objectors first argued that the current legal standards for assessing

the fairness of a class action settlement under Rule 23(e) should be modified when the settlement consisted solely of non-pecuniary benefits. The Third Circuit refused to entertain this argument because the objectors had not raised this argument in the District Court, and also because this issue was not preserved for appeal. *Id*. at *7. The objectors also argued that the District Court erred because the settlement did not offer a real or substantial benefit to the class. Specifically, the objectors asserted that the settlement required the class to relinquish $10 billion in claims in order to receive an exclusively non-pecuniary relief – the discontinuation of Ingenix and TOR – which it claimed the class would have received anyway, as Horizon was planning on discounting those databases regardless of the outcome of the litigation. The Third Circuit disagreed, finding that the District Court had noted that the $10 billion damages calculation came from Plaintiffs' expert report, which at the time of the settlement, was subject to *Daubert* challenge, and was calculated using a model that the District Court had rejected in a similar case. The Third Circuit remarked that placed in that context, the likelihood of Plaintiffs actually recovering any portion of that damages calculation was dubious. *Id*. at *10. The Third Circuit agreed with the District Court that a settlement could be fair without involving pecuniary relief. *Id*. at *11. Finally, the objectors argued that they were denied procedural fairness in voicing their objections to the proposed settlement because the District Court refused to continue the final fairness hearing to accommodate their counsel's vacation schedule. *Id.* at *13. The Third Circuit pointed out that the objectors were heard through counsel in both their papers and at two sessions of the final fairness hearing and, therefore, they were not denied procedural fairness. *Id.* at *14. Accordingly, the Third Circuit affirmed the District Court's ruling.

***Monteleone, et al. v. The Auto Club Group,* 2015 U.S. Dist. LEXIS 510 (E.D. Mich. Jan. 6, 2015).** Plaintiffs, a group of insureds, brought a putative class action alleging that Defendants denied their valid property damage claims by erroneously applying the terms of their policies. Plaintiffs had homeowners policies from Defendants. Plaintiffs claimed that they paid for coverage for water damage losses where water from the home is unable to reach the municipal sewer due to a blockage or other plumbing failure, which forces the exiting water to re-enter the home through a basement or floor drain. *Id* at *3. Plaintiffs claimed that Defendants denied coverage under the policies' exclusion, which provided that no coverage exists for water or water-borne material that backs up through sewers or drains or water which enters into and overflows from within a sump pump, sump pump well, or other type of system designed to remove sub-surface water that is drained from the foundation area. *Id.* at *4. Plaintiffs sought a declaratory judgment that Defendants' misinterpretation of certain policy provisions was erroneous (Count I); alleged breach of contract on behalf of the class members who purchased policies (Count II); and alleged breach of contract on behalf of class members whose claims were denied (Count III). Defendants moved to dismiss Count II, and the Court granted the motion. Defendants moved to dismiss the breach of contract claim arising out of the alleged policy of denying certain legitimate overflow claims, which was brought on behalf of all policyholders regardless of whether they sought coverage for water damage. The Court opined that Plaintiffs failed to state a claim for breach of contract arising out of the theory that all homeowners paid for certain coverage for which they did not receive. *Id*. at *10. The Court observed that unless Plaintiffs filed a claim with their insurer, Plaintiffs could not establish a breach under the policy, and there can be no breach in the absence of a duty. *Id*. Further, the Court ruled that even if Defendants' method of reviewing water damage claims relied on an improper interpretation of policy provisions, this alleged error did not give rise to a cognizable claim because no covered loss occurred for those Plaintiffs who never suffered water damage, and Defendants owed no duty to them. *Id*. at *11. The Court remarked that Defendants' duty to perform under the insurance contracts does not arise unless a homeowner submits a valid claim, and Plaintiffs who never filed property loss claims can show no actual injury. *Id*. Additionally, the Court observed a general rule of insurance law which states that an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned. *Id.* at *16. Because Defendants were not at risk for any legitimate claims once the insurance contract was executed, the Court found that there was no basis for the return of any premiums. Accordingly, the Court granted Defendants' motion to dismiss.

(xliv) Disparate Impact Issues In Class Actions

***Abril-Rivera, et al. v. U.S. Department Of Homeland Security,* 2015 U.S. App. LEXIS 13299 (1st Cir. July 30, 2015).** Plaintiffs, a group of employees, brought an action under Title VII of the Civil Rights Act

alleging that the Federal Emergency Management Agency's ("FEMA") implementation of a rotational staffing plan at the Puerto Rico National Processing Service Centers ("PR-NPSC") and eventual closure of the facility discriminated against them on the basis of their Puerto Rican national origin and constituted unlawful retaliation for protected conduct. *Id.* at *2. The FEMA established a temporary call center in Puerto Rico to address calls from Spanish-speaking victims of Hurricane Marilyn, and, in 2003, it became a full-fledged NPSC even though it lacked the state of the art furniture and equipment found in the other NPSCs. *Id.* at *3-4. In 2007, the FEMA's Occupational, Safety & Health Office conducted a Management Evaluation and Technical Assistance Review of the PR-NPSC facility and disclosed several serious deficiencies rated as significant risks to health and safety. *Id.* at *4-5. In May 2008, the Branch Chief for NPSC Operations notified the employees about the suspension of operations at the PR-NPSC until the correction of identified fire and life safety deficiencies. *Id.* at *6-7. Another notification to the employees in July 2008 explained that, based on the FEMA's review of the inspection result, it had decided to continue making repairs to the facility and to resume operations with a reduced staff on a rotational basis. *Id.* at *9. The FEMA eventually decided to close the PR-NPSC explaining that the facility, originally established only to serve a temporary mission, no longer had an operational requirement and, in view of the inadequacy of the facility, it would not be a sound investment to repair or relocate it to a new facility. *Id.* at *11. The District Court granted summary judgment to Defendants, finding that Defendants had legitimate, non-discriminatory reasons for their action and that Plaintiffs failed to show a causal link between their protected conduct and the purported retaliation. *Id*. On Plaintiffs' appeal, the First Circuit affirmed the District Court. The First Circuit agreed with the District Court that the rotational staffing plan served the FEMA's legitimate needs of maintaining as many employees as possible to assist in the event of a disaster while still maintaining a safe working environment. *Id.* at *22. The record was clear that the 2008 inspection revealed serious safety concerns, and the FEMA's decisions to reduce staffing levels while addressing those concerns and evaluating the future of the PR-NPSC were reasonable. *Id.* Further, the undisputed facts showed numerous business justifications for the conclusion that the PR-NPSC should have closed, including remedying the deficiencies identified in the 2008 inspection and establishing and operating a new facility in Puerto Rico both being expensive and lacking critical modern infrastructure. *Id.* at *23-24. The First Circuit thus found no contrary evidence against Defendants' legitimate business justification for its conduct and, therefore, affirmed the District Court's dismissal of Plaintiffs' disparate impact claims as baseless. Plaintiffs based their retaliation claim on an EEOC complaint filed in 2006 by several groups of PR-NPSC employees asserting less payments compared to their mainland counterparts and on an EEOC complaint filed in response to the July 2008 implementation of the rotational staffing system. *Id.* at *27. The First Circuit found that the first set of complaints was far too temporally remote from the challenged actions to support an inference of causality. *Id.* at *28. Because over 14 months had elapsed between the complaint regarding pay and the implementation of rotational staffing system during repairs, the First Circuit also reasoned that it was too long to support an inference that the complaint led to a decision to reduce staffing during fire-safety related repairs. *Id*. The First Circuit, therefore, concluded that the entire lawsuit was without merit and, accordingly, affirmed the District Court's judgment.

***Waldon, et al. v. Cincinnati Public Schools,* 2015 U.S. Dist. LEXIS 12464 (S.D. Ohio Feb. 3, 2015).** Plaintiffs brought a class action alleging that Defendant school district terminated their employment based on § 3319.391 of the Ohio Revised Code and the firings had a racially-discriminatory impact. The House Bill 190, which the Ohio Legislature enacted in 2007 as § 3319.391 of the Ohio Revised Code, requires schools to terminate employees with certain convictions regardless of how remote in time or how little they related to the employees' qualifications. *Id*. at *3. Pursuant to this law, Defendant terminated Plaintiffs based on criminal matters that were decades old. Plaintiffs asserted violations of Title VII and § 4112 of the Ohio Revised Code. The parties cross-moved for summary judgment. While Defendant contended that Plaintiffs had failed to show statistical proof of disparate impact of the criminal background check requirement and therefore had not shown the requirement resulted in a disparate impact, Plaintiffs contended that nine of the ten employees discharged were African-Americans, and Defendant had offered no business necessity justifying the use of the policy. *Id*. at *2. The Court granted Defendant's motion and denied Plaintiffs' motion. Plaintiffs offered statistical analysis showing that while African-Americans comprised slightly more than 50% of Defendant's non-licensed employees, they comprised 100% of Defendant's non-licensed employees who lost their jobs due to the criminal background check policy. *Id*. at

*8. Defendant, however, argued that Plaintiffs were wrong to focus solely on the sub-set of employees that Defendant terminated, but should instead offer relevant statistical evidence of the effects of the policy state-wide, as § 3319.391 applied state-wide and not merely to Defendant's employees. *Id*. Although Plaintiffs contended that the "total group" at issue was Defendant's employee population, the Court found Defendant's position "well-taken" that the policy at issue was one that came from a state mandate, and, therefore, the onus was on Plaintiffs to show that the total group impacted state-wide was disproportionally comprised of minorities. *Id*. at *8-10. The Court observed that it was appropriate to view the "total group" in order to examine whether the policy had a disproportionate impact. *Id*. at *10. The Court found that Plaintiffs had not offered evidence showing state-wide disparate impact of the background check policy. Accordingly, the Court concluded that Plaintiffs failed to establish a *prima facie* case, and that their claim failed as a matter of law. *Id*. Finally, the Court ruled that because Plaintiffs' federal claims failed, their state law claim under § 4112 also failed.

(xlv) ADA Class Actions

***Heinzl, et al. v. Starbucks Corp.*, 2015 U.S. Dist. LEXIS 28365 (W.D. Pa. Mar. 9, 2015).** Plaintiff, a customer, brought a putative class action under the ADA alleging that Defendant's facilities were not fully accessible to and independently usable by individuals who used wheelchairs for mobility. Plaintiff alleged that Defendant violated the ADA by failing to remove architectural barriers, to alter its stores' design, or construct accessible facilities, which would deter similarly-situated individuals from returning to Defendant's facilities. *Id*. at *4. Defendant filed a motion to dismiss, which the Court denied. Defendant argued that it did not own or control the parking lots with the alleged violations, that it was only one of the many tenants at the location, and that Plaintiff had either sued the wrong party or failed to join the necessary parties. *Id*. at *5. Defendant further argued that Plaintiff lacked standing to bring this class action, as she claimed that she was likely to return to only three of the alleged incompliant facilities and not to 19 other locations cited in the complaint. Defendant also claimed that Plaintiff lacked standing under a deterrent effect theory because she could not allege that she had knowledge regarding barriers at other Starbucks locations, and that she could not create a standing by making class action allegations. *Id*. at *6. Plaintiff argued that she demonstrated an intent to return to the subject properties based upon past discriminatory conduct, a reasonable inference that the conditions would continue, and a reasonable inference that her stated intent to return were plausible. Plaintiff also contended that she satisfied the deterrent effect test based upon the barriers she encountered that impeded her safe access to Defendant's store. *Id*. The Court observed that because a Plaintiff only may seek injunctive relief under the ADA, and no damages were available, the case law precedents look beyond the alleged past violations and consider the possibility of future violations. *Id*. at *11. The Court also observed that case law precedents have used a four part test under the ADA, which requires a Plaintiff to show his or her: (i) proximity to Defendant's place; (ii) past patronage; (iii) definitiveness of return; and (iv) frequency of travel. *Id*. The Court noted that the intent of return test for standing in ADA cases favors the deterrent effect test. In turn, the deterrent effect test, the Court reasoned, relies on the provision in the ADA that a disabled person shall not be required to engage in a futile gesture if such person has actual notice that an organization does not intend to comply with its provision. *Id*. at *15. The Court observed that even under the deterrent effect test, Plaintiff must still assert an intent to return to a particular place where violations allegedly occur. The Court, however, concluded that Plaintiff had established these requirements here because she was not required to show that she would likely visit the remaining 19 locations, as such was an issue for consideration during the determination of a class certification motion, and not one for a motion to dismiss. *Id*. at *17. Further, the Court explained that in a class action, the issue of standing was limited to Plaintiff's individual standing, not whether Plaintiff can challenge policies as they related to a multitude of locations. *Id*. Finally, the Court rejected Defendant's argument that necessary parties were not included in this action. The Court explained that Defendant had numerous alternatives to overcome this, since it could notify the landlords to comply with the ADA, and could join or implead the landlords as additional Defendants. *Id*. at *32. Accordingly, the Court denied Defendant's motion to dismiss, finding that Plaintiff had standing to bring this action.

***Mielo, et al. v. Aurora Huts, LLC,* 2015 U.S. Dist. LEXIS 1471 (W.D. Pa. Jan. 7, 2015).** Plaintiff, a wheelchair bound individual, brought a class action alleging that, when he visited Defendant's retail

property, he experienced unnecessary difficulty and risk due to excessively sloped surfaces in a purportedly accessible parking space and access aisle. Plaintiff asserted that investigators examined multiple retail locations owned by Defendant, and they found numerous specified conditions in violation of the Americans With Disabilities Act ("ADA") at each of the locations. Plaintiff alleged a failure to remove architectural barriers in violation of 42 U.S.C. § 12182(b)(2)(A)(iv) and a failure to alter, design, or construct accessible facilities in violation of § 12183(a)(1) that deterred him from returning to or visiting Defendant's facilities. Plaintiff asserted that, without injunctive relief, he would be unable to fully access Defendant's facilities. *Id.* at *9. Defendant moved to dismiss, and the Court denied the motion. The Court noted that, because the remedy for a private ADA Title III violation is injunctive relief, it must look beyond the alleged past violations and consider the possibility of future violations. Plaintiff, therefore, had to demonstrate a real and immediate threat of injury in order to satisfy the injury-in-fact requirement of standing. *Id.* at *11. Defendant argued that Plaintiff lacked standing because, although he alleged that he visited one location, he did not claim to have visited any of the other 12 locations identified in the complaint, nor did he allege any concrete plans to visit any of the locations in the future. Further, Defendant contended that Plaintiff's lack of definitive allegations regarding plans to return to all locations described in the complaint resulted in a failure to sufficiently allege standing to assert ADA claims. The Court observed that *Heinzl v. Boston Market Corp.*, 2014 WL 5803144 (W.D. Pa. Nov. 7, 2014), held that, when a Plaintiff has presented a class action complaint, the issue of standing is limited to Plaintiff's individual standing, not whether Plaintiff can challenge policies as they relate to a multitude of locations, which is an issue of class certification. *Id.* at *14. Further, the Court noted that the question of whether an injunction properly may extend to stores that Plaintiff has not actually visited should be answered by asking whether Plaintiff can serve as a representative of a class that seeks such relief. *Id.* at *15. Thus, the Court found that the issue of standing should not be conflated with class certification under Rule 23. *Id.* Additionally, the Court observed that, at the pleading stage, general factual allegations of injury resulting from Defendant's conduct may suffice because, on a motion to dismiss, the Court presumes that general allegations embrace those specific facts that are necessary to support the claim. *Id.* Accordingly, the Court opined that, at this initial stage of litigation, Plaintiff sufficiently alleged the requirements of standing and denied Defendant's motion to dismiss for lack of standing. Additionally, the Court noted that Plaintiff alleged a commonality of barriers and a centralized policy regarding the management and operation of Defendant's facilities, as well as a lack of plan or policy that was reasonably calculated to make Defendant's facilities fully accessible to and independently usable by individuals with mobility disabilities. Plaintiff alleged specific conditions at each location that violated the regulations promulgated pursuant to the ADA and provided sufficient factual allegations to plausibly state a cause of action for relief pursuant to the ADA. Accordingly, the Court denied Defendant's motion to dismiss pursuant to Rule 12(b)(6).

***National Federation Of The Blind Of California, et al. v. Uber Technologies, Inc.*, 2015 U.S. Dist. LEXIS 51767 (N.D. Cal. April 17, 2015).** Plaintiffs, National Federation of the Blind of California ("NFBC") and three individuals, brought a class action alleging that Defendants discriminated against blind individuals by refusing to transport guide dogs in violation of the Americans With Disabilities Act ("ADA"), the California Unruh Civil Rights Act, and the California Disabled Persons Act ("DPA"). Defendants use mobile software applications to arrange rides between passengers and their drivers. To use Defendants' services, a customer submits a request through a mobile software application. Individuals who downloaded Defendants' mobile software application agreed to Defendants' terms of service, including an agreement to submit all disputes to binding arbitration. *Id.* at *3. Defendants moved to dismiss the complaint for failure to establish standing and failure to state a claim. Specifically, Defendants alleged that Plaintiffs NFBC, Hingson, and Pedersen did not have standing to sue under the ADA or state law and that Defendant Uber was not a public accommodation under the ADA. The Court denied the motion to dismiss on all grounds. First, the Court found that NFBC met the test set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342 (1977), for associational standing because: (i) at least one Plaintiff had standing to sue in his own right; (ii) NFBC's purpose – to achieve the integration of the blind into society on a basis of equality with the sighted – was relevant to the purpose of the litigation; and (iii) NFBC was seeking to represent its members in claims for declaratory and injunctive relief that did not require individualized proof. *Id.* at *8-9. Second, the Court found that the arbitration agreements were not a bar to associational standing because NFBC brought claims on behalf of members who had standing and

did not seek monetary relief. *Id.* at *10-11. Third, the Court concluded that prudential considerations did not preclude NFBC's associational standing because NFBC was not simply standing in for one of its members, but rather it represented a broad membership base that allegedly had been injured by Defendants. *Id.* at *11-12. Fourth, the Court noted that the ADA does not require Plaintiffs to engage in futile gestures, and Plaintiffs can establish injury-in-fact under the ADA by showing that they were deterred from visiting an accommodation on specific occasions because of known barriers. *Id.* at *12-13. The Court also found that Plaintiff Hingson had standing because he had knowledge that Defendants turned away disabled individuals with service animals and believed that there was a likelihood of continued discrimination. *Id.* at *15. Fifth, the Court concluded that Plaintiff Hingson could seek monetary recovery under the Unruh Act Claims and the DPA for his actual harm and his attorneys' fees because the ADA did not provide for those two remedies. *Id.* at *17. Finally, the Court found that, because the NFBC had standing under the ADA, it also had standing to pursue state law claims. *Id.* at *17-18. Accordingly, the Court denied Defendants' motion to dismiss the complaint.

***Vondersaar, et al. v. Starbucks Corp.*, 2015 U.S. Dist. LEXIS 18222 (C.D. Cal. Feb. 12, 2015).** Plaintiffs, a group of disabled individuals, brought an Americans With Disabilities Act ("ADA") action alleging that an unspecified number of Defendant's stores had pick-up counters that were too high for Plaintiffs to reach. Plaintiffs alleged that thousands of stores across the country had high counters, and identified 50 such stores in California, some of which Plaintiffs had personally visited. Plaintiffs moved for certification of a nationwide class comprised of all disabled wheelchair and scooter users who were adversely affected by high counters in Defendant's stores constructed between January 26, 1993 and 2005. *Id*. at *2-3. The Court denied the motion. Defendant submitted evidence that no California store location currently had a counter higher than 34 inches. The Court observed that because a private Plaintiff can sue only for injunctive relief under the ADA, a Defendant's voluntary removal of alleged barriers prior to trial can moot a Plaintiff's ADA claim. *Id.* at *5. Further, the Court noted that inherently transitory class claims, which by their nature are capable of repetition or likely to repeat as to the class, are not mooted upon the mooting of the proposed class representative's claim, and that a Defendant's litigation decision to "pick off" a named class representative may also render a claim transitory and preclude a finding of mootness. *Id.* Here, Plaintiffs asserted that Defendant picked off class representatives in a perpetual "cat and mouse game" whereby Plaintiffs visited a store and Defendant then fixed those counters and asserted mootness. *Id.* The Court, however, found that Defendant had not lowered counters only at those stores visited by the named Plaintiffs, nor had it limited its alterations to the broader set of stores specifically identified in the complaint. Defendant had instead addressed the counter height issue at every one of its stores in California, which the Court opined did not amount to a focused attempt to "pick off" the named Plaintiffs. *Id.* at *6. Thus, the Court concluded that the transitory claim exception to the mootness doctrine was inapplicable. Plaintiffs contended that the absence of the alleged violations within California did not moot Plaintiffs' ADA claim because named Plaintiff Taruc regularly traveled outside California, and had encountered a high counter at a Defendant store in Arizona. Plaintiffs, however, had not alleged any of these facts regarding Taruc in the complaint, and only raised them for the first time in their reply in support of their motion. Defendant thus had no opportunity to respond to Plaintiffs' contentions. Nevertheless, the Court found that Plaintiffs failed to carry their burden to demonstrate that Taruc's claims and the defenses against them were typical of those of the class, or that Taruc would be an adequate class representative. *Id.* at *7. The Court thereby denied Plaintiffs' motion to certify the ADA class.

***Wagner, et al. v. White Castle System, Inc.*, 2015 U.S. Dist. LEXIS 125773 (S.D. Ohio Sept. 21, 2015).** Plaintiffs brought a putative class action alleging that Defendant discriminated against them in violation of the Americans With Disabilities Act ("ADA") by failing to have accessible facilities at 54 of its Ohio-based White Castle restaurant sites. Plaintiffs alleged that they had encountered architectural barriers at the White Castles they had visited that made it more difficult for them to enter the premises, to eat inside the premises, and to use the counters; as a result, they were denied the full and equal access to Defendant's restaurants. *Id.* at *2-3. Plaintiffs sought a permanent injunction, requiring Defendant to correct the alleged problems, and also asked for costs and attorneys' fees. *Id.* at *4. Plaintiffs sought to represent a class of individuals with mobility impairment, who desired to use Defendant's White Castle locations in Ohio. *Id.* at *4-5. The Court denied the motion, finding that they had not met their burden under Rule 23(a)(2). In light

of Plaintiffs' allegations and the evidence before it at that time, the Court was persuaded by the approach that the U.S. District Court for the Western District of Pennsylvania took under similar circumstances in *Mielo v. Bob Evans Farms, Inc.*, 2015 U.S. Dist. LEXIS 36905 (W.D. Penn. Mar. 23, 2015). *Id.* at *12. The Court in Mielo held that the proposed class members would not share common legal issues or salient core facts and any determinations regarding ADA compliance would have to be answered on a store-by-store basis. *Id.* at *13-14. Similarly, the Court observed here that Plaintiffs had not demonstrated that there was a common answer to the question of whether the putative class members had been denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Defendant's facilities due to Defendant's failure to operate its facilities in compliance with the ADA. *Id.* at *15. The Court determined that Plaintiffs presented no evidence of a common design or blueprint as to any specific feature of Defendant's 54 Ohio-based White Castle restaurants, or a common policy applicable to the stores. *Id.* at *15-16. Moreover, Plaintiffs provided no counter-evidence to the affidavit offered by Defendant's Director of Engineering who averred that the restaurants varied significantly. *Id.* at *16. The Court pointed out that even Plaintiffs' own expert identified varied alleged ADA violations among the handful of restaurants he visited. *Id.* The Court remarked that Plaintiffs had presented no evidence of the years in which the 54 challenged White Castle restaurants were built and, therefore, which legal standard applied in terms of the ADA's requirements. *Id.* at *17. The Court maintained even if they had, differences in applicable law would require it to answer a variety of restaurant-specific questions. *Id.* Accordingly, the Court declined certification of a Rule 23 class, but allowed Plaintiffs to re-file for class certification at a later date if they were able to present evidence demonstrating that a narrower or more specifically defined class of individuals met the prerequisites for Rule 23 class certification. *Id.* at *18-19.

(xlvi) Government Enforcement Litigation

***Case New Holland, Inc. v. EEOC,* Case No. 13-CV-1176 (D.D.C. Sept. 22, 2015).** Plaintiffs, a group of employers, brought an action alleging that the EEOC and certain EEOC officials violated the Administrative Procedure Act ("APA") and the Fourth and Fifth Amendments of the U.S. Constitution by sending e-mails and web-linked inquiries to 1,330 business e-mail addresses of Plaintiffs' employees without prior notice to Plaintiffs. *Id.* at 1. The e-mails allegedly contained a link to a series of questions relevant to the EEOC's investigation into allegations that Plaintiffs discriminated against job applicants and current and former employees. Plaintiffs alleged that the EEOC's e-mails disrupted its business operations, and the blast e-mail trolled for individuals to sue Plaintiffs and force a monetary settlement regardless of the merits of any claim. *Id.* at 2. In October 2014, the Court dismissed the action without prejudice, finding that Plaintiffs' claims were conclusory, consisting of generalities and speculation that were insufficient to establish a cognizable injury, and nothing in the complaint suggested that litigation was impending. *Id.* at 2-3. Plaintiffs moved to reconsider the dismissal order, or in the alternative to grant leave to Plaintiffs to file a first amended complaint. The Court denied Plaintiffs' motion to alter or amend its previous order, but granted leave to file an amended complaint. The Court found that the factual assertions presented in Plaintiffs' complaint, even if assumed to be true, were insufficient to allege a cognizable injury, and that it applied the appropriate standard while entering the dismissal order. *Id.* at 6. Plaintiffs argued that they were injured-in-fact by the statutory and constitutional violations, regardless of other harm or results, merely because the complaint contained allegations that Defendants violated the APA and U.S. Constitution. *Id.* The Court, however, pointed out that standing principles demand some form of injury and not a mere showing that a law has been violated. *Id.* at 6-7. Because the Court did not reach the merits of Plaintiffs' claims, and dismissed the action without prejudice so as to provide Plaintiffs with an opportunity to remedy their shortcomings by amending the pleadings, the Court permitted Plaintiffs to file an amended complaint. *Id.* at 7-8. Accordingly, the Court denied Plaintiffs' motion to alter or amend the dismissal order and granted leave to file a first amended complaint.

Editor's Note: This case represents the rare instance where an employer initiated litigation against the EEOC over its alleged unlawful investigatory techniques.

***County Of Cook, et al. v. Bank Of America Corp.,* 2015 U.S. Dist. LEXIS 34468 (N.D. Ill. Mar. 19, 2015).** Plaintiff brought an action alleging that Defendants discriminated against African-American and Hispanic borrowers in violation of the Fair Housing Act ("FHA"). Specifically, Plaintiff alleged that

Defendants targeted minority borrowers and made approximately 95,000 home loans with less favorable terms and conditions than loans made to similarly-situated white borrowers. *Id.* at *2. Defendants moved to dismiss, arguing that Plaintiff lacked Article III and statutory standing, and that Plaintiff failed to state any FHA claims upon which relief could be granted. The Court denied Defendants' motion on the basis that Plaintiff asserted an adequate injury-in-fact that was plausibly connected to Defendants' alleged discriminatory lending activities. *Id.* at *11. Plaintiff asserted several distinct injuries arising from Defendants' alleged discriminatory practices, including: (i) an eroding tax base; (ii) declining property tax revenues; (iii) the cost of providing government services associated with foreclosed and/or vacant properties; (iv) lost recording fee income; and (v) intangible injuries to the fabric of its communities. *Id.* at *8. The Court found that Plaintiff's asserted injuries satisfied Article III's injury-in-fact requirement. *Id.* Defendants also argued that Plaintiff did not fall within the FHA's zone of interests. Because the Court had already determined that Plaintiff's complaint satisfied Article III's standing requirements, and found a plausible causal connection between Defendants' alleged conduct and Plaintiff's injuries, it declined to undertake a separate zone of interests analysis. *Id.* at *12. Defendant further asserted that the FHA's two-year statute of limitations barred Plaintiff's claims. The Court, however, applied the continuing violation doctrine, finding that Plaintiff's complaint was not limited to discrete home loan decisions made between 2004 and 2008, but that Defendants "continued" to charge minority borrowers discriminatory fees and costs during the servicing of home loans. *Id.* at *14-16. Finally, Defendant contended that Plaintiff failed to state plausible disparate treatment and disparate impact claims. The Court rejected this argument, finding that Plaintiff's central allegation – that Defendants targeted minority borrowers and steered them into more expensive home loans with a higher risk of default than loans made to similarly-situated white borrowers – was sufficient to state a plausible disparate treatment claim. *Id.* at *17-18. Because Plaintiff's disparate impact claim was cognizable under the FHA and because Plaintiff identified specific practices that allegedly caused minority borrowers to receive a disproportionate share of high cost home loans, the Court concluded that Plaintiff had sufficiently alleged a disparate impact claim. *Id.* at *20. Accordingly, the Court denied Defendants' motion to dismiss.

***Lone Star College System, et al. v. EEOC,* 2015 U.S. Dist. LEXIS 30266 (S.D. Tex. Mar. 12, 2015).** Plaintiff brought an action alleging that the EEOC failed to follow its own procedures and regulations in conducting an investigation into Plaintiff's employment practices. Plaintiff alleged eleven claims against the EEOC, including opening an investigation without an authorizing regulation; violating the duty to verify an aggrieved party's charge; attempting to depose Plaintiff's general counsel and inquire into matters protected by the attorney-client privilege; disclosing information to a third-party; requiring compliance with investigations that constitute undue hardship for the company; subjecting it to unreasonable searches and seizures in violation of the Fourth Amendment; and violating the Fifth Amendment by demanding access Plaintiff's data. *Id.* at *2-3. The EEOC filed a motion to dismiss, which the Court granted in its entirety. The Administrative Procedure Act ("APA") authorizes judicial review of a final agency action, and without a final agency action, a Court lacks subject-matter jurisdiction over an APA claim. *Id.* at *7. The Court found that it lacked jurisdiction because the alleged claims involved no final agency action. According to the Court, the EEOC's actions during the investigation process, including issuing a subpoena and making reasonable cause determination, were not final actions appropriate for judicial review because they did not fix obligations or legal relationships or change the legal position of the party being investigated. *Id.* at *11. Plaintiff argued that the EEOC's written determination on its petition to revoke the subpoenas was a final agency action sufficient to garner judicial review. The Court, however, rejected that argument, finding that the EEOC could not enforce subpoenas without a Court's order and thus the determination fixed no obligation or consequences to Plaintiff. *Id.* at *13. The Court explained that, although compliance with an EEOC subpoena might "speed the investigation along, and in many cases is the right thing to do, there may be valid reasons not to comply" absent a Court's order. *Id.* Therefore, according to the Court, if Plaintiff believed that the charge was invalid or insufficient, its remedy was to refuse to comply with the EEOC's subpoenas in accordance with regulations regarding such refusals to comply, and if the EEOC sought judicial enforcement of its subpoenas, it would have to demonstrate the validity of the charge to the Court. *Id.* at *17. Because the claims at issue were not brought in relation to the judicial enforcement of a subpoena, the Court concluded that Plaintiff did not challenge a final action, and thus the claims were not ripe for review. *Id.* at *16. The Court also rejected Plaintiff's claim that the EEOC's questioning of its

general counsel about privileged matters was unauthorized, and that the investigator was biased. The Court noted that all of Plaintiff's claims involved different facets of the investigation process, and thus, were not the kind of exceptional circumstances that could persuade it to overlook the requirement for final agency action. *Id.* at *17-18. Moreover, the regulations that Plaintiff claimed to be violated state that a violation does not create an enforceable right against the EEOC or its officers or employees. The Court thus found no stand-alone cause of action for a violation of the regulation. *Id.* at *19. Claiming that the EEOC plan to provide a third-party with a list of all of Plaintiff's Hispanic employees, Plaintiff sought a declaratory judgment and injunction prohibiting the disclosure. The Court, however, found that the claim did not involve a final agency action because the information had not yet been released and the Court could not engage in pre-violation review of the EEOC's actions. *Id.* at *22-23. As to the alleged constitutional violations, the Court found no injury because the EEOC had not yet required Plaintiff to submit to any searches or seizures, or sought enforcement of the subpoena. *Id.* at *24. The Court therefore concluded that the complained-of-actions could be raised for judicial review only if the EEOC sought judicial enforcement, and until then it lacked jurisdiction over Plaintiff's claims. Accordingly, the Court granted the EEOC's motion to dismiss.

***Poursaied, et al. v. EEOC,* 2015 U.S. Dist. LEXIS 153686 (M.D.N.C. Nov. 13, 2015).** Plaintiff brought an action alleging that Defendants – the EEOC and Defendant Constangy, Brooks, Smith, & Prophete, LLP ("Constangy") – violated the Freedom of Information Act ("FOIA"). This case arose out a discrimination action that Plaintiff filed against her former employer, the Wake Forest University Baptist Medical Center ("WFUBMC"). In this action, Plaintiff contended that the EEOC released her file to Constangy, WFUBMC's counsel, without her permission. *Id*. at *2-3. Plaintiff claimed that Constangy sent her a copy of her EEOC file via unsafe e-mail, and later sent a physical copy through standard mail, which caused her serious emotional injury. *Id*. at *3. Defendants moved to dismiss, and the Court granted the motion. At the outset, the Court noted that the FOIA grants Courts authority to enjoin agencies from withholding agency records, and to order an agency to produce records improperly withheld from a complainant. *Id*. at *4. The Court found that Plaintiff did not claim that the EEOC improperly withheld agency records, and she admitted that this case was not about improperly withheld records. *Id*. at *5. The Court further determined that the complaint also contained no allegations relating to Plaintiff's administrative remedies. *Id.* Accordingly, the Court concluded that Plaintiff failed to state a claim under the FOIA. The Court noted that while the complaint could be construed as an attempt to invoke the Privacy Act ("PA"), which prohibits agencies from disclosing certain types of records without consent, the complaint still failed to state a claim. *Id*. at *6. The Court observed that Plaintiff did not plead any cognizable pecuniary damages, which is a requirement to state a claim under the PA. Accordingly, the Court concluded that Plaintiff failed to state a claim under either the FOIA or the PA, and dismissed the complaint.

***United States v. City Of Jacksonville,* 2015 U.S. Dist. LEXIS 74422 (M.D. Fla. June 9, 2015).** In this Title VII action, the U.S. Department Of Justice and other intervener Plaintiffs alleged that ten specific promotion exams the City of Jacksonville and the firefighters union conducted between 2004 and 2011 with the City's Fire Department caused a disparate impact on African-American candidates. After completion of discovery, the parties both moved for summary judgment on the issue of whether Plaintiffs had presented a *prima facie* case of disparate impact based on race under § 707 of Title VII. The Court held a hearing to determine whether Plaintiffs had demonstrated disparate impact as to any of the ten challenged exams, and examined the testimony of the parties' experts that explained the statistical calculations and methodologies at issue. The Court found that, as to nine of the ten tests, Plaintiffs had offered statistical evidence of a kind and degree sufficient to show that the practice in question had caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. *Id* at *5. Thus, the Court concluded that Plaintiffs had made the necessary *prima facie* showing of disparate impact to warrant the continuance of the lawsuit. The Court, however, deferred the motions for summary judgement as to the rank order use of the tenth test until further discovery was taken to determine whether the results may be aggregated with those of the 2006 district chief suppression exams. *Id* at *6. Accordingly, the District Court granted Plaintiffs' motions for summary judgement.

***United States v. Maricopa County,* Case No. 12-CV-981 (D. Ariz. June 15, 2015).** The U.S. Department of Justice ("DOJ") brought an action alleging that Defendants, Maricopa County, its Sheriff and head of the Maricopa County Sheriff's Office ("MCSO"), violated the U.S. Constitution and federal statutes by engaging in a pattern or practice of discrimination against Latinos in Maricopa County. The DOJ alleged discriminatory police conduct directed at Latinos, including stopping, detaining, and arresting Latinos on the basis of race, denying Latino prisoners with limited English language skills constitutional protections, and illegally retaliating against perceived critics through baseless criminal actions, lawsuits, and administrative actions. *Id.* at 9. The DOJ asserted violations of 42 U.S.C. § 14141 and the Fourteenth Amendment based on a pattern or practice of law enforcement practices, including traffic stops, workplace raids, home raids, and jail operations, with the intent to discriminate, and a pattern or practice of unreasonable searches and seizures conducted without probable cause or reasonable suspicion. *Id.* The DOJ also asserted violations of Title VI based on the use of federal financial assistance by persons alleged to be engaging in discriminatory law enforcement practices and violations of Title VI's contractual assurances. *Id.* Defendants moved for summary judgement, arguing that the claims were moot because of a related action. In 2007, private individuals had initiated a class action against Defendants alleging racial discrimination against Latinos under the guise of enforcing immigration law (the "*Melendres*" action). The *Melendres* action focused on "saturation patrols," described as "crime suppression sweeps" in which officers saturated a given area and targeted persons who appeared to be Latino for investigation of their immigration status. *Id.* at 2. Following the issuance of findings of facts and conclusion of law, the Court in *Melendres* enjoined the MCSO from using Hispanic ancestry or race as a factor in making law enforcement decisions, and implemented standards for bias-free detention and arrest policies and training, including the appointment of an independent monitor to report on the compliance of the Sheriff and the MCSO and collection of traffic stop data (the "*Melendres* injunction"). *Id.* at 3-4. Although Defendants appealed and argued that the evidence was insufficient to sustain Court's conclusion in *Melendres* that the unconstitutional policies extended beyond the context of saturation patrols, the Ninth Circuit found that the Court in *Melendres* did not err in finding that Defendants' policy applied across-the-board to all enforcement decisions. *Id.* at 5. Based on these findings, Defendants argued that the DOJ's claims involving discriminatory traffic stops were moot. The Court denied Defendants' motion, finding that it would be premature to conclude that the DOJ's allegations would lead to a replica of the *Melendres* injunction. *Id.* at 15. Defendants argued that the *Melendres* injunction eliminated the threat of immediate and future discriminatory traffic stops as well as the ability of Court to provide redress for those claims. *Id.* at 9. Although portions of the DOJ's claims of discriminatory policing involved conduct addressed in the *Melendres* litigation, the Court noted that the DOJ's claims also included allegations regarding discriminatory home raids, worksite raids, and non-motor vehicle related arrests and detentions. The Court thus found that the DOJ had extended its claims to discrimination in general law enforcement, and its interest was distinct from those of Plaintiffs in *Melendres. Id.* at 14. The Court further found that the *Melendres* injunction did not moot the portions of the DOJ's claims which overlapped with *Melendres* because continued violations by the Sheriff and the MCSO following the issuance of the injunction demonstrated a real and immediate threat of future harm, as well as the importance of granting the DOJ the authority to enforce injunctive relief addressing the MCSO's discriminatory traffic stops. *Id.* Moreover, Plaintiff's broader claims might lead to different injunctive measure than those put forth in *Melendres. Id.* Accordingly, the Court denied Defendants' motion for summary judgment.

(xlvii) Alien Tort Statute And Trafficking Victims Class Actions

***Menocal, et al. v. The Geo Group, Inc.*, 2015 U.S. Dist. LEXIS 87831 (D. Colo. July 6, 2015).** Plaintiffs, a group of detainees at a private for-profit immigration detention facility maintained by Defendant, brought a class action alleging violations of the Colorado Minimum Wage Order ("CMWO") and the Trafficking Victims Protection Act's ("TVPA"). Plaintiffs alleged that, while at the facility, they participated in a "voluntary work program" performing tasks such as doing laundry and preparing meals for compensation of $1 per day instead of the Colorado minimum wage, in violation of the CMWO. *Id.* at *2. Plaintiffs also alleged that each day Defendant required six randomly selected detainees to clean the facility's "pods" without compensation under threat of solitary confinement, in violation of the TVPA. *Id.* The Court granted Defendant's motion to dismiss in part. First, Defendant argued that Plaintiffs were not "employees" under the FLSA, and that the CMWO did not extend to those working in government custody. Defendant cited

Alvarado Guevara v. I.N.S., 902 F.2d 394, 396 (5th Cir. 1990), which held that immigration detainees did not qualify for protection under the FLSA because they were not employees. *Id.* at *3-4. Defendant also cited an Advisory Bulletin from the Colorado Department of Labor ("CDOL"), which declared that inmates and prisoners were exempt from the CMWO and were not employees according to Colorado law. *Id.* at *4. Defendant asserted that the reasoning in *Alvarado* applied here because immigration detainees were housed by the government and did not require the minimum wage to bring up their standard of living. *Id.* The Court remarked that, although immigration detainees appeared to fall under the broad definition of "employee," so did prisoners, and the CDOL had found that the CMWO's definition of "employee" should not apply to prisoners. *Id.* Further, because immigration detainees, like prisoners, did not use their wages to provide for themselves, the Court opined that the purposes of the CMWO were not served by including them in the definition of "employee." *Id.* at *5. Accordingly, the Court dismissed Plaintiffs' CMWO claims. Defendant further argued that the TVPA was inapplicable because its purpose was to prevent human trafficking. Defendant also contended that 18 U.S.C. § 1584, which prohibits "knowingly and willfully holding any person to involuntary servitude," required dismissal of Plaintiffs' TVPA claims. *Id.* at *12. The Court observed that, in *U.S. v. Kozminski*, 487 U.S. 931 (1988), the U.S. Supreme Court held that § 1584 reaches only compulsion of services by use of physical or legal, as opposed to psychological, coercion. *Id.* Further, in *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997), the Fifth Circuit held that an immigration detainee forced to work in the kitchen under threat of solitary confinement was not subjected to involuntary servitude in violation of the Thirteenth Amendment. *Id.* The Court noted that both *Kozminski* and *Channer* interpreted the term "involuntary servitude," whereas § 1589 reached "whoever obtains the labor or services of a person by threats of physical restraint." *Id.* at *14. Thus, the Court opined that the language at issue here was broader than the language at issue in *Kozminski* and *Channer*. Finally, the Court observed that Defendant cited no authority for reading a civic duty exception into § 1589, or for applying such an exception to a private, for-profit corporation under contract with the government. Thus, the Court denied Defendant's motion to dismiss Plaintiffs' TVPA claim.

***You, et al. v. Japan,* 2015 U.S. Dist. LEXIS 167219 (N.D. Cal. Dec. 14, 2015).** In this putative class action for personal injury and crimes against humanity during the Second World War, the Court granted six out of the 20 Defendants' motion to dismiss, and granted one Defendant's motion for summary judgment in part. Plaintiffs, a group of Korean citizens, alleged that the Japanese government abducted them, forced them into servitude, and exploited them as sex slaves for the benefit of Japanese soldiers at comfort stations in Japan. Plaintiffs brought claims under the Alien Tort Claims Act ("ATCA") against five categories of Defendants, which they referred to as "Wartime Defendants," "Corporation Defendants," "Headquarter Defendants," "Subsidiary Defendants," and "Individual Defendants." *Id*. at *3. Each of the six moving Defendants was the U.S. subsidiary of a parent company based in Japan. Without specifying whether they were referring to the parent or the subsidiary, Plaintiffs alleged that each of the moving Defendants provided war material to Japan during Second World War, and that each realized huge profit from such conduct. *Id*. at *4. At the outset, the Court noted that in 1951, Japan entered into a treaty of peace with the Allied Powers, and Article 14 of the Treaty required Japan to pay certain reparations to the Allied Powers for the damage and suffering it caused during the war. *Id*. at *6. Additionally, the 1951 Treaty ("1951 Treaty") included a waiver of all claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. *Id*. The Court observed that in 1965, Japan entered into a treaty with Republic of Korea ("1965 Treaty"), and § 1 of Article II of the Treaty settled completely and finally, all claims between the parties and their nationals, including those addressed in the 1951 Treaty. *Id*. at *7. The Court further noted that in *Joo v. Japan*, 413 F.3d. 45 (D.C. Cir. 2005), the D.C. Circuit dismissed similar claims because they presented non-justiciable political questions. *Id*. at *7. Plaintiffs in *Joo* argued that the 1951 Treaty with Japan only waived claims by Americans against Japan and its nationals, and not the claims by citizens of other non-party nations. *Id*. at *7. Plaintiffs in *Joo* also argued that Korea believed that its citizens' claims against Japan and its nationals survived the 1965 Treaty. The United States submitted a statement of interest in *Joo*, asserting that the Congress precluded Americans and non-Americans from bringing their war-related claims against Japan or use the American judicial system as a venue to litigate any such claims. *Id*. at *7-8. As to the 1965 Treaty, the Court held that it was not the province of the Court to decide whether Korea's reading or Japan's reading of the treaty between them was correct. *Id*. at *8. Accordingly, the Court concluded that Plaintiffs'

claims against the moving Defendants must be dismissed inasmuch as they presented non-justiciable political questions. *Id*. at *15. Moreover, the Court noted that the wrongs in question occurred more than 70 years ago, while the longest limitations period of any of Plaintiffs' claims was 10 years under the ATCA. *Id*. at *16. The Court opined that Plaintiffs failed to make credible arguments to overcome the time-bar on their claims, and accordingly, dismissed those claims against the moving Defendants. *Id*. at *20.

(xlviii) Workplace Antitrust Class Actions

***In Re Animation Workers Antitrust Litigation,* 2015 U.S. Dist. LEXIS 111262 (N.D. Cal. Aug. 20, 2015).** In this consolidated class action brought by three former employees alleging that Defendants, various animation and visual effects studios, engaged in a conspiracy to fix and suppress employee compensation and to restrict employee mobility, the Court denied Defendants' motion to dismiss and found that Plaintiffs timely and sufficiently pled federal and California antitrust claims. In 2014, Plaintiffs, a group of artists and engineers employed by one or more of Defendants, filed a series of class action complaints asserting that Defendants violated Sherman Act and California's Cartwright Act and Unfair Competition Law ("UCL") by conspiring to suppress employee compensation by entering into non-solicitation agreements and agreeing on salary ranges. The Court had previously dismissed Plaintiffs' antitrust claims as time-barred. *Id.* at *47. Plaintiffs then filed a second amended complaint alleging that Defendants concealed the conspiracy, preventing Plaintiffs from timely filing their claims. Defendants moved to dismiss the second amended complaint. In denying dismissal, the Court found that Plaintiffs had adequately pled fraudulent concealment, and the statute of limitations could be tolled. *Id.* at *48. The Court found that Plaintiffs' allegations that Defendants made pre-textual statements regarding compensation – that salaries were based on performance, skills, and proficiency – in combination with allegations that they actively concealed and ensured the secrecy of the conspiracy – were sufficient to allege "affirmative acts." *Id.* at *62-64. The Court also found that Plaintiffs made more detailed allegations with respect to Defendants' affirmative attempts to maintain the secrecy of the conspiracy, and their attempt to conceal the existence of the conspiracy. This included the allegations that Defendants opted for in-person meetings; they explained the non-solicitation agreement as a "gentleman's agreement" because it was not in writing; and Lucasfilm made affirmative efforts to eliminate a paper trail regarding its code-named "DNR" agreements, including a requirement that all discussions of "DNR" needed to be conducted over the phone. *Id.* at *67. According to the Court, these factual allegations raised the reasonable inference that Defendants took affirmative steps to conceal the details of their conspiracy. The Court found that Plaintiffs adequately alleged that they did not have actual or constructive knowledge of their claims, and they acted diligently once the claims were discovered. *Id.* at *76-77. Plaintiffs claimed that they had no reason to know that Defendants conspired to suppress compensation until 2013, when incriminating documents were unsealed and filed publicly in the related litigation entitled *In Re High-Tech Employees Antitrust Litigation. Id.* at *77. Plaintiffs diligently pursued and investigated their claims shortly after the documents disclosing the conspiracy were first released, and also tried to obtain information concerning their claims, but were met with misrepresentations. *Id.* Taking the allegations as true, the Court determined that the fraudulent concealment claim was sufficient to toll the statute of limitations. *Id.* at *80. The Court therefore denied Defendants' motion to dismiss Plaintiffs' claims as time-barred. The Court also denied Defendant Blue Sky and Sony Pictures' separate motions to dismiss, finding that Plaintiffs were not obligated to allege fraudulent concealment as to each Defendant. *Id.* at *88. In addition, the Court noted that Plaintiffs made plausible claims for relief against Blue Sky and Sony because, at a minimum, the inclusion of Blue Sky on Pixar's anti-solicitation list rendered it plausible that Blue Sky was an active participant in the conspiracy. *Id.* at *90. Plaintiffs further supported their claims with allegations of conversations between Blue Sky's Human Resources Director and other Defendants concerning no-poaching practices. *Id.* Similarly, the Court found that Plaintiffs had adequately alleged that Defendant Sony participated in the conspiracy, as they claimed that Sony and Pixar executives met and reached a "gentleman's agreement" where neither company's recruiters would approach the others' employees, and provided evidence that Sony was included on Pixar's "do not poach" list and that Sony HR representatives exchanged sensitive compensation information with competitors, including salary information, salary budgets, salary ranges, and overtime. *Id.* at *94-95. Plaintiffs further alleged sufficient facts to support a plausible *per se* claim that Defendants conspired to suppress the compensation of the putative class by systematically sharing information and agreeing not to solicit each other's employees, and that the purpose of the information-

sharing and no-poaching scheme was to suppress wages. *Id.* at *105. The Court therefore held that Plaintiffs successfully alleged a single conspiracy to suppress the compensation of Defendants' employees. *Id.* Accordingly, the Court denied Defendants' motion to dismiss.

***In Re VHS Of Michigan, Inc., d/b/a Detroit Medical Center,* 2015 U.S. App. LEXIS 1816 (6th Cir. Feb. 3, 2015).** Plaintiffs, a group of registered nurses ("RNs"), brought a class action against eight local hospitals in the Detroit area alleging that Defendant engaged in a conspiracy to suppress nurses' wages in violation of § 1 of the Sherman Act. Seven hospitals settled, leaving Detroit Medical Center as the only remaining Defendant. Plaintiffs alleged two theories of liability, including: (i) a *per se* theory that the hospitals had a wage-fixing agreement; and (ii) a rule of reason theory that the hospitals softened competition by sharing compensation information. *Id*. at *2-3. The District Court granted summary judgment on the *per se* argument and then certified the class. On Defendant's appeal, in light of the U.S. Supreme Court's ruling in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Sixth Circuit ordered the District Court to reconsider class certification. On remand, the District Court analyzed *Comcast*, determined that it did not call into question its prior decision, and then reinstated its order granting class certification. *Id*. at *3. The District Court noted that *Comcast* would apply if Plaintiffs' two initial theories of liability brought about separate and distinct harm to the class members, and Plaintiffs' damages calculation aggregated those distinct harms. *Id*. Plaintiffs' damages calculation, however, did not aggregate distinct harms because Plaintiffs' two theories of liability were mutually exclusive, and Plaintiffs' damages calculation could equally represent either theory of recovery. *Id*. at *4. Defendant filed a petition seeking permission to appeal, and the Sixth Circuit denied the petition. Relying primarily on *Comcast*, Defendant contended that Plaintiffs had not established a link between their damages model and their rule of reason theory and that the damages from Plaintiffs' two theories could be aggregated. *Id*. At the outset, the Sixth Circuit found that the District Court correctly concluded that Defendant's argument did not implicate the concerns of *Comcast. Comcast* applies where multiple theories of liability exist, those theories create separable anti-competitive effects, and the combined effects can result in aggregated damages. *Id*. at *5. The Sixth Circuit held that, where there is no chance of aggregated damages attributable to rejected liability theories, the Supreme Court's concerns in *Comcast* do not apply. *Id*. The Sixth Circuit agreed with the District Court that Plaintiffs' two theories of anti-competitive conduct – the *per se* wage-fixing claim and the rule of reason "softened competition" claim – were mutually exclusive. *Id*. Further, the Sixth Circuit noted that, because Plaintiffs' damages calculation applied to either theory of anti-competitive conduct, Plaintiffs did not improperly aggregate damages. *Id*. The Sixth Circuit ruled that the case did not raise the aggregated-damages concern present in *Comcast*. *Id*. Accordingly, the Sixth Circuit concluded that Defendant failed to show that it was likely to succeed in making the requisite strong showing that the District Court abused its discretion, and denied Defendant's request to appeal. *Id*. at *6.

***Ryan, et al. v. Microsoft Corp.*, 2015 U.S. Dist. LEXIS 158944 (N.D. Cal. Nov. 23, 2015).** Plaintiffs, two former employees, filed a class action alleging that Defendant unlawfully suppressed their wages by entering into multiple employee non-solicitation agreements with its competitors. The case was spawned by the same U.S. Department of Justice ("DOJ") investigation that eventually resulted in several class action wage suppression antitrust suits brought against a number of Silicon Valley technology companies. In those cases, the Court eventually approved settlements totaling $435 million. In this case, the Court concluded that Plaintiffs delayed too long before filing suit and dismissed all counts of their first amended complaint with prejudice. In 2009, the DOJ initiated an investigation of the employment and recruitment practices of a number of Silicon Valley technology companies. In 2010, the DOJ filed two lawsuits against seven different companies. Those companies entered into stipulated final judgments in which they agreed to injunctions preventing them from entering into or maintaining any agreement not to solicit each other's employees. *Id*. at *3-4. In 2009, the DOJ also opened an investigation into possible antitrust violations by Defendant, but on October 29, 2014, it informed Defendant that it would not pursue a case against it. *Id*. at *27. Plaintiff's class action complaint, which was filed on October 16, 2014, asserted four causes of action, including: (i) § 1 of the Sherman Act, 15 U.S.C. § 1; (ii) California's Cartwright Act, Cal. Bus & Prof. Code § 16720; (iii) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, §§ 17200, *et seq*.; and (iv) California Business and Professions Code §§ 16600, *et seq. Id*. at *13. Each of the claims was subject to a four year statute of limitations. Accordingly, the Court concluded that Plaintiffs must allege that the

causes of action accrued on or after October 16, 2010, or that the statute of limitations were tolled until at least October 16, 2010. *Id*. at *22. The Court had previously dismissed Plaintiffs' original complaint on the grounds that the statute of limitations had expired. In granting leave to amend, the Court warned that failure to cure the timeliness problem would result in dismissal of the complaint with prejudice. *Id*. at *18-19, 34. Under the Sherman Act, a claim accrues when a Defendant commits an unlawful act that injures a Plaintiff. In this case, Plaintiffs alleged that they were injured by the anti-solicitation agreements because they were not contacted or offered employment by competitors of Defendant. However, the last such agreement was allegedly reached in 2009. Thus, unless tolling applied, the four year statute of limitations expired in 2013. *Id*. at *23. Under California law, a claim accrues when it is complete with all of its elements, including wrong-doing, harm, and causation. Again, the latest that all of those elements could have occurred would have been in 2009. Thus, without tolling, the Court concluded that the applicable statute of limitations expired in 2013. *Id*. at *24-25. Regarding the Sherman Act claim, the Court rejected Plaintiffs' arguments that statutory tolling should apply during the pendency of the DOJ investigation, that the continuing violation doctrine applied, and that Defendant fraudulently concealed the violations. Statutory tolling did not apply because the DOJ never filed a complaint against Defendant. *Id*. at *29. The continuing violation doctrine also did not apply because merely maintaining the alleged unlawful agreements did not constitute an overt act necessary for application of the doctrine. *Id*. at *37-38. Finally, fraudulent concealment was not adequately alleged because, among other things, insufficient facts supporting the doctrine were pled to satisfy the heightened pleading requirements of Rule 9(b). *Id*. at *42-43. The Court also rejected Plaintiffs' argument that the California discovery rule applied to Plaintiffs' UCL claim. While the California discovery rule might apply to a UCL claim grounded in fraud, it does not apply in cases like this one where the UCL claim involves solely unfair competition. *Id*. at *65. Finally, the Court also rejected Plaintiffs' argument that California's "continuous accrual" rule applied; the "continuous accrual" rule requires a separate recurring invasion of the Plaintiff's rights. *Id.* at *65-67. Here, while entering into a new anti-solicitation agreement could constitute a separate recurring invasion, merely maintaining an existing agreement did not. Accordingly, the Court reasoned that the doctrine did not apply. *Id*. at *70. Accordingly, the Court dismissed Plaintiffs' complaint with prejudice.

(xlix) Stays In Class Action Litigation

***Davis, et al. v. Electronic Arts, Inc.,* Case No. 10-CV-3328 (N.D. Cal. Sept. 3, 2015).** Plaintiffs, a group of retired NFL football players, brought a putative class action alleging that their statutory and common law rights of publicity were violated through unauthorized use of their likenesses in Defendant's Madden NFL video game. Defendant filed an interlocutory appeal to challenge the denial of its "anti-SLAPP" motion, which the Ninth Circuit rejected. Defendant sought a stay in light of its filing of a petition for *certorari* to the U.S. Supreme Court. The District Court denied Defendant's motion to stay. The District Court explained that it was divested of jurisdiction of all aspects of the case pertaining to the appeal, with the result that those parts of the case were effectively stayed. *Id*. at *1. Subsequently, Defendant filed a "request for clarification" as to whether that automatic stay extended to the entire case or whether there were issues outside the scope of the appeal, and therefore outside the scope of the stay. In response, Plaintiffs asserted that although the automatic stay did not encompass all of the issues in the case, they found it appropriate to agree to a permissive stay of the remaining issues. *Id.* As a result, the Court denied Defendant's request for an order staying all proceedings pending the outcome of Defendant's appeal.

***Fanning, et al. v. HSBC Card Services, Inc.,* Case No. 12-CV-885 (C.D. Cal. Aug. 10, 2015).** Plaintiffs brought a putative class action alleging that Defendants recorded telephone conversations without consent in violation of the California's Invasion of Privacy Act ("CIPA"). In November 2014, the Court consolidated this action with *Lindgren v. HSBC Card & Retail Services, Inc.,* ("*Lindgren*") which asserted similar allegations against Defendants. *Id.* at 2. Plaintiffs in this action and Plaintiffs in *Lindgren* then moved to intervene in another action – *Medeiros, et al. v. HSBC Card & Retail Servs.* ("*Medeiros*") – filed in July 2014 in the U.S. District Court for the Southern District of California on behalf of a class that received calls from Defendants alleging that Defendants violated the CIPA by recording calls without their consent. *Id*. As Defendants had settled with Plaintiffs in *Medeiros*, they moved to stay the consolidated cases until final approval of the proposed class action settlement in *Medeiros*. *Id.* The Court granted Defendants' motion to stay, finding minimal to no damage to Plaintiffs from granting a stay. *Id.* at 5. Plaintiffs contended that a

stay would deprive them of the opportunity to complete the discovery process critical to their ability to successfully challenge the proposed settlement in *Medeiros*. *Id*. The Court found that Plaintiffs did not identify what further discovery they needed to challenge the fairness, reasonableness, and adequacy of the proposed settlement in *Medeiros*. *Id.* Further, nearly half of Plaintiffs' brief in opposition to the motion for a stay outlined the inadequacy and unfairness of the proposed settlement; according to the Court, this suggested that Plaintiffs already possessed the information they needed. *Id.* Moreover, Defendants claimed that they would be forced to endure duplicative motion practice and unnecessary, costly discovery because the putative class in *Medeiros* was the same as those in this action and *Lindgren*, and given that the certification process was on-going in the consolidated cases, the putative class could simultaneously receive a notice related to the proposed settlement in *Medeiros* and a notice related to class certification in consolidated cases, thereby causing confusion among putative class members. *Id.* at 5-6. The Court thus found that in weighing the hardships of not granting a stay against the damage from granting a stay, the dual risks of inconsistent rulings and confusion among the putative class members outweighed the potential minimal damage to Plaintiffs from granting a stay. *Id.* at 6. Accordingly, the Court granted Defendants' motion to stay until further order of the Court.

***Galicki, et al. v. State Of New Jersey,* 2015 U.S. Dist. LEXIS 145173 (D.N.J. Oct. 26, 2015).** Plaintiffs brought a class action for alleged damages caused to them due to the closure of multiple lanes of traffic on the George Washington Bridge from September 9, 2013 through September 13, 2013. The Court granted the United States' motion for permission to intervene and for a stay in part. On April 23, 2015, a federal grand jury indicted two Defendants in this civil case for their roles in allegedly deliberately causing traffic problems, and another Defendant in this case was found guilty for his role in the same scheme. *Id*. at *3. Because of the criminal case, set for trial in March 2016, the United States sought to intervene in this civil matter, and stay it until completion of the criminal case. *Id*. Plaintiffs recognized that United States had a right to intervene, but opposed a stay prior to the completion of the pleadings. *Id*. at *4. The crux of the United States' motion was that discovery should not proceed, and for the first time in its reply it argued that an immediate stay would have the added benefit of avoiding the threat of inconsistent judgments if the Court were to resolve motions to dismiss in the civil case before the issues raised by those motions relating to criminal charges were fully adjudicated in the criminal case. The Court noted that the United States did not raise these issues in its motion, and at the time of the indictment of two of the Defendants in April 2015, the prior motions to dismiss were pending, and that United States did not seek to intervene at that time either. *Id*. at *6. The Court observed that the United States did not offer any explanations as to why the Court's consideration of the new motions to dismiss addressing the same issues as it had previously addressed, without intervention and objection by the United States, would now prejudice the Government or interfere with the criminal case. *Id*. Accordingly, the Court granted the United States' motion to intervene but denied the motion to stay at that stage of the litigation.

***Hillson, et al. v. Kelly Services, Inc.,* Case No. 15-CV-10803 (E.D. Mich. July 15, 2015).** In this class action brought for alleged violations of the Fair Credit Reporting Act ("FCRA"), the Court granted Defendant's motion to stay all proceedings. Considering all the factors discussed in *Landis v. North America Co.,* (1936), the Court concluded that the case should be stayed until the U.S. Supreme Court issued its ruling in *Spokeo, Inc. v. Robins. Id.* at 1. The Court found that a stay was warranted because *Spokeo* had the high potential to be completely dispositive of the instant case and because judicial economy favored a limited delay in awaiting the decision in *Spokeo. Id.* at 1-2. In addition, the Court opined that the Supreme Court's ruling in *Spokeo* could directly impact the Court's anticipated class certification ruling, as it likely would bear upon the issue of whether the proposed class members had Article III standing under the FCRA. Accordingly, the Court granted Defendant's motion to stay all proceedings.

***In Re Petrobras Securities Litigation,* 2015 U.S. Dist. LEXIS 51451 (S.D.N.Y. April 13, 2015).** Plaintiffs brought a putative class action alleging that Defendants violated federal securities laws in connection with a bribery and corruption scheme involving named Defendant Petroleo Brasileiro S.A. Petrobras ("Petrobras"). The lead Plaintiff, Universities Superannuation Scheme, Ltd. ("USS"), moved to lift the Private Securities Litigation Reform Act ("PSLRA") discovery stay with respect to two categories of

discovery, including: (i) documents that Petrobras, its wholly-owned subsidiary Petrobras Global Finance B.V., and the underwriter Defendants had already produced, or would soon produce, to regulatory, governmental, or investigative agencies in connection with the wrong-doing that was the subject of USS' amended complaint; and (ii) permission to initiate the process to obtain discovery from foreign non-parties pursuant to either the Inter-American Convention on Letters Rogatory or Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, as applicable based on the location of the foreign non-parties. The Court denied USS' motion. USS argued that the first category of discovery was necessary to prevent undue prejudice because it was at an "increasing informational disadvantage" regarding the various governmental authorities that were investigating Petrobras. *Id*. at *5-6. Although USS argued that its lack of access to the materials produced to governmental authorities prejudiced its ability to make informed strategic decisions regarding the prosecution and settlement of its claims, the Court found that the existence of parallel government enforcement proceedings is commonplace in actions subject to the PSLRA. *Id*. at *6-7. Further, the Court opined that finding "undue prejudice" on that ground would create an exception that would swallow the PSLRA's automatic discovery stay. *Id*. at *7. The Court remarked that the deferral of strategic decisions until after Defendants' motion to dismiss was resolved did not constitute undue prejudice, as delay is an inherent part of every stay of discovery required by the PSLRA. *Id*. Regarding the second category of discovery, USS argued that without a lift of the stay, it might be unable to obtain discovery from foreign non-parties under the relevant treaty procedures before this Court's deadline for the completion of fact discovery. *Id*. at *8. The Court, however, stated that the deadline had not yet been set, and if the scenario USS envisioned ever occurred, then USS could apply to the Court for appropriate relief at that time. Accordingly, the Court denied USS' motion to lift the PSLRA discovery stay.

***Mohamed, et al. v. Uber Technologies*, 2015 U.S. Dist. LEXIS 95712 (N.D. Cal. July 22, 2015).**
Plaintiffs brought a putative class action alleging that Defendants ran background checks on drivers without authorization in violation of the Fair Credit Reporting Act and state fair credit reporting laws. After the District Court denied Defendants' motion to compel arbitration, Defendants appealed to the Ninth Circuit and moved the District Court to stay proceedings pending the appeal. *Id.* The District Court granted the motion in part and denied the motion in part. *Id.* First, the District Court found that, although Defendants failed to make a sufficient showing that they were likely to succeed on the merits of their appeal, the appeal presented "serious legal issues" or "substantial questions" that warranted a stay. *Id.* at *19-20. The District Court identified two such issues, including: (i) whether an arbitration provision that contains a conspicuous and meaningful opt-out provision may nevertheless be found at least somewhat procedurally unconscionable under California law, as articulated by *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), leaving the door open to a general finding of unconscionability; and (ii) whether the ruling in *Iskanian v. CLS Transportation L.A., LLC*, 59 Cal. 4th 348 (2014), that pre-dispute PAGA waivers are unenforceable as a matter of California law, is preempted by the Federal Arbitration Act. *Id.* at *5. As to the first issue, in denying Defendants' motion to compel arbitration, the District Court rejected Defendants' claim that, as a matter of California law, an arbitration provision could not be procedurally unconscionable if the signatory to the agreement had a "meaningful opportunity to opt-out of the arbitration program" because it found that *Gentry* overruled previous authority to that effect. *Id.* at *12. The District Court held that, although Defendants presented no reason to suggest that the Ninth Circuit would reverse its ruling on this issue, the propriety of its application of *Gentry* at least presented a "serious issue" because few judges in the Ninth Circuit had recognized that *Gentry* abrogated previous authority, and the Ninth Circuit had not expressly addressed the impact of *Gentry*. *Id.* at *13-14. As to the second issue, the District Court held that no Ninth Circuit authority had resolved whether the ruling in *Iskanian* – that pre-dispute PAGA waivers are unenforceable as a matter of California law – was preempted by the Federal Arbitration Act, and the issue had been the subject of significant disagreement at the District Court level. *Id.* at *17. The District Court held that, until the Ninth Circuit issued a ruling one way or another, the validity of both *Iskanian*, and pre-dispute PAGA waivers more generally, remained issues of first impression that were sufficiently serious for purposes of Defendants' motion to stay. *Id.* at *17-18. For these reasons, the District Court found that the balance of hardships absent a stay tipped sharply in favor of staying all non-discovery-related activity pending the Ninth Circuit's decision on the merits of Defendants' appeal. The District Court noted that, if the case proceeded on the merits without a ruling from the Ninth Circuit, the District Court's substantive

rulings might be for naught, and the parties would have expended significant resources to obtain what, in all likelihood, would constitute non-binding advisory opinions. *Id.* at *23. Alternatively, if any ruling on the merits by the District Court had binding effect on the arbitration, Defendants would have lost the benefit of arbitration. *Id.* Further, because Defendants would be required to engage in discovery irrespective of the outcome of their appeal, the District Court reasonably could protect Plaintiffs' interests by allowing reasonable discovery to continue. *Id.* at *23-24. Accordingly, the District Court stayed the case for all purposes with the exception of reasonable discovery pending the issuance of the Ninth Circuit's mandate in Defendants' appeal. *Id.* at *27.

***Patel, et al. v. Trans Union, LLC*, Case No. 14-CV-522 (N.D. Cal. Sept. 3, 2015).** In this class action, Plaintiff alleged that Defendant Trans Union Rental Screening Solutions and its parent Trans Union, LLC violated the Fair Credit Reporting Act ("FCRA"). Earlier, the Court had certified two Rule 23(b)(3) classes, including: (i) a national class challenging Defendants' willful failure to maintain and follow reasonable procedures to ensure the maximum possible accuracy of their information; and (ii) a national sub-class challenging Defendants' willful failure to provide consumers with all information in their files. *Id.* at 1-2. Defendants subsequently moved to stay the proceedings in this case until the U.S. Supreme Court decided two cases: *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), and *Bouaphaekeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014). *Id.* at 2. The Court granted the motion. The Court noted that judges in two similar FCRA cases in the U.S. District Court for the Northern District of California – *Larson v. Trans Union LLC*, No. 12-CV-05726 (N.D. Cal. June 22, 2015), and *Ramirez v. Trans Union LLC*, No. 12-CV-632 (N.D. Cal. June 22, 2015) – had granted stays. The Court noted that the issue in *Spokeo* was whether a Plaintiff has Article III standing by alleging a willful violation of 15 U.S.C. § 1681n(a) without suffering actual damages. Whereas the Ninth Circuit held that because a cause of action under the FCRA does not require proof of actual damages, a Plaintiff can suffer violation of the statutory right without suffering actual damages. *Id*. at 3. The Court remarked that the Supreme Court's grant of *certiorari* in *Spokeo, Inc. v. Robins,* No. 13-1339 (U.S. April 27, 2015), had a direct bearing on this case. Accordingly, the Court stayed this case pending the Supreme Court's decision in *Spokeo*.

***Physicians Healthsource, Inc., et al. v. Endo Pharmaceuticals,* Case No. 14-CV-2289 (E.D. Pa. Jan. 5, 2015).** Plaintiff brought a putative class action under the Junk Fax Protection Act alleging that Defendants sent two facsimile advertisements without opt-out notices. Plaintiff asserted its claims without regard to whether the facsimile advertisements received were solicited or unsolicited. Defendants moved to stay this case, which the Court granted. The Court noted that the Federal Communications Commission ("FCC") has implemented regulations requiring opt-out language on both unsolicited and solicited facsimile advertisements. *Id*. at 1. Defendants disputed the validity of the regulation, and argued that the FCC had exceeded its statutory authority in promulgating a regulation requiring opt-out notices in solicited faxes. *Id*. Defendants cited to a number of administrative petitions filed with the FCC, which requested the FCC to rule on issues related to the subject of this litigation. *Id*. The Court noted that there was no schedule for the FCC to reach a final decision, and any stay could be open-ended. *Id*. at 2. Nonetheless, the Court reasoned that judicial efficiency would be better served by imposing a stay of litigation while the FCC considered those related issues, which had already been presented to it, which were within the FCC's domain of specialized knowledge, and which might significantly limit the scope of this action. *Id*. In addition, the Court considered the risk of inconsistent rulings if the FCC was not permitted to issue its ruling before the judicial system considered these issues. *Id*. Thus, balancing the equities, the Court found potential prejudice to Defendants if they must defend this action without guidance from the FCC on issues such as statutory authority and standing to pursue a private right of action. *Id*. Because Defendants had acknowledged their duty to preserve evidence, and would alert pertinent third-parties that they must preserve evidence while the case was stayed, the Court found that a stay would not prejudice Plaintiff. *Id*. at 2-3. Accordingly, the Court granted Defendants' motion to stay, and placed the case in administrative suspense pending adjudication of related actions.

***Schartel, et al. v. OneSource Technology, LLC,* 2015 U.S. Dist. LEXIS 155967 (N.D. Ohio Nov. 17, 2015).** Plaintiff brought an action alleging that Defendant reported the criminal charges filed against him that were dismissed more than seven years prior to the issuance of the report in violation of the Fair Credit

Reporting Act ("FCRA"). *Id.* at *1. Plaintiff requested statutory and punitive damages. *Id.* Defendant moved to stay the case pending the U.S. Supreme Court's ruling in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015). *Id.* at *2. Defendant contended that *Spokeo* would address whether Article III standing existed for cases in which Plaintiffs alleged no actual damages, suffered no concrete harm, and relied solely on statutory standing. *Id.* The Court further noted that the Supreme Court in *Gomez v. Campbell-Ewald Co.,* 135 S. Ct. 2311 (2015), would decide whether an unaccepted Rule 68 offer that would fully satisfy a Plaintiff's claim moots the claim and that the answer would differ depending on whether the offer was made before or after the Court certified a class action. *Id.* at *3. The Court remarked that although the parties disputed whether a ruling in *Spokeo* would have a dispositive effect in this litigation, its outcome was directly relevant to whether a class could be certified. *Id.* at *4. The Court observed that Defendant's motion on its offer of judgment (which mooted Plaintiff's claims), was made before the Court certified a class in this case and thus, *Campbell-Ewald* was directly relevant to Defendant's dispositive motion as well as to class certification. *Id.* The Court found that the possible prejudice to Plaintiff that would result from a stay was minimal as the Supreme Court had already heard oral arguments in both *Spokeo* and *Campbell-Ewald* and decisions would likely be rendered within several months. *Id.* Accordingly, the Court granted Defendant's motion to stay the proceedings.

***Speer, et al. v. Whole Food Market Group, Inc.,* 2015 U.S. Dist. LEXIS 57783 (M.D. Fla. April 29, 2015).** Plaintiff, a former employee, brought a class action on behalf of himself and others similarly-situated for violations of the Fair Credit Reporting Act ("FCRA"). Plaintiff alleged that Defendant conducted background checks on many of its job applicants as part of a standard screening process, and on existing employees from time-to-time during the course of their employment through a third-party, LexisNexis. Plaintiff asserted that an applicant had to first read and sign two forms, including a disclosure statement and a consent and release of information. Plaintiff contended that the consent form was both an authorization to procure a consumer report and a release, and thus violative of the FCRA because both the disclosure and consent forms must be read and reviewed at the same time. Plaintiff alleged that Defendant willfully failed to make proper disclosure, and to obtain proper authorization in violation of the FCRA. After the Court denied Defendant's motion to dismiss, Defendant moved to stay the proceedings pending the outcome of the U.S. Supreme Court's ruling in the *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. April 27, 2015). Denying the motion, the Court stated that it could not predict whether the Supreme Court would decide the *Spokeo* case in such a manner as to benefit Defendant's position regarding Plaintiff's lack of standing to pursue the case for himself and those similarly-situated to him. *Id.* at *2. The Court thus concluded, consistent with established Eleventh Circuit precedent, that a grant of *certiorari* by the Supreme Court does not change the law and does not constitute new law, and that a stay of these proceedings to await a decision from the Supreme Court in *Spokeo* was not warranted. *Id.* Accordingly, the Court denied Defendant's motion.

***Stone, et al. v. Sterling Infosystems, Inc.,* Case No. 15-CV-7351 (C.D. Cal. Oct. 21, 2015).** Plaintiff, a consumer, brought a putative class action alleging that Defendant furnished consumer reports for employment purposes without first obtaining a certification from users in violation of the Fair Credit Reporting Act ("FCRA"). *Id*. at 2. The District Court took judicial notice of a nearly-identical action that Plaintiff filed against Defendant in March 2015 entitled *Stone v. Sterling Infosystems, Inc.*, No. 15-CV-711 (C.D. Cal.), wherein the Court had granted a motion to stay pending the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015). *Id*. at 2. In *Spokeo*, the Supreme Court granted *certiorari* on the question of whether Congress can confer Article III standing upon a Plaintiff who suffered no concrete harm, and who could not otherwise invoke federal jurisdiction, by authorizing a private right of action based on a bare violation of a federal statute. *Id*. Defendant moved to stay this case pending the decision in *Spokeo*, and the District Court granted the stay. First, the District Court found that minimal damage would result from a stay because Plaintiff could not credibly claim prejudice from having to wait slightly longer to pursue his claim for a mere statutory violation. *Id*. at 3. Plaintiff sought money damages, and not injunctive or declaratory relief, and therefore a delay in the proceedings potentially would delay only his monetary recovery and potentially deprive Plaintiff of accompanying interest, which would be the extent of his damage. *Id*. Second, the District Court found that the Supreme Court's decision in *Spokeo* would direct whether Plaintiff had standing to bring the case and whether the District Court had subject-

matter jurisdiction. *Id*. at 4. The District Court noted that, in the absence of a stay, Defendant would be forced to begin the significant effort of defending a purported nationwide class action with a putative class of more than 1,000 individuals. *Id*. Accordingly, the District Court concluded that this factor also weighed in favor of a stay. Plaintiff argued that, even if the Supreme Court's decision rendered Plaintiff's claims non-actionable in federal court, the work done in this action would not be wasted because the District Court would remand the case to state court. *Id*. at 6. The District Court ruled that Plaintiff failed to account for the complication of issues of proof that could arise when discovery begins in the District Court, is interrupted by a remand, and then continues in a state court. *Id*. The District Court, therefore, ruled that the orderly course of justice also weighed in favor of a stay. Accordingly, the District Court granted Defendant's motion to stay the proceedings.

(l) FCRA Class Actions

***Berry, et al. v. Schulman*, 2015 U.S. App. LEXIS 21062 (4th Cir. Dec. 4, 2015).** Plaintiffs brought a class action alleging that Defendants violated the Fair Credit Reporting Act ("FCRA") by selling certain Accruint brand reports to debt collectors without treating the reports as consumer reports within the meaning of the FCRA. After several years of litigation, the parties settled, wherein Defendants agreed to make sweeping changes to its product offerings in order to protect consumer information, and in exchange, the class members would release any statutory damages under the FCRA. *Id*. at *3. The District Court approved the settlement, a group of objectors appealed, and the Fourth Circuit affirmed the District Court's decision. The objectors challenged the District Court's certification of a Rule 23(b)(2) class for settlement purposes. According to the objectors, the statutory damages waived under the settlement agreement predominated over the injunctive relief awarded and were not of the incidental and non-individualized sort that may be certified under Rule 23(b)(2). *Id*. at *16. The Fourth Circuit disagreed, finding that all the statutory damages claims released under the settlement agreement were not the kind of individualized claims that threatened class cohesion or were prohibited by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *Id*. The Fourth Circuit remarked that the availability of statutory damages in this case was a simple function of Defendants' policies with respect to Accruint reports, that were applicable to the entire Rule 23(b)(2) class. *Id*. at *17. The objectors also argued that the statutory damages claims released by the settlement agreement could not be deemed incidental to injunctive relief and did not permit consumers to seek injunctive remedies. *Id*. at *18. The Fourth Circuit disagreed and determined that the FCRA does not expressly provide a private right of action for injunctive relief, and did not permit consumers to seek injunctive remedies. *Id*. at *19. The Fourth Circuit remarked that failing to acknowledge the critical role of the settlement agreement, the objectors relied on authority from outside the settlement context, which was unavailing here. *Id*. Alternatively, the objectors argued that even if the statutory damages claims released by the Rule 23(b)(2) class were incidental and not predominant, due process precluded certification of the class without opt-out rights. The objectors relied on *Wal-Mart*, noting the serious possibility that due process requires opt-out rights under the Rule 23(b)(2), even where the monetary claims did not predominate. The Fourth Circuit, however, reasoned that the Supreme Court did not go that far in *Wal-Mart*, holding instead only that claims for individualized monetary relief may not be certified under Rule 23(b)(2). *Id*. at *22. The Fourth Circuit observed that federal case law precedent had long permitted certification of mandatory Rule 23(b)(2) classes involving monetary relief so long as that relief was incidental to injunctive or declaratory relief (meaning that damages must be in the nature of a group remedy directly from liability to the class as a whole). *Id*. The objectors further challenged the District Court's approval of a Rule 23(b)(2) class settlement, arguing that it was unfair and inadequate because it released class members' statutory damages claims without providing for any monetary relief in exchange. *Id*. at *28-29. The Fourth Circuit held that it found no reason to disturb the District Court's assessment of the relative strength of the parties' legal positions of its fact-intensive analysis of the benefits provided the Rule 23(b)(2) class by the parties' settlement. *Id*. at *33. The Fourth Circuit remarked that in its view, the District Court was well within its discretion in approving the settlement as fair, reasonable, and adequate under Rule 23(e). For these reasons, the Fourth Circuit affirmed the District Court's approval of the settlement.

***Coleman, et al. v. Kohl's Department Stores, Inc.*, 2015 U.S. Dist. LEXIS 135746 (N.D. Cal. Oct. 5, 2015).** Plaintiffs, a group of former hourly non-exempt employees, brought a class action alleging that

Defendant unlawfully acquired applicants' consumer reports during the hiring process, in violation of the FCRA. During the application process, Defendant provided an employment application, and a consent and disclosure for acquisition of consumer reports. Both forms required the applicant to fill out identifying information, and the consent disclosure forms stated that Defendant would use a consumer reporting agency to obtain consumer reports or investigative consumer reports on the applicant, and that the report could include personal information such as criminal history, past employment, personal references, drug offenses, and sex offender status. *Id.* at *4-8. Defendant moved to dismiss, and the Court granted the motion. Plaintiffs alleged that in accordance with the FCRA, Defendant must first give a clear and conspicuous disclosure that it may obtain a report for employment purposes, in a document that consists solely of the disclosure. *Id.* at *15. Plaintiffs' claimed that the disclosure contained in the consent and disclosure form appeared together with other extraneous information in the employment application such as a release of liability provision. The Court found that Plaintiffs did not sufficiently allege a failure to comply with the statute, and remarked that Plaintiffs themselves acknowledged in their complaint that the two forms were two separate documents. Further, the Court noted the consent and disclosure form was formatted differently than the other forms, and bore a distinct title and form code, and related only to consumer reports. Thus, the Court opined that Defendant provided two separate documents to Plaintiffs in compliance with the FCRA. In addition, Plaintiffs alleged that Defendant violated the FCRA provision that states whenever an employer requests a consumer report, it must notify the consumer in writing within three days of the request. *Id.* at *19. It also states that the notification must include a written summary of rights which must contain certain disclosures, such as the consumer's right to obtain a copy of the consumer report, dispute information contained in the report, and obtain a credit score from the consumer reporting agency. *Id.* at *19-20. The Court observed that to state a viable claim, Plaintiffs need to specifically allege that Defendant violated the statutes in question, and did so willfully. *Id.* at *20. Plaintiffs merely alleged that Defendant did not comply with the FCRA and failed to allege any facts at all as to the willfulness element. Thus, the Court concluded that the assertions were insufficient to survive dismissal. Accordingly, the Court granted Defendant's motion to dismiss.

***Ford, et al. v. CEC Entertainment, Inc.*, Case No. 14-CV-1420 (N.D. Cal. July 7, 2015).** Plaintiffs brought a putative class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") and related statutes by using background check disclosure forms in its employment applications that contained extraneous information, such that the forms did not solely consist of the disclosure. *Id*. at *2. The parties settled the litigation. Defendant estimated that it procured background checks for approximately 28,500 people who executed those forms ("settlement class"), and Plaintiffs claimed that Defendant took adverse employment action with respect to nearly 400 people as a result of the background checks ("adverse action sub-class"). Plaintiffs moved to certify the class for settlement purposes as the parties had agreed on a class-wide resolution of the dispute, which the Court granted. At the outset, the Court noted that the proposed settlement class consisted of all individuals for whom Defendant obtained a background check from a third-party credit reporting agency during the class period, without fully complying with the disclosure and authorization requirements of the FCRA, the California Consumer Credit Reporting Agencies Act, and the California Investigative Consumer Reporting Agencies Act. *Id*. at *2. The adverse action sub-class consisted of members of the settlement class against whom Defendant took adverse employment action based on those background checks. Defendant agreed to settle the class claims for $1,750,500, which included: (i) individual settlement payments; (ii) class representative service awards of up to $5,000; (iii) payment of attorneys' fees to class counsel of up to 33% of the settlement; and (iv) class counsel's expenses. *Id*. at *3. The Court noted that as the settlement class consisted of over 28,500 members, the numerosity requirement was satisfied. *Id*. at *5. Further, as each settlement class member executed a form disclosing the employer's intent to obtain a credit report, the question common to the class was whether Defendant willfully violated the law by using those forms. *Id*. Accordingly, the Court concluded that the commonality requirement was satisfied. Similarly, the Court found that typicality and adequacy of representation requirements were also satisfied. The Court observed that the common issue of whether Defendant willfully violated the relevant laws predominated over individual issues because proof of actual injury for this statutory cause of action was not necessary. *Id*. at *7. The Court therefore certified the settlement class. The Court also analyzed the fairness of the settlement, and found that in order to succeed on the merits, Plaintiffs would have to prove that Defendant's violations were willful, which when

coupled with Plaintiffs' burden of proof, would make it difficult to prove liability. *Id*. at *9. The parties also argued that there was a risk that the class ultimately would not be certified, or, if the class was certified, Defendant would appeal the certification order, or that the class might later be decertified. *Id*. at *10. The Court opined that these threats weighed in favor of preliminary approval of the settlement. Moreover, the Court noted that the FCRA provides statutory damages between $100 and $1,000 for a willful violation. *Id*. The settlement agreements required Defendant to pay a total of $1,750,000, which would mean that class members would receive $36 in actual cash payments without having to file a claim. Therefore, the Court concluded that the settlement amount was fair. Accordingly, the Court preliminarily approved the settlement.

***Freckleton, et al. v. Target Corp.,* 2015 U.S. Dist. LEXIS 4130 (D. Md. Jan. 12, 2015).** Plaintiff, a job applicant, brought an action alleging that Defendants violated the Fair Credit Reporting Act ("FCRA") 15 U.S.C. §§ 1681b(b)(3), 1681e(b), when Defendant refused to hire her pursuant to a consumer report that Defendant First Advantage LNS Screening Solutions, Inc. prepared for Target. First Advantage completed a background screening and reported to Target that she had been involved in a theft. *Id*. at *6. First Advantage moved to dismiss for failure to state a claim, after which Plaintiff filed an amended complaint. Subsequently, Plaintiff moved for leave to amend, and Target moved to strike the amended complaint, or, alternatively, to dismiss the amended complaint for failure to state a claim. The Court granted Plaintiff's motion and denied all other motions. First, Defendants argued that the amended complaint should be struck because it was filed more than 21 days after Target's motion to dismiss. The Court noted that under Rule 15(a)(2), leave should be denied only when an amendment would unduly prejudice the opposing party, amount to futility, or reward the movant's bad faith. *Id.* at *11. Here, discovery had not yet begun, and there had been no showing of prejudice or bad faith. The Court noted that an amended pleading supersedes the original pleading, and that motions directed at superseded pleadings are to be denied as moot. *Id.* at *12. Thus, the Court denied Defendants' motions to dismiss the original complaint as moot. Target further contended that the amended complaint should be dismissed because the background check performed by First Advantage was not a consumer report protected by the FCRA, and that its actions, as described in the amended complaint, were within one of the FCRA's exclusions. The Court noted that § 1681a(y) of the FCRA creates an exclusion of certain communications for employee investigations. *Id.* at *15. The Court also observed that the FCRA protects consumers from the transmission of inaccurate information about them, and establishes credit reporting practices that utilize accurate, relevant, and current information in a confidential and responsible manner. *Id.* at *15-16. Target's background check was not performed in connection with an investigation into misconduct, and Plaintiff alleged in the amended complaint that Target did not suspect her of any misconduct when it requested the background check, and that the check was merely a matter of routine. *Id*. at *16. Further Target was not running the check to be compliant with state or federal regulations, and the amended complaint alleged that Target requested a background check that was a consumer report, and made her ineligible for hire based on that report without giving her prior notice. *Id*. at *17. Plaintiff also alleged that knowing that First Advantage gathered information subject to the FCRA, Target chose not to comply with the FCRA notification requirements. Since the Court concluded that Plaintiff's amended complaint stated an FCRA claim against Target, the Court denied Target's motion to dismiss the amended complaint, and granted Plaintiff's motion for leave to amend.

***Harris, et al. v. Home Depot, U.S.A., Inc.*, 2015 U.S. Dist. LEXIS 93576 (N.D. Cal. June 30, 2015).** Plaintiff brought a putative class action alleging that Defendant obtained pre-employment background checks without a proper written disclosures in violation Fair Credit Reporting Act ("FCRA"). Plaintiff contended that the disclosure document that she signed did not merely consist of a disclosure; instead, it also included language requiring her to release Defendant of any liability it might incur in connection with the background check. *Id.* at *1-2. Defendant filed a motion to dismiss, which the Court denied. Defendant argued that Plaintiff's FCRA claim was barred by the statute of limitations. The Court noted that, as it was unlawful to procure a report under the FCRA without first providing the proper disclosure and receiving the consumer's written authorization, Defendant could not have violated the statute until it procured a report on Plaintiff. *Id*. The Court observed that the complaint did not clearly mention when the reports were obtained. *Id*. Because Defendant's statute of limitations argument was based on an

erroneous argument that the FCRA violations allegedly occurred when Plaintiff signed the disclosure form, the Court rejected the statute of limitations argument. *Id.* Thus, it denied the motion to dismiss on statute of limitations grounds. Defendant also argued that the complaint did not adequately allege that the violation was willful as required under the FCRA. Defendant relied on *Peikoff v. Paramount Pictures Corp.*, No. 15-CV-68 (N.D. Cal. Mar. 26, 2015), which held that there could be no willful violation for inclusion of release language in a disclosure form as a matter of law. *Id*. at *4. The Court observed that in *Peikoff*, the Court held that the language the employer included in its disclosure form was so closely related to the disclosure that it was inherently implausible that anyone would include it in a willful attempt to violate the statute. *Id*. The Court remarked that in other words, in *Peikoff*, the employer had nothing to gain – other than improving chances that the background checks would be accurate – by insisting on the additional language in the disclosure form. *Id*. at *4-5. In this case, however, the Court found that it was plausible that Defendant inserted this language into the disclosure form despite knowing that to do so would violate the FCRA, or at least with reckless disregard for the FCRA's requirements. *Id*. at *5. Accordingly, the Court denied Defendant's motion to dismiss.

***Hawkins, et al. v. S2Verify,* 2015 U.S. Dist. LEXIS 134415 (N.D. Cal. Oct. 1, 2015).** Plaintiff, a job applicant, brought an action alleging that the consumer report that Defendant had obtained on him contained numerous inaccuracies as well as information that the FCRA mandates be excluded from reports. Plaintiff, a former drug addict who had committed various petty theft crimes, was denied employment because his consumer report contained criminal record information on multiple cases, none of which had resulted in a conviction. Named Defendant S2Verify, LLC (S2V), a consumer reporting agency, moved to strike all class allegations under Rule 23, and the Court denied the motion. First, the Court ruled that Plaintiff made a *prima facie* showing of commonality and typicality such that it would be better to review these issues at the time of class certification, rather than on a motion to dismiss. Some of the common questions included: (i) whether S2V violated the FCRA by failing to notify consumers contemporaneously of the fact that their criminal history information was being sent to employers; and (ii) whether S2V violated the FCRA by failing to maintain strict procedures to assure that the criminal history information furnished was complete, accurate, and up-to-date. *Id.* at *6. The Court remarked that Plaintiff sufficiently pled that a class action would be superior to adjudicating these claims individually. The Court noted that under the FCRA, statutory damages are limited to $1,000 per violation, and thus, there would be little incentive for consumers to bring individual lawsuits. *Id*. at *10. The Court also opined that the issue of equitable relief would be best resolved at a later stage. Further, although the Court agreed with S2V that some case law precedents held that the FCRA does not have a remedy for such equitable relief, it observed that the federal circuits had not directly ruled on this issue, and that it was thus not redundant, immaterial, impertinent, or scandalous for Plaintiff to request equitable relief. *Id.* Since S2V failed to raise adequate Rule 23(b) objections that justified striking Plaintiff's class allegations at this early stage, the Court denied the motion to dismiss.

***Huff, et al. v. Telecheck Services, Inc.,* 2015 U.S. Dist. LEXIS 3185 (M.D. Tenn. Jan. 9, 2015).** Plaintiffs brought a putative class action alleging that, in providing consumer disclosures, Defendants willfully or negligently violated the Fair Credit Reporting Act ("FCRA") by refusing or failing to provide the information required under the FCRA. Defendants moved to dismiss Plaintiffs' claims for declaratory or injunctive relief and to strike all class allegations. The Court granted Defendants' motions. First, the Court held that private litigants may not bring claims for injunctive and declaratory relief under the FCRA. The Court, therefore, dismissed Plaintiffs' claims for injunctive and declaratory relief. *Id.* at *3. Second, the Court held that, because the FCRA does not provide a private right of action for injunctive and declaratory relief, Plaintiffs could not satisfy the requirements for class certification under Rule 23(b)(2). The Court, therefore, struck Plaintiffs' class allegations pertaining to Rule 23(b)(2). Finally, the Court noted that an action to enforce liability under the FCRA must be brought no later than the earlier of: (i) two years after the date of discovery by Plaintiff of the violation that is the basis for liability; or (ii) five years after the date on which the violation that is the basis for liability occurs. *Id.* at *4. Defendants contended that, because Plaintiffs' proposed class definition relied upon the statute of repose of five years, rather than the two-year statute of limitations, individualized inquiries would be required to determine whether each Plaintiff's claim was timely filed and, therefore, the Court should strike the class allegations under Rule 23(b)(3). *Id.* The

Court found Defendants' request moot. Plaintiffs agreed to modify the class definition to those individuals who received a Telecheck File Report on or after September 2012. *Id.* at *5. Accordingly, the Court granted Defendants' motion to dismiss Plaintiffs' claims for injunctive and declaratory relief, granted Defendants' motion to strike class allegations under Rule 23(b)(2), and held that Plaintiffs class allegations under Rule 23(b)(3) were limited by agreement.

***Kirchner, et al. v. Shred-It USA, Inc.,* 2015 U.S. Dist. LEXIS 42238 (E.D. Cal. Mar. 31, 2015).** Plaintiff brought a putative class action alleging that Defendant failed to comply with Fair Credit Reporting Act ("FCRA") while conducting pre-employment background checks by failing to notify Plaintiff that it might obtain a consumer report for employment purposes on a form consisting "solely of the disclosure." *Id.* at *2. The parties reached a settlement and moved for preliminary approval. Under the settlement agreement, Defendant agreed to pay a gross settlement amount of $250,000, which consisted of up to $80,000 in attorneys' fees and a settlement fund of $170,000. *Id.* at *23. The Court preliminarily certified the action for settlement purposes and approved the settlement on the understanding that Plaintiff's counsel would demonstrate the fairness of the proposed fee award on or before the date of the final fairness hearing. *Id.* at *34. The Court granted class certification for settlement purposes, finding that Plaintiff and the proposed class of approximately 3,238 members satisfied Rule 23 requirements. The Court agreed that the potential claims of the class members arose from a set of circumstances similar to Plaintiff's circumstances, *i.e.*, the receipt or signing of Defendant's form that contained language beyond the disclosure and authorization language permitted by the FCRA, and the question of whether these forms complied with the FCRA was common to all class members and predominated over any individual issues. *Id.* at *7. The Court further found, for the purpose of preliminary approval, that Plaintiff's injuries were reasonably co-extensive with those of the putative class members, and therefore appeared to be aligned with them. *Id.* at *10-11. At the same time, the Court raised doubts about the appropriateness of the attorneys' fee award. While the settlement agreement provided for attorneys' fees of up to $80,000, which Defendant agreed to pay separately, Plaintiff's counsel stated in a declaration that he would only seek 25% of the gross settlement, or $62,500. *Id.* at *31. The Court assumed that the counsel calculated this percentage in fees based on the $250,000 in total liability that Defendant faced under the settlement agreement. The settlement agreement, however, did not establish a common fund of $250,000 because it stated that $250,000 would be the total amount of money Defendant would pay pursuant to the settlement and it arrived at that number by combining the $170,000 available to class members with class counsel's right to collect a maximum of $80,000 from Defendant. *Id.* at *32. The Court, therefore, raised concern that Plaintiff's counsel based his percentage-of-the-fund calculation in part on an amount that Defendant might never pay. *Id.* The Court opined that a disparity existed between attorneys' fees and the amount available for class members because an award of $80,000 represented approximately 47% of the amount recovered, and the request of $62,500 represented 37% of $170,000. *Id.* at *33-34. Because Plaintiff's counsel had not yet presented evidence to justify the amount he intended to request, the Court ordered Plaintiff's counsel to justify the proposed fee award. Accordingly, the Court granted preliminary approval of the class action settlement.

***Larson, et al. v. Trans Union, LLC*, 2015 U.S. Dist. LEXIS 83459 (N.D. Cal. June 26, 2015).** Plaintiff, a consumer, brought a class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") by providing him and approximately 18,000 putative class members with file disclosures that were not clear and accurate within the meaning of 15 U.S.C. § 1681g. Plaintiff moved for class certification, and Defendant cross-moved for summary judgment on the grounds that Plaintiff was not entitled to the free file disclosure on which his claims were based. The Court denied Defendant's motion, and stayed the proceedings pending resolution of writ of *certiorari* granted by the U.S. Supreme Court in *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014). The Court noted that Defendant's argument was based largely on the interaction between § 1681g and § 1681j. Section 1681j authorizes credit reporting agencies to charge a reasonable fee, not to exceed $8, for file disclosures under § 1681g. *Id*. at *14. The Court observed that some exceptions to the statute included § 1681j(a)(1)(A), which provides that consumers were entitled to one free file disclosure per 12 month period. *Id*. The undisputed facts showed that Plaintiff requested a free disclosure on July 15, 2010, and because Plaintiff had already obtained a free disclosure within 12 months, Defendant sent him a letter explaining that he was not entitled to a free disclosure. *Id*. at

*15. On August 11, 2011, Plaintiff again requested a free disclosure, which Defendant provided. *Id*. In October 2011, Plaintiff submitted an on-line request for another free disclosure; Plaintiff indicated that he was entitled to another by checking the box stating that he "received an adverse action notice based on information from" Defendant's credit report. *Id*. at *16. Defendant provided the disclosure, which became the subject of this litigation. Defendant contended that because Plaintiff's claims were based on § 1681n(a), the FCRA's damages provision, he must show that Defendant willfully failed to comply with any requirement imposed under the FCRA to prevail. The Court observed that Plaintiff accused Defendant of willfully violating § 1681g, which requires credit reporting agencies to clearly and accurately disclose to a consumer all information in the consumer's file upon request. *Id*. at *18. Moreover, even if § 1681g's clear and accurate disclosure requirement was subject to § 1681j, § 1681j does not require a consumer either to pay a fee or to qualify for an exception to obtain his file from a credit reporting agency. *Id*. at *19. Finding that Defendant's argument was misplaced, the Court denied the motion for summary judgment. Further, the Court noted that after the motion for class certification was fully briefed, *certiorari* was granted in *Robins*. In *Robins*, the Ninth Circuit held that Plaintiff alleged Article III standing, regardless of whether he had sufficiently alleged actual harm, by merit of his claims for willful violations. *Id*. at *20. The question before the Supreme Court was whether Congress may confer Article III standing upon a Plaintiff who suffered no concrete harm, and who therefore, could not otherwise invoke federal jurisdiction. *Id*. at *21. The Court remarked that the question presented in *Robins* was squarely implicated in this case. The Court explained that Plaintiff's ability to establish injury-in-fact without reliance on the FCRA's statutory damages provision had not been tested in this case and was far from certain. *Id*. at *24. The Court remarked that even if Plaintiff himself could make a sufficient showing of actual harm to satisfy Article III, the record indicated that a significant portion of the putative class would not be able to do the same. *Id*. A decision in *Robins* reversing the Ninth Circuit would thus raise serious questions regarding Plaintiff's ability to establish his own individual standing, as well as the predominance and superiority requirement necessary to certify and maintain a class action under Rule 23(b)(3). *Id*. The Court, however, deferred on making a tentative ruling on Plaintiff's motion for class certification, and found that all the requirements of a class certification under Rule 23 were nevertheless, satisfied, but stayed the proceedings until the resolution of *Robins*.

***Manuel, et al. v. Wells Fargo Bank National Association,* 2015 U.S. Dist. LEXIS 109781 (E.D. Va. Aug. 19, 2015).** Plaintiff brought a putative class action alleging that Defendant's background checks violated the Fair Credit Reporting Act ("FCRA"). Plaintiff had a conditional job offer from Defendant pending the successful completion of a background check. Plaintiff completed a consent form that had language releasing liability from Defendant, their vendor, and other third-parties in relation to the background check obtained along with their conditional offer of employment. *Id.* at *8. When Plaintiff's background check reflected several convictions on Plaintiff's records, Defendant coded Plaintiff as "ineligible," thereby initiating a pre-adverse action protocol in which Plaintiff received the "Pre-Adverse Action Notice," copy of the report and a copy of the summary of rights as outline by the FCRA. *Id.* at *3. Upon receiving the documents, Plaintiff began the appeal process with Defendant. The vendor then generated a revised report that still contained the disputed convictions. *Id.* Defendant eventually determined that Plaintiff was ineligible for employment. Plaintiff alleged that Defendant violated the FCRA requirement of "a clear and conspicuous" disclosure in a document that consisted solely of a disclosure that a background check might be obtained because it also had language releasing the company and others from liability arising from the background check. *Id.* at *16. Plaintiff also alleged that Defendant's coding of him as "ineligible" in the background check vendor's system and initiating the adverse action protocol violated the FCRA requirement that the pre-adverse action notice, a copy of the report, and summary of rights be provided to the individual before taking adverse action. Defendant moved for summary judgment, arguing that Plaintiff lacked standing because he had not alleged a legally-cognizable injury-in-fact. *Id.* at *11. The Court denied Defendant's motion on the basis that Plaintiff demonstrated an injury-in-fact through his allegations that he was deprived of the appropriate type of information under the FCRA. *Id.* at *18. Although Plaintiff received some information through Defendant's disclosure, the Court found that it was not the type of information that Plaintiff was entitled to under the FCRA. *Id.* at *16. Defendant argued that it was entitled to summary judgment on Plaintiff's ineligible claim because the action of sending notice to the vendor that a candidate was likely ineligible and thus needed to receive the two adverse action letters did not qualify as an "adverse action" under the FCRA. *Id.* at *22-23. Plaintiff

asserted that when Defendant determined that the applicant was not eligible because of the consumer report and sent a message to the vendor to code the consumer's file as "ineligible," it committed an adverse action under the FCRA. *Id.* at *26. Finding the evidence sufficient to support a reasonable jury's finding that Defendant's actions were adverse, the Court concluded that the issue was one for the jury. *Id.* at *31. Finally, Defendant argued that it did not procure consumer reports within the meaning of the FCRA and thus its background checks were not subject to the FCRA requirements. The Court, however, found sufficient evidence to find that Defendant's background checks qualified as consumer reports under the FCRA. The Court noted that Defendant sought information about the applicant's criminal history, academic achievement, employment history, social security number verification, character, general reputation, personal characteristics, and mode of living. *Id.* at *40. The Court reasoned that such a broad-reaching background check supported the conclusion that it was a consumer report as contemplated by the FCRA. Accordingly, the Court denied Defendant's motion for summary judgment.

***Newton, et al. v. Bank Of America, N.A.*, 2015 U.S. Dist. LEXIS 62930 (C.D. Cal. May 12, 2015).**
Plaintiffs, a group of employees, brought an action alleging that Defendant willfully violated § 1681b(b)(2)(A) of the FCRA by procuring consumer reports using invalid authorization forms that failed to provide Plaintiffs and the class members with a clear and conspicuous disclosure in a document that consisted solely of the disclosure. As a condition of employment, all applicants had to consent to and pass both the applicant screening investigation ("ASI background check"), and the criminal background screening ("criminal background check") (collectively the "background screening"). *Id.* at *2. The Court granted Defendant's motion for summary judgement. Defendant argued that Plaintiffs' claim failed because it did not procure consumer reports within the FCRA's definition. The Court noted that certain reports are not considered as consumer reports if the communication is made to an employer in connection with an investigation of: (i) suspected misconduct relating to employment; or (ii) compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing written policies of the employer. *Id.* at *12. Defendant's routine background screening was a mandatory condition of employment, which did not require a careful degree of inquiry into its compliance with laws or its pre-existing written policies. Defendant did not require Plaintiffs to undergo background screening in connection with its investigation; rather, it required Plaintiffs to undergo background screening pursuant to its written policies and federal law. *Id.* at *13-14. Thus, the Court found that the background screening was not an investigation within the plain language of the exclusion, and that reports Defendant procured in connection with its background screening were consumer reports as defined by the FCRA and thus, subject to the FCRA's disclosure requirements. Further, Defendant provided evidence that it procured Plaintiffs' consumer reports using disclosures that complied with the FCRA, namely the criminal background authorization and ASI authorization (the "authorizations"). The Court observed that both authorizations were clear and conspicuous, they disclosed that a consumer report could be obtained for employment purposes, and they were in a document that consisted solely of the disclosure. *Id.* at *16. Plaintiffs had authorized the procurement of their consumer reports. The Court thus concluded that the authorizations met the FCRA's disclosure requirements. Plaintiffs also contended that even if Defendant procured the consumer reports pursuant to the criminal background authorization, the disclosure violated the FCRA because it was presented in a job application and side-by-side with extraneous information. Further, Plaintiffs alleged that the FCRA disclosure was not a clear and conspicuous document consisting solely of the disclosure because Defendant sought applicants' authorization during its job application process through a convoluted electronic book exceeding 15 pages. The Court opined that a "clear and conspicuous" disclosure means "in a reasonably understandable form and readily noticeable to the consumer." *Id.* at *21. The Court reasoned that the authorizations were conspicuous to applicants and used language that a lay person would understand. The amount of text was minimal with headings in boldface, and capital font using a larger typeface than the surrounding text. Further, the Court determined that the FCRA does not prohibit an employer from providing an FCRA disclosure as part of the employer's job application process or prohibit an employer from providing an FCRA disclosure at the same time the employer provides other employment documents. *Id.* Thus, because the background screening complied with the FCRA's disclosure requirements, the Court found that Plaintiffs' claim failed as a matter of law. Accordingly, the Court granted summary judgment to Defendant.

***Patel, et al. v. Trans Union, LLC*, 2015 U.S. Dist. LEXIS 84142 (N.D. Cal. June 26, 2015).** Plaintiff brought a class action alleging that Defendant inaccurately reported that Plaintiff was on a terrorist watch list in violation of the Fair Credit Reporting Act ("FCRA"). Plaintiff contended that he when he applied to rent an apartment, his application was refused because of Defendant's inaccurate reporting. *Id*. at *6. Plaintiff sought to certify: (i) a national class challenging Defendant's willful failure to maintain and follow reasonable procedures to ensure maximum accuracy of their information, in violation of 15 U.S.C. § 1681e(b); and (ii) a national sub-class challenging Defendant's willful failure to provide consumers with all information in their files, in violation of 15 U.S.C. § 1681g. The Court certified the two classes. Defendant challenged the class definitions on the ground that the classes were not ascertainable because the "accuracy class" could not be defined by reference to objective criteria and instead inaccurate information could be shown only by examining files individually. *Id*. at *24. Defendant disagreed with Plaintiff's assertion that tagging the class members as terrorists was always inaccurate and thus was enough to define the class. The Court noted that Defendant's implied argument was that a significant number of the proposed class may have been accurately tagged as potential terrorists. *Id*. at *25. The Court remarked that absent some significant proof to the contrary, it was willing to assume that no significant fraction of the proposed class was accurately tagged as potential terrorists. As to the disclosure sub-class, Defendant argued that cross-referencing lists among Defendants would not necessarily produce a list of "disclosure" class members who requested a file disclosure, and even if it did, the list would contain people who may or may not be entitled to their files. *Id*. at *28. The Court opined that when a Defendant is in the business of collecting, analyzing, and arranging data for sale or on-demand retrieval, when it had already identified over 11,000 people with alerts, and when all tagged persons gave their contact information as part of the background check process, Defendant's argument that the class was not ascertainable was not convincing. *Id*. Accordingly, the Court concluded that both the classes were ascertainable. The Court noted that Defendant themselves identified 11,000 persons with an alert on their report and therefore the class satisfied the numerosity requirement. *Id*. at *31. The Court also found that common questions predominated and were common across the class, thereby satisfying the commonality requirement. *Id*. at *32. Likewise, the Court determined that all other Rule 23(a) and (b) requirements were satisfied, and accordingly, granted Plaintiffs' motion for class certification.

***Rawlings, et al. v. ADS Alliance Data Systems, Inc.,* 2015 U.S. Dist. LEXIS 81055 (W.D. Mo. June 23, 2015).** Plaintiff, a job applicant, brought an action under the Fair Credit Reporting Act ("FCRA") alleging that Defendant obtained a consumer report on her without providing her a copy of the report and without providing reasonable time to cure any inaccuracies in the reports. Plaintiff also alleged that Defendant obtained the report based on a disclosure form that was not on a document consisting solely of the disclosure and instead containing extraneous information such as state law disclosures; and that Defendant failed to obtain proper authorization from her and others before procuring the consumer reports. *Id*. at *2-3. Defendant moved to dismiss, which the Court granted in part. Defendant argued that the report obtained fell within a statutory exclusion from the definition of a consumer report, since the communication was made to an employer in connection with an investigation of compliance with federal, state, or local laws and regulations, or any pre-existing written policies of the employer. *Id.* at *5. Defendant provided a document titled "Background Checks and Investigation Policy," arguing that the pleadings embraced this document. *Id.* The Court, however, remarked that it could not determine that the report obtained was excluded from the definition of a consumer report, because the policy was a general one and made repeated references to consumer reports, was couched in the terms used in the FCRA, and described investigation procedures that would be used, which were the same as those contained in the FCRA. *Id.* at *7. The Court observed that interpreting the FCRA to exclude an employer's general policy of performing background checks swallows the protections the FCRA affords applicants for employment, and thus it denied the motion to dismiss Plaintiff's claims in their entirety. *Id.* Alternatively, Defendant argued that the Court must dismiss or strike the adverse action claim because Plaintiff proposed a fail-safe class that could not be certified. Plaintiff alleged that Defendant had a common and uniform policy and practice of making adverse hiring decisions based on consumer reports without allowing the impacted applicant to view the report or correct inaccuracies. The Court observed that under the FCRA, it is a violation to use a consumer report to make adverse employment actions unless the consumer to whom the report relates is given a copy of the report and a description in writing of the rights of the consumer under the FCRA. *Id.* at *10.

Thus, the Court held that even if Plaintiff's proposed class was a fail-safe class, it was possible to redefine the class at the class certification stage. *Id.* at *10-11. Defendant also argued that the disclosure form it provided Plaintiff was not objectively unreasonable, and she could not prove that Defendant willfully violated the FCRA. Plaintiff alleged that the disclosure form was not a document consisting solely of the FCRA disclosure, but that it included extraneous information such as state law disclosures. Further, Plaintiff alleged that Defendant knowingly used a disclosure form to obtain a consumer report that contained extraneous information, and that Defendant's violations of the FCRA combined with its knowledge of the requirements of the FCRA was evidence that its violations were willful. The Court opined that the complaint was sufficient to state a claim that Defendant violated the FCRA's stand-alone disclosure requirement, and thus it denied the motion to dismiss the improper disclosure claim. *Id*. at *15. Finally, Defendant argued that Plaintiff failed to allege any facts consistent with a willful violation of the FCRA because she merely alleged that Defendant obtained her consumer report without proper authorization. The authorization form Plaintiff signed provided that a consumer reporting agency would prepare a background report, and that the authorization sufficed to permit the company to perform additional background checks throughout the applicant's period of employment. The Court remarked that a reasonable person would be on notice that the background report being obtained by the consumer reporting agency was in the nature of a consumer report, and that the form satisfied Defendant's obligation to obtain authorization to procure a consumer report. *Id.* at *16. The Court thus granted Defendant's motion in this regard.

***Rodriguez, et al. v. Equifax Information Services, LLC*, 2015 U.S. Dist. LEXIS 93560 (E.D. Va. July 17, 2015).** Plaintiff, a job applicant, brought a class action alleging that Defendant, a consumer reporting agency, provided the U.S. Office of Personnel Management ("OPM") with a consumer report containing public record information that would have had an adverse effect upon his ability to obtain employment, without providing notice to him "at the time" it furnished the report to OPM, as required by 15 U.S.C. § 1681k(a)(1). *Id.* at *7. The consumer report contained a reference to a public record listing of a bankruptcy and a civil judgment, as well as a collection account. *Id.* at *7. Defendant moved for summary judgment, which the Court granted. Plaintiff contended that Defendant was required to have a notification system that allowed it to actually send to the affected consumer the required notice before or at the same time Defendant sent the consumer report to OPM, and not afterwards. *Id.* at *13. Under Defendant's notification system, a notice to a consumer was triggered and created internally at the same time a report to OPM was generated internally. *Id.* Defendant then printed the notice and mailed it to the consumer as part of a continuous process that was designed to be completed on the same day as OPM received the consumer report. The Court observed that Congress did not impose a "same time" requirement with respect to the receipt of notice and that in 2000, the Federal Trade Commission interpreted the "at the time" requirement to permit the mailing of § 1681k(a)(1*)* notices. *Id.* at *14. Although Plaintiff contended that Defendant's decision to automate its delivery system to OPM required it to similarly update and automate its notice process to consumers, the Court refrained from concluding that the text of the statute requires such technological symmetry during periods of technological innovation so long as the system initiated, at the same time Defendant initiates a report to OPM, a process that was designed to deliver notice to the consumer according to a reasonable, standard, and accepted method of delivery. *Id.* at *14-15. Further, Plaintiff asserted that Defendant's system of notification was so flawed that he had affirmatively discovered from Defendant that it had no procedure to actually get these notices from a computer to the U.S. Postal Service on the same day of the report. The Court noted that testimony of Defendant's employees established that during the time period relevant to this litigation, Defendant had a policy and seamless practice beginning with the automated generation of the report and PR files from midnight to 3:00-4:00 a.m., printing the notices beginning at approximately 7:00 a.m., and sending them out by U.S. mail that same business day. *Id.* at *16. Although Plaintiff contended that Defendant did not establish that its mailing vendor mailed the notices on the same business day the report was delivered to OPM, the record contained uncontroverted evidence that Defendant designed the system for that purpose, Defendant contracted for that service, and the vendor picked up notices daily. *Id.* at *17. The Court remarked that isolated instances when Defendant did not mail a notice on the same business day did not establish that Defendant violated § 1681k by virtue of the overall system used to provide notice. In addition, Plaintiff alleged that Defendant violated § 1681e(b), because the consumer report on him

contained an objectively incorrect civil judgment under a name other than his and a collection amount that had been discharged in bankruptcy. *Id.* at *18-19. Plaintiff sought actual damages and alternatively, statutory and punitive damages. The Court opined that there was insufficient evidence to establish that Plaintiff suffered any cognizable damages or that Defendant engaged in either a negligent or willful violation of § 1681e(b). Accordingly, the Court granted summary judgement in favor of Defendant.

***Sweet, et al. v. LinkedIn Corp.,* 2015 U.S. Dist. LEXIS 49767 (N.D. Cal. April 14, 2015).** Plaintiffs, a group of rejected job applicants, brought a putative class action alleging that Defendant's reference search function did not comply with the requirements of the Fair Credit Reporting Act ("FCRA"). Defendant designed a reference search function available to premium account holders to generate a list of individuals who previously worked with a job applicant and who might be able to provide feedback about the applicant's previous job performance. *Id.* at *8. Plaintiff submitted a resume to a potential employer through LinkedIn, and got invited for an interview. Plaintiff did not get the job as the potential employer changed its mind to hire her after checking references allegedly based on LinkedIn's references search function. Plaintiffs asserted that the references search violated the FCRA because it provided the reports without determining their intent on using the information. Defendant moved to dismiss and argued that the reference search could not be considered as "consumer reports" under the FCRA, and that it was not acting as a "consumer reporting agency." *Id*. The Court agreed with Defendant and granted the motion to dismiss. The Court found that the reference search function on LinkedIn was not a "consumer report" for the purpose of FCRA. The Court explained that the information contained in references search came solely from LinkedIn's transactions or experiences with consumers, and the FCRA defines "consumer report" to exclude a "report containing information solely as to transactions or experiences between the consumer and the person making the report." *Id.* at *12-13. The Court noted that Plaintiffs' own allegations showed that consumers provided LinkedIn with information about their employment histories so that LinkedIn could publish the information on-line, and sharing information was precisely why Plaintiffs or anyone else on LinkedIn provided their employment histories to LinkedIn. *Id.* at *13-14. The Court reasoned that to meet the definition of a consumer report, a communication must be made by a consumer report agency, and Defendant was not a "consumer reporting agency" under the FCRA. *Id.* at *18. The FCRA defines consumer reporting agency as "any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third-parties…" *Id.* Because consumers had voluntarily provided their names and employment histories to LinkedIn for the purpose of publication, the Court ruled that the facts alleged in Plaintiffs' complaint supported the inference that Defendant gathered the information about the employment histories of the subjects for the purpose of carrying out Plaintiffs' information-sharing objectives, and not for the purpose of creating consumer reports. *Id.* at *19-20. The Court also noted that Defendant marketed the reference search results – and therefore expected them to be used – as a way for potential employers to locate people who could provide reliable feedback about job candidates and did not market the results themselves as a source of reliable feedback about job candidates. *Id.* at *28. The Court therefore concluded that Defendant's reference search function was not a consumer report subject to FCRA, and accordingly, dismissed Plaintiffs' action.

(li) Appeals In Class Action Litigation

***Ades, et al. v. Omni Hotels Management Corp.,* Case No. 13-CV-2468 (C.D. Cal. June 22, 2015).** Plaintiffs, a group of consumers, brought a class action alleging that Defendants' representatives recorded their personal information when they called their toll-free telephone numbers in violation of the California Invasion of Privacy Act ("CIPA"). Plaintiffs further alleged that Defendants had a company-wide policy of recording inbound telephone conversations with consumers without seeking permission or informing consumers about the monitoring. *Id*. at *1. After the Court certified the class, the Court granted Defendants' *ex parte* application to compel the production and consideration of a notice mailed to Verizon Wireless ("Verizon") subscribers who were potential class members in this action. Plaintiffs claimed that they subpoenaed that information because, among other reasons, it would help prove that class members were physically located in California when they made calls to Defendants. Subsequently, the Court issued an order concluding that § 2891(a) of the California Public Utilities Code applies to cellular telephone

subscribers, and that the names, addresses, and physical whereabouts of subscribers at the time of those calls constitute information protected by that statute. The Court therefore ruled that the information that Plaintiffs sought should not be released without the telephone subscribers' express consent. *Id*. at *3. Plaintiffs then filed a motion to certify three questions for interlocutory review by the Ninth Circuit under § 1292(b), including: (i) is the name and address demographic information; (ii) is historical cell site location information relating to a specific call a "calling pattern" or "demographic information;" and (iii) if the term "residential subscribers" includes wireless subscribers. *Id*. at *4. The Court declined to certify the questions to the Ninth Circuit. *Id*. at *7. At the outset, the Court noted that a question is controlling if resolution of the issue on appeal could materially affect the outcome of litigation. *Id*. at *5. The Court further observed that the issue need not be dispositive of the lawsuit in order to be regarded as controlling, but it cannot be collateral to the basic issues of the case. *Id*. Additionally, a question is not controlling merely because it is "one the resolution of which may appreciably shorten the time, effort, or expense of conducting a lawsuit." *Id*. Applying these standards, the Court concluded that none of the issues that Plaintiffs sought to certify could be properly described as controlling. The Court noted that discovery-related orders are rarely appropriate for appeal under § 1292(b). *Id*. at *6. Although Plaintiffs argued that reversal on any of the disputed issues would require a completely new trial, the Court noted that Plaintiffs cited to no precedent in support of that position. Furthermore, the Court remarked that the mere possibility that a reversal on appeal could lead to a new trial, without more, was not sufficient reason for granting the relief requested by Plaintiffs. *Id*. at *7. Accordingly, the Court concluded that the issues presented by Plaintiffs did not present a controlling issue of law, and should not be certified for interlocutory appeal. *Id*.

***Augustin, et al. v. Nassau County Sheriff's Department,* 2015 U.S. App. LEXIS 6317 (2d Cir. April 17, 2015).** In this consolidated class action, Plaintiffs alleged that Defendants arrested and strip searched them on misdemeanor charges, without individualized suspicion, in violation of their federal and state constitutional rights. After Defendant Nassau County conceded liability, the District Court certified two classes as to liability and damages, and entered summary judgment on liability because of Nassau County's concession. *Id*. at *3. Before the District Court entered final judgment, Defendants moved to vacate the summary judgment order and to dismiss the action based on the U.S. Supreme Court's decision in *Florence v. Board of Chosen Freeholders,* 132 S. Ct. 1510 (2012). In *Florence*, the Supreme Court held that under certain circumstances, the Fourth Amendment does not prohibit such searches. *Id*. The District Court granted the motion as to the federal constitutional claim, but denied the request as to the state constitutional claim and entered final judgment in favor of Plaintiffs. After the parties filed cross-appeals, the District Court, pursuant to Rule 62(d), granted in part Defendants' motion to stay enforcement of the judgment. *Id*. at *2. Defendants moved for a continuation of the temporary stay pending appeal, but without depositing the monies or without posting a bond, which the Second Circuit granted. Defendants argued that pursuant to the District Court's order, Plaintiffs must wait anyway to recover until the conclusion of the appeals process, and that it was essentially guaranteed that Defendants, a group of government entities, would pay the judgment if Plaintiffs prevailed. *Id*. at *5. The Second Circuit noted that Rule 62(d) provides that an appellant is entitled to a stay pending appeal, by posting a supersedeas bond. *Id*. at *6. The Second Circuit found that Defendants had demonstrated the existence of appropriated funds, available for the purpose of paying judgments without substantial delay or other difficulty. *Id*. at *7. The Second Circuit thus concluded that there was no practical reason to require Defendants to post a bond or deposit funds in order to secure a Rule 62(d) stay pending appeal. *Id*. at *8. Accordingly, the Second Circuit stayed the judgment, including the order for payment of fees and costs, without bond or other condition pending appeal. *Id*.

***Gelboim, et al. v. Bank Of America Corp.*, 135 S. Ct. 897 (2015).** Plaintiffs brought several actions alleging that a number of banks, acting together, violated federal antitrust law. The London InterBank Offered Rate ("LIBOR") is a reference point in determining interest rates for financial institutions in the United States and globally. The Judicial Panel on Multi-District Litigation established a multi-district litigation, the LIBOR MDL, for cases involving allegations that Defendant banks understated their borrowing costs, thereby depressing LIBOR and enabling the banks to pay lower interest rates on financial instruments sold to investors. *Id*. at 898. Those actions, including a class action filed by petitioners Ellen Gelboim and Linda Zacher ("Petitioners"), who raised a single claim that several banks violated antitrust

law, were consolidated for pre-trial proceedings. The District Court dismissed four categories of cases included in the MDL, three of which involved putative class actions, with a single lead case, namely: (i) the present action; (ii) an action filed on behalf of purchasers of over-the-counter LIBOR-based instruments ("OTC Plaintiffs); and (iii) an action filed on behalf of purchasers of LIBOR-based instruments on exchanges ("Exchange Plaintiffs"). *Id.* at 903. The District Court granted Defendants' motion to dismiss Petitioners' antitrust claims, the sole claim raised, holding that no Petitioner could assert a cognizable antitrust injury. The Second Circuit held that the District Court's dismissal of the complaint was not fit for appellate review. *Id.* at 904. The U.S. Supreme Court granted review of the Second Circuit's order and reversed. The Supreme Court noted that cases consolidated for MDL pre-trial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision. *Id.* The Supreme Court observed that Congress specifically stated that, at or before the conclusion of pre-trial proceedings, each of the transferred actions must be remanded to the originating district unless the action shall have been previously terminated. *Id.* at 905. Because the District Court completed its adjudication of Petitioners' complaint and terminated their action, the Supreme Court opined that Petitioners were no longer participants in the consolidated proceedings. *Id*. The Supreme Court noted that nothing about the initial consolidation of their civil action with other cases in the MDL rendered the dismissal of their complaint in any way tentative or incomplete. Further, the Supreme Court reasoned that the § 1407 consolidation did not meld the Petitioners' class action and others in the MDL into a single unit. *Id.* Defendants asserted that Plaintiffs with the weakest cases may be positioned to appeal because they stated only one claim, while Plaintiffs with stronger cases would be unable to appeal simultaneously because they had other claims still pending. The Supreme Court, however, observed that, under Rule 54(b), the District Court could grant certification of a final judgment, thereby enabling Plaintiffs in actions that have not been dismissed in their entirety to pursue immediate appellate review. *Id.* Here, the District Court granted Rule 54(b) certification to the OTC Plaintiffs and the Exchange Plaintiffs so that they could appeal at the same time as Petitioners in this action. The Supreme Court remarked that, if the MDL believed that further proceedings might be relevant to a claim that Defendants moved to dismiss, the MDL ordinarily could defer ruling on the motion, thus allowing all Plaintiffs to participate in the on-going MDL proceedings. *Id.* at 906. The Supreme Court opined that Rule 54(b) was of no avail here because it addresses orders finally adjudicating fewer than all claims presented in a civil action and does not apply to a single claim action or to a multiple claim action in which all of the claims have been finally decided. *Id.* Accordingly, the Supreme Court reversed the order of the Second Circuit.

***Paz, et al. v. AG Adriano Goldschmeid,* Case No. 14-CV-1372 (S.D. Cal. Jan. 27, 2015).** Plaintiff brought a class action alleging that although a pair of jeans he bought were allegedly made in the United States, certain components of the jeans were manufactured in other countries. After the Court denied Defendants' motion to dismiss on the ground of preemption, Defendants moved to certify the order for interlocutory review and to stay proceedings pending appeal. The Court denied the motion, finding that Defendants failed to establish the second and the third requirements of 28 U.S.C. § 1292(b), that there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.* at 1. Regarding the second requirement, the Court noted that a substantial ground for difference of opinion exists where circuit case law precedents are in dispute on the question and the court of appeals of the circuits have not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented. *Id.* at 2. The Court observed that the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion. *Id.* at 3. Although the Court agreed with Defendants that the preemption issue was one of first impression, it remarked that this was insufficient to warrant certification under § 1292(b). *Id.* Because Defendants' assertion that other jurists may disagree with the Court's conclusion was speculative, the Court opined that the second requirement for certification was not met. Regarding the third requirement, the Court observed that if the Ninth Circuit disagreed with its decision that Plaintiff's claims were not preempted, Plaintiff's claims would be dismissed and the litigation would come to an end, but if the Ninth Circuit agreed with the decision, then certification would have delayed the progress of the case and its ultimate termination. *Id.* at

3. Therefore, the Court denied Defendants' motion for § 1292(b) certification of its order on the preemption issue.

(lii) Certification Of Defendant Classes

***Medical Protective Co., et al. v. Center For Advanced Spine Technologies,* 2015 U.S. Dist. LEXIS 102577 (S.D. Ohio. Aug. 5, 2015).** Plaintiff, the Medical Protective Co., brought an action alleging that Defendant, Abubakar Atiq Durrani, breached conditions of his insurance policies when he fled the country in December 2013. Plaintiff issued insurance policies to Durrani, the president and sole shareholder of Defendant Center for Advanced Spine Technologies, Inc. ("CAST") and CAST, and Defendant/Cross-Claimant Cincinnati Insurance Company ("CIC") issued general liability insurance policies to CAST. *Id.* at *6-7. Durrani faced more than 405 lawsuits from former patients who claimed that he performed unnecessary surgeries and accused him of fraudulently billing Medicare millions of dollars for unnecessary procedures (the "Underlying Litigation"). Durrani fled the country after a warrant was issued for his arrest. Plaintiff's contract with Durrani required him to "fully cooperate" with any claims brought against him and required him to "attend and assist in the preparation and trial" related to any claim. *Id.* In December 2013, Durrani advised Plaintiff via e-mail that he would not return to the country or assist Plaintiff in any way in defense of the cases pending against him. *Id.* at *8. Plaintiff, therefore, sought a declaration that Durrani's absence from the trials violated the terms of his contract and that it had no duty to defend or indemnify Durrani or CAST in the underlying litigation under its policies. CIC also sought a declaratory judgment that Durrani and CAST breached their duties to cooperate in CIC's investigation of the claims asserted in the underlying litigation, that it would be prejudiced by their failure to cooperate, and it had no obligation to defend or indemnify Durrani or CAST. *Id.* at *15-16. Plaintiff and CIC (the "Movants") moved to certify a Defendant class of any person or legal entity who had or might have a claim, cause of action, or judgment against Durrani, CAST, Plaintiff, or CIC in connection with the underlying litigation. *Id.* at *18-19. The Court granted class certification. First, the Court found that Movants satisfied the numerosity requirement because they identified over 400 pending lawsuits against Defendants. Second, the Court ruled that Movants satisfied commonality because they demonstrated that the issue of whether Durrani and CAST satisfied the policies' cooperation requirements would be based on the same conduct, namely Durrani's refusal to participate in the defense of the underlying litigation. *Id.* at *26. Third, the Court determined that Movants satisfied typicality because they showed that the policy provisions at issue were the same for all putative class members, and the putative class representatives' interests were typical of those of the class, *i.e.*, to defend against declarations that Movants were not obligated to provide defense or indemnity to Durrani or CAST with respect to the underlying litigation. *Id.* at *29. Fourth, the Court found that Movants satisfied the adequacy requirement because they demonstrated that the proposed class representatives' interests were aligned for the purposes of this action because all members of the class shared the same unified interest in seeking to establish that Movants were obligated to defend and indemnify Durrani and CAST. *Id.* at *30. The Court, therefore, held that class certification under Rule 23(b)(2) was proper. Although technically Movants were situated more like traditional Defendants because the case involved the validity of class members' potential claims against Movants for indemnification of Durrani and CAST, the Court found no risk that Plaintiff or CIC could control the outcome of the action by its own conduct because the Court ultimately would be tasked with determining whether Movants were obligated to defend Durrani and CAST given the relevant policy language and the facts. *Id.* at *34. The Court, therefore, granted Movants' motion to certify a Defendant class pursuant to Rule 23(b)(2).

***Strawser, et al. v. Strange,* 2015 U.S. Dist. LEXIS 66399 (S.D. Ala. May 21, 2015).** Plaintiffs, several same-sex couples, brought an action alleging that Alabama's laws excluding same-sex couples from marriage and refusing to recognize same-sex marriages violated the Fourteenth Amendment. Plaintiffs moved for certification of a Plaintiff Class and a Defendant Class. The Plaintiff Class included all persons in Alabama who wished to obtain a marriage license to marry a person of the same sex, wished to have that marriage recognized under Alabama law, and were unable to do so because of the enforcement of Alabama's laws prohibiting the issuance of marriage licenses to same-sex couples and barring recognition of their marriages. The Defendant Class included all Alabama county probate judges who enforced the Alabama law at issue. *Id*. at *1-2. The Court granted Plaintiffs' motion. First, regarding the Plaintiff Class, Plaintiffs cited to census data from 2010 indicating that Alabama is home to approximately 6,582 same-sex

couples. *Id*. at *4. The Court found that the 2010 census data, coupled with the actual experiences in other states, amply supported the conclusion that the number of same-sex couples in Alabama seeking to be married far exceeded any number which would be practical for joinder. *Id*. at *8. The Court also agreed with Plaintiffs that probate judges would have no difficulty identifying those affected by the requested injunction because any same-sex couples who attempted to apply for a marriage license plainly qualified as members of the proposed class. *Id*. As to the Defendant Class, the Court found that Alabama had 68 probate judges, all of whom had refused, or could in the future refuse, to issue marriage licenses to same-sex couples. *Id*. at *10. The Court concluded that, whereas all 68 probate judges were known, it was impracticable to join them all, and their inclusion in the class would serve the interests of judicial economy. *Id*. at *11. Second, regarding the commonality requirement, the Court found that Plaintiffs based their claims on the same legal theories as absent class members and sought the same legal relief, *i.e.*, a declaratory judgment striking down Alabama's laws banning same-sex marriage and an injunction barring their enforcement. *Id*. at *12-13. Similarly, the question common to the entire Defendant Class was whether their enforcement of Alabama's laws barring same-sex couples from marriage violated the Fourteenth Amendment. *Id*. at *13. Third, the Court found that Plaintiffs met the typicality requirement because the injuries, claims, and defenses of the Plaintiffs and Defendants were typical of the injuries, claims, and defenses of the proposed classes. *Id*. at *15. Fourth, regarding adequacy of representation of the Defendant Class, named Defendant Judge Don Davis asserted that he could not be an effective class representative because the 68 probate judges had no unified position on the constitutionality of denying marriage licenses to same-sex couples and because he had never made public statements or taken a public stance on the matter. *Id*. The Court, however, noted that the issuance of marriage licenses is a purely ministerial act and that none of the Defendant Class members were charged with discretion or judgment in carrying out that ministerial duty. *Id*. at *16-17. The Court found that certification was proper under Rule 23(b)(1) and (2). The Court reasoned that a class-wide ruling would definitively determine the issues as to all of Plaintiffs' claims against all 68 probate judges. *Id*. at *19. Because Defendants allegedly directed their conduct against a specific class of people and applied it uniformly, the injuries of all Plaintiff Class members could be properly addressed by class-wide injunctive relief. *Id*. at *20. Accordingly, the Court certified the Plaintiff and Defendant Classes.

(liii) Venue Issues In Class Actions

***Fernandez, et al. v. UBS AG,* 2015 U.S. Dist. LEXIS 47767 (D.P.R. Mar. 30, 2015).** Plaintiffs, a group of Puerto Rico residents who invested in Defendants' mutual funds, brought a class action alleging that Defendants improperly steered Plaintiffs – most of whom were older individuals focused on preserving their capital and generating income for retirement – to invest in the mutual funds without regard to their suitability, and in violation of Defendant's fiduciary and contractual obligations. Plaintiffs initially filed the action in the U.S. District Court for the Southern District of New York where they recognized their contractual obligation to litigate their civil action in New York. *Id*. at *3. The parties' client agreements contained a forum-selection clause pursuant to which Plaintiffs agreed to bring suit in the courts of the State of New York or in the U.S. District Court for the Southern District of New York for the purpose of determining all matters with regard to their agreements. Further, the agreements waived any objection to such venue. *Id*. at *4. Plaintiffs, however, voluntarily dismissed the New York complaint and then filed the same action in Puerto Rico. *Id*. Defendants moved for a change of venue to New York based on the exclusivity of that forum, which the Court granted. The Court cited *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972), which held that forum-selection clauses should be enforced absent a showing that to do so would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Id*. at *4-5. The Court noted that when the parties have agreed to a valid forum-selection clause, the Court should ordinarily transfer the case to the forum specified in that clause. *Id*. at *5. Although Plaintiffs argued that the factors overwhelmingly favored litigating the action in Puerto Rico, they failed to persuade the Court that the Commonwealth of Puerto Rico itself had an interest in the action. *Id*. at *6. The Court noted that when parties have contracted in advance to litigate disputes in a particular forum, it should not unnecessarily disrupt the parties' settled expectations. *Id*. at *7. Accordingly, the Court transferred venue for the case to the U.S. District Court for the Southern District of New York.

***Hicks, et al. v. PGA Tour, Inc.,* 2015 U.S. Dist. LEXIS 115416 (N.D. Cal. July 24, 2015).** In this workplace antitrust class action, the Court denied Defendant's motion to transfer venue to the U.S. District Court for the Middle District of Florida. Applying the multi-factor test applied to transfer of venue motions, the Court concluded that Defendant failed to meet the burden of showing that a transfer was warranted for the convenience of the parties and witnesses, and also failed to meet its burden of showing that a transfer would promote the interests of justice. *Id*. at *60. Specifically, the Court remarked that although the alleged antitrust violations were allegedly harming PGA Tour caddies in California as well as in the Middle District of Florida, the case likely would be adjudicated more quickly in California. The Court also noted that document production and written discovery would be easier if the case was located in California. Moreover, the Court found that Defendant had made no showing that a trial in California would be more inconvenient for third-party witnesses than a trial in the Middle District of Florida. *Id.* at *61-62. Accordingly, the Court denied Defendant's motion for transfer of venue.

***Horanzy, et al. v. Vemma Nutrition Co.,* 2015 U.S. Dist. LEXIS 21906 (N.D.N.Y. Feb. 18, 2015).** Plaintiff, a consumer, brought a putative class action alleging that Defendants were responsible for marketing, advertising, and selling of liquid dietary supplements based on false and misleading health claims in violation of the federal Magnuson-Moss Warranty Act. Plaintiff also asserted claims under New York's General Business Law as well as common law claims for unjust enrichment, negligent and fraudulent misrepresentation, and breach of express warranty. Defendant Vemma Nutrition Co. ("Vemma") was an Arizona corporation, whereas Plaintiff was a New York resident, and sought to represent all persons in the United States who purchased Defendants' products. Defendants moved to transfer venue to the U.S. District Court for the District of Arizona pursuant to 28 U.S.C. § 1404(a), which the Court granted. The parties agreed that the action could have been brought in the District of Arizona. The Court remarked that the only question to be decided was whether the transfer would promote the interests of justice and the convenience of the parties, which depended on nine factors. *Id*. at *8. The Court noted that the first factor was Plaintiff's choice of forum, which is given substantial weight. *Id*. at *9. Defendants, however, argued that Plaintiff's choice of forum had little weight because the operative facts concerned misrepresentations made by Vemma in connection with its nationwide sales campaign. Defendants contended that since those representations originated from its headquarters in Arizona, the proper venue was Arizona. *Id*. The Court noted that at least in the patent infringement context, case law authorities have held that where a party's products are sold in many states, sales alone are insufficient to establish a material connection to the forum and to override other factors favoring transfer. *Id*. at *10. Therefore, the Court concluded that although Plaintiff was a suitable representative for the New York sub-class, the overarching operative facts had little relation to New York. Accordingly, the Court held that Plaintiff's choice of forum was irrelevant to this context. The District Court found that the second factor – the convenience of witnesses – weighed in favor of transfer, as it was logical to assume that Vemma's corporate officers, all of whom were located in Arizona, would offer some degree of relevant testimony on Vemma's marketing, sales, and distribution network. *Id*. at *13. Similarly, the Court reasoned that the remaining factors – the location of documents, convenience of parties, locus of operative facts, availability of process, relative means of parties, familiarity with governing law, and trial efficiency & interests of justice – were either neutral, or weighed in favor of transfer of venue to Arizona. *Id*. at *14-19. Accordingly, the Court granted the motion to transfer venue to the District of Arizona.

***Legg, et al. v. Quicken Loans, Inc.,* Case No. 14-CV-61116 (S.D. Fla. Mar. 5, 2015).** Plaintiff, a Florida resident, brought a putative class action under the Telephone Consumer Protection Act ("TCPA") alleging that Defendant purchased Plaintiff's cell phone number from a credit reporting bureau and used an autodialer and/or pre-recorded message to call Plaintiff. Plaintiff alleged that callers with six different numbers called him without his permission. Defendant moved to transfer venue, arguing that the U.S. District Court for the Eastern District of Michigan was the proper venue for the action because its primary operations were located in Michigan, substantially all of the witnesses resided in Michigan, and the vast majority of anticipated documents and physical evidence were located there. *Id*. at 2. The Court denied the motion. First, the Court found that Defendant did not actually identify potential witnesses it claimed were residing in Michigan. The Court also determined that the supporting declarations that Defendant's senior telecommunications engineer submitted did not include any detail on how the potential witnesses

were relevant to the unsolicited calls made to Plaintiff. *Id*. Second, the Court ruled that the majority of relevant documents could be produced electronically and other evidence, such as Plaintiff's testimony, was located in Florida. *Id*. at 3. Third, the Court agreed with Plaintiff that the convenience of the parties factor weighed in his favor because "where a transfer merely shifts the inconvenience from one party to another, Plaintiff's choice of forum should remain." *Id*. The Court observed that Defendant's argument that depositions and mediation could take place in Florida for Plaintiff's convenience undermined the argument that Florida was inconvenient for Defendant. *Id*. Regarding the locus of operative facts, the Court observed that the alleged incidents took place in Florida, and that Defendant's declarations did not introduce evidence that facts related to the calls or any facts other than the location of Defendant's headquarters were centered in Michigan. *Id*. at 4. Concerning the relative means of the parties factor, the Court reasoned that Defendant would be significantly better able to bear any travel costs or other expenses associated with the litigation as it was a large corporation with significant resources. *Id*. As a result, the Court held that the weight accorded a Plaintiff's choice of forum favored Plaintiff. Although Defendant argued that Plaintiff's preference should not matter because this was a putative class action and thus it could include class members from all over the country, the Court found that some deference for Plaintiff's forum was still appropriate. *Id*. Finally, regarding trial efficiency and the interests of justice factor, the Court explained that Florida has a more developed TCPA body of case law than Michigan. *Id*. at 4-5. Thus, the Court concluded that transfer was inappropriate and denied Defendant's motion to transfer venue.

***Nguyen, et al. v. Barnes & Noble, Inc.,* Case No. 12-CV-812 (C.D. Cal. Feb. 17, 2015).** Plaintiff brought a putative class action alleging that Defendant improperly continued to sell HP Tablets on its website after its inventory was gone and complaining that Plaintiff was unable to purchase an HP Tablet during the liquidation period for the discounted price. After HP announced it was discontinuing production of certain tablets, retailers including Defendant offered steep promotional discounts, and Plaintiff ordered two tablets. *Id.* at 1-2. Fifteen hours after Plaintiff ordered the tablets, Defendant cancelled the transaction because of shortage of inventory. *Id.* at 3. Defendant moved to transfer the action to the U.S. District Court for the Southern District of New York. The Court denied the motion, finding that transfer of venue did not serve the convenience of the parties and witnesses and did not promote the interests of justice. First, because Plaintiff asserted three claims under New York law and three claims under California law, the Court noted that neither it nor the Southern District of New York was likely to be more familiar with the legal issues raised by Plaintiff. *Id*. at 6. Second, the Court observed that, when an individual purports to represent a class, Plaintiff's choice of forum may be given less weight, and consideration must be given to the extent of the parties' contacts with the forum. *Id*. at 7. Because Plaintiff styled his action as a putative nationwide class action, the Court found that Plaintiff's choice of forum was entitled to less weight. Third, the Court observed that the doctrine of reduced deference to a Plaintiff's forum choice in a class action serves as a guard against the dangers of forum shopping, especially when a representative Plaintiff does not reside within the district. *Id.* Plaintiff resided in the Central District of California, ordered the tablets using a billing address in that District, and requested that the tablets be shipped to an address in that District. Because the danger of forum shopping was absent here, the Court opined that Plaintiff's choice of forum weighed against transfer. The Court concluded that, because Plaintiff resided in the Central District of California, and Defendant allegedly operated dozens of physical bookstores in California and made on-line sales to customers living in that District, both parties' contacts with that forum were significant. *Id.* at 8. Further, because Plaintiff used a billing address in the Central District of California, the Court found that the parties' contacts with the forum were intertwined with Plaintiff's claims. *Id.* Finally, although Defendant asserted that its corporate witnesses worked and resided in New York, and the costs of litigation in New York were less, the Court found that the convenience of corporate witnesses ordinarily was entitled to less consideration than that of non-party witnesses. *Id.* The Court also reasoned that, considering the progress of the action since its filing, transfer only would impede its speedy resolution. *Id.* at 9. Accordingly, considering the totality of factors, the Court denied the motion to transfer on the basis that transfer would neither serve the convenience of parties and witnesses, nor further the interests of justice.

***Romo, et al. v. McKesson Corp.,* 2015 U.S. Dist. LEXIS 77429 (C.D. Cal. June 9, 2015).** Plaintiffs filed several separate product liability class actions in California state courts alleging cardiovascular injuries as a

result of ingestion of prescription pain medications containing propoxyphene. In 2012, a group of attorneys responsible for many of the propoxyphene actions against Defendants filed petitions with the California Judicial Council to establish a coordinated proceeding for all California propoxyphene actions under § 404 of the California Code of Civil Procedure. Plaintiffs asked for coordination of their lawsuits due to concerns that there could be potential duplicate and inconsistent rulings, orders, or judgments. After the petitions for coordination were filed, Defendants removed the cases under the mass action provision of the Class Action Fairness Act ("CAFA"). The Court found that it lacked jurisdiction under the CAFA because Plaintiffs' petitions were not proposals to try cases jointly and remanded the cases to state court. Subsequently, the Ninth Circuit reversed the order of remand, holding that the propoxyphene actions were removable under the mass action provision of the CAFA because Plaintiffs asked in state court that the cases be coordinated before "one judge . . . for all purposes." *Id*. at *2. After Plaintiffs in the propoxyphene actions did not agree to join a multi-district litigation ("MDL") in the U.S. District Court for the Eastern District of Kentucky where other related cases were pending, Defendants moved to transfer this action to the Eastern District of Kentucky or to sever. The Court granted Defendants' motion to transfer the action to the Eastern District of Kentucky, which rendered moot the motion to sever. The Court first addressed Plaintiffs' threshold argument that the transfer of a CAFA mass action under § 1404(a) was prohibited. While the Court agreed with Plaintiffs that transfer to an MDL is forbidden without the consent of the majority of Plaintiffs in a mass action, the Court opined that Plaintiffs failed to persuade it that such prohibition applied to a venue transfer under § 1404. *Id*. at *6. The Court further assessed whether transfer of the propoxyphene actions was appropriate under § 1404. First, the Court noted that the parties did not dispute that this action might have been filed in the Eastern District of Kentucky because, as Defendants pointed out, venue is appropriate in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated. *Id*. at *7. Second, the Court found that the transfer of the propoxyphene actions to the Eastern District of Kentucky would promote the interests of justice. *Id*. at *7-8. Defendants argued that the propoxyphene actions should be transferred to the Eastern District of Kentucky for efficiency purposes because the Eastern District of Kentucky had presided over the propoxyphene MDL and, therefore, efficiently could handle these claims as well. *Id*. at *9. The Court observed that the Eastern District of Kentucky had become familiar with the issues at stake in this litigation and, consequently, would resolve them more efficiently. *Id*. at *10. Moreover, the Court observed that a transfer to the Eastern District of Kentucky would move the matter from a more congested to a significantly less congested venue, which could lead to a faster resolution of these actions. *Id*. at *11. Third, the Court found that transferring the actions would be convenient for the parties and witnesses because Xanodyne, a primary Defendant, was located in Kentucky, and none of the alleged manufacturing Defendants had a meaningful connection to California. *Id*. at *13. Accordingly, the Court concluded that the Eastern District of Kentucky was the most convenient forum to hear the propoxyphene actions.

***Ryan, et al. v. Microsoft Corp.,* 2015 U.S. Dist. LEXIS 47753 (N.D. Cal. April 10, 2015).** Plaintiffs brought a putative class action alleging that Defendant conspired with technology companies to suppress employee wages by illegally entering into anti-solicitation and restricted hiring agreements, in violation of antitrust laws. Defendant moved to transfer venue and contended that the forum selection clauses in Plaintiffs' employment agreements required Plaintiffs to litigate in the U.S. District Court for the Western District of Washington. *Id.* at *12. Plaintiffs did not contest that the action could have been brought in the Western District of Washington, but contended that they chose to bring the action in the Northern District of California because Defendant made and performed the alleged anti-solicitation and restricting hiring agreements in the Silicon Valley area. *Id.* at *14. The Court denied Defendant's motion and found that Defendant failed to carry its burden of showing that transfer was warranted. The Court noted that the relevant forum selection clauses covered "any action arising out of" Plaintiffs' employment agreements, and Plaintiffs' claims did not "arise out of" the employment agreements because the issue of whether Defendant violated antitrust laws did not require interpretation of Plaintiffs' employment agreements. *Id.* at *18. Defendant argued that because Plaintiffs agreed to non-competition clauses that prevented Plaintiffs from working for competitor companies for a period of one year following their termination, the non-competition clauses created a powerful disincentive for competing companies to poach them, and this would be material to the adjudication of Plaintiffs' claims against Defendant. *Id.* at *17. The Court, however, pointed

out that Defendant had failed to explain why resolution of Plaintiffs' antitrust claims would require interpretation of the scope of Plaintiffs' non-competition agreements. According to the Court, whether Defendant engaged in a conspiracy that had the effect of depressing employee wages and restricting mobility did not require determining whether Plaintiffs breached employment agreements, or the scope of the rights and responsibilities of the parties under Plaintiffs' employment agreements. *Id.* at *20. Since Plaintiffs' claims were based on Defendant's alleged illegal conduct, the Court concluded that the forum selection clauses in Plaintiffs' employment agreements did not apply to this action. *Id.* The Court therefore denied Defendant's motion to transfer venue based on the employment agreements.

***Silvis, et al. v. Ambit Energy, LP,* 2015 U.S. Dist. LEXIS 31681 (E.D. Pa. Mar. 13, 2015).** Plaintiff, a Pennsylvania resident, brought a putative class action alleging that Defendants, a residential energy supplier and a host of related entities based in Texas, breached their promise of providing lower competitive electricity rates. Plaintiff accused Defendants of giving her an initial one-month "teaser rate" before nearly doubling the rate. *Id.* at *2. Plaintiff alleged breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and declaratory relief. Defendants moved to transfer venue to Texas, arguing that the operating terms of service called for dispute resolution in Texas and the Court should enforce the forum-selection clause therein. The Court denied the motion. *Id.* at *10-11. Although Plaintiff disputed the validity of the forum-selection clause, the Court found that the current record was not sufficiently developed to resolve the question of contract validity. *Id.* at *8-9. The Court applied the public-interest factors and determined that Commonwealth's interests compelled that the litigation be conducted in Pennsylvania. The Court noted that the parties formed the contracts at issue in Pennsylvania, the alleged breach occurred in Pennsylvania, and the proposed class had only current or former Pennsylvania residents. *Id.* at *13. The Court thus found that the U.S. District Court for the Eastern District of Pennsylvania had a decisive and stronger interest in this case than any other state. *Id.* Further, because the case implicated Pennsylvania's historical and on-going regulation of the commodity at issue, one with substantial impact on Pennsylvania's citizens and economy, the Court concluded that it was a truly exceptional case that precluded enforcement of the forum-selection clause. *Id.* at *14-15. Accordingly, the Court denied Defendants' motion to transfer the venue.

(liv) Bifurcation Issues In Class Actions

***Jean-Louis, et al. v. Clear Springs Farming, LLC,* 2015 U.S. Dist. LEXIS 91964 (M.D. Fla. July 15, 2015).** Plaintiffs brought a class action on behalf of Haitian, Afro-Haitian, and African-American farm workers alleging race, color, and national origin discrimination in their employment in violation of Title VII of the Civil Rights Act and the Florida Civil Rights Act. Plaintiffs alleged that Defendants recruited them to pick blueberries during the March 2012 season, but failed to provide them any work when they reported for duty. *Id.* at *3. After the Court certified the class and granted the parties' joint motion to continue the pre-trial conference and trial, Plaintiffs moved to bifurcate the trial into two phases. The first phase would consist of a trial on liability, and if Plaintiffs prevailed in this phase, then the parties would engage in discovery as to damages with a trial on damages following the discovery period. The Court denied the proposed bifurcation plan on the basis that it was inefficient and would unnecessarily delay the case. *Id*. at *4. The Court found that the circumstances did not warrant bifurcation because staying discovery as to damages when the parties had ample time to conduct damages discovery prior to the trial would needlessly delay the case. *Id.* Moreover, Plaintiffs' motion largely focused on Haitian farm workers, who spoke primarily Haitian-Creole, and who worked outside of Florida during the summer months. The Court determined that this point was unpersuasive because the fact that damages discovery might be inconvenient to Plaintiffs did not warrant bifurcation. *Id*. Defendants pointed out that the discovery they sought were simple interrogatories relevant to Plaintiffs' mitigation efforts and allegations of compensatory damages. Because the Court opined that the case was not complex or difficult and that Plaintiffs' bifurcation plan did not promote convenience and efficiency, the Court denied Plaintiffs' motion.

(lv) Joinder And Severance Issues In Class Actions

***DeCrane, et al. v. Eli Lilly And Co.,* 2015 U.S. Dist. LEXIS 141924 (S.D. Ind. Oct. 19, 2015).** Plaintiffs, a group of consumers, brought an action alleging that they suffered personal injuries and damages as a

result of Defendant's failure to provide adequate instructions about its drug Cymbalta. Specifically, Plaintiffs alleged that Defendant failed to provide adequate instructions for stopping Cymbalta and an adequate warning that fully and accurately informed Plaintiffs about the frequency, severity, and/or duration of symptoms associated with Cymbalta withdrawal. *Id.* at *7-8. Along with this action, Plaintiffs' counsel also filed numerous other lawsuits across the country relating to Cymbalta, specifically as to withdrawal symptoms, including numerous Plaintiffs from different states. On July 23, 2015, Plaintiffs in the numerous Cymbalta-related lawsuits moved to transfer the pending Cymbalta cases to an MDL proceeding in the U.S. District Court for the Southern District of Indiana. The Judicial Panel for Multi-District Litigation denied transfer and found that all factors weighed against centralization of the 41 cases. *Id.* at *7. Defendant then filed a motion to sever and transfer Plaintiffs' claims, arguing that Plaintiffs' claims should be severed into separate actions and that each action should be transferred to Plaintiffs' home state of Kentucky. *Id.* at *10. Defendant argued that Plaintiffs' action should be severed because the lawsuit combined the claims of two Plaintiffs whose allegations rested on distinct, unrelated factual scenarios, including that they commenced Cymbalta therapy at different times, for distinct reasons, and discontinued it under the care of his or her own distinct healthcare professional. *Id.* at *11-12. The Court granted Defendant's motion to sever, but denied the request to transfer Plaintiffs' claims to the District of Kentucky. The Court found that Plaintiffs failed to demonstrate that their claims arose out of a single transaction or occurrence so that a joinder of their claims would be appropriate. *Id.* at *17. While some of Plaintiffs' claims related to Cymbalta's development and the way in which Defendant marketed and sold the drug might have arisen from the same set of facts, the Court noted that the crux of Plaintiffs' claims would be highly individualized as it would not turn on the wording of Defendant's warning, but rather on Plaintiffs' interactions with their medical providers. *Id.* at *15. The Court explained that each Plaintiff would need to show that Defendant's conduct caused his or her injuries, which would require evidence relating to why the health care provider prescribed Cymbalta, the nature of the health care provider's knowledge regarding withdrawal from Cymbalta, for what medical condition he/she was taking Cymbalta, how much and how long he or she took Cymbalta, and how he or she attempted to discontinue using Cymbalta. In sum, these issues would require highly individualized inquiries. *Id.* at *17-18. The Court therefore concluded that the differences made Plaintiffs' claims improper for joinder. The Court was unable to determine whether each Plaintiff's claims should be transferred as the parties' brief addressed transfer based on the present multi-Plaintiff status of the case, and the collective analysis of the transfer issue no longer applied given that the Court severed the claims. *Id.* at *28. The Court thereby denied Defendant's motion to the extent that it sought transfer of Plaintiff's class claims to the U.S. District Court for the Eastern District of Kentucky, but without prejudice should Defendant seek transfer in any individual case. *Id.* at *28-29. Accordingly, the Court granted Defendant's motion to sever Plaintiffs' claims and denied transfer of the claims to the Eastern District of Kentucky.

(lvi) Comity Principles In Class Actions

***Baker, et al. v. Microsoft Corp.*, 2015 U.S. App. LEXIS (9th Cir. Mar. 18, 2015).** Plaintiff, a group of consumers, brought a putative class action alleging that Defendant's Xbox 360 video game console's optical disc had a design defect and was unable to withstand even the smallest of vibrations, which resulted in scratched discs that were rendered permanently unplayable. Previously, several Xbox owners had sued Defendant alleging similar claims in *In Re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 U.S. Dist. LEXIS 109075 (W.D. Wash. Oct. 5, 2009), where the District Court had denied class certification, finding that individual issues predominated and relying heavily on *Gable v. LandRover North America, Inc.*, 2008 U.S. Dist. LEXIS 82996 (C.D. Cal. Sept. 29, 2008). *Id*. at *4. After the denial of class certification in *Wolin v. Jaguar Land Rover North America,* LLC, 617 F.3d. 1169 (9th Cir. 2010), the Ninth Circuit reversed *Gable*, finding that the District Court in *Gable* erred when it concluded without a discussion that certification was inappropriate because Plaintiffs did not prove that the defect manifested in a majority of the class' vehicles. *Id*. at *7. Here, the District Court found that the ruling in *Wolin* did not undermine the causation analysis articulated in the *Scratched Disc Litigation*, and that comity required deferral to the earlier certification order. On that basis, the District Court dismissed the action. On appeal, however, the Ninth Circuit reversed and remanded. At the outset, the Ninth Circuit noted that here, the District Court cited *Scratched Disc Litigation* and its description of the causation analysis in *Gable* for the notion that individual issues of causation predominated in this case. The District Court determined that nothing in *Wolin*

undermined the causation analysis in *Scratched Disc Litigation*'s. The Ninth Circuit, however, noted that *Wolin* expressly and specifically rejected the notion that individual manifestations of the defect precluded resolution of the claims on a class-wide basis. *Id*. at *13. *Wolin* held that although individual factors might affect premature tire wear, they did not affect whether the vehicles were sold with an alignment defect. *Id*. Similarly, in this case, the Ninth Circuit noted that although individual factors may affect the timing and extent of the disc scratching, they did not affect whether the Xboxes were sold with a defective disc system. *Id*. at *14. Likewise, the Ninth Circuit found that proof that the allegedly defective disc system caused individual damages was not necessary to determine whether the existence of the alleged design defect breached Defendant's express warranty. *Id*. at *16. The Ninth Circuit accordingly, ruled that the District Court's erroneously applied the principle of comity, and reversed and remanded the case.

(lvii) Breach Of Contract Class Actions

***Hirsh, et al. v. Jupiter Golf Club,* 2015 U.S. Dist. LEXIS 62719 (S.D. Fla. May 13, 2015).** Plaintiffs brought a class action against Defendants alleging breach of contract, and seeking injunctive relief and declaratory judgment. Plaintiffs alleged that they signed agreements to be members of Ritz-Carlton Golf Club & Spa Jupiter (the "Club"). Defendants RBF, LLC ("RBF") and Jupiter Golf Club, LLC ("JGC") either previously or currently owned the Club. *Id*. at *2. When JGC brought the Club from RBF, JGC changed the club membership terms set forth in the membership agreements, which triggered Defendants' obligation under the contract to refund Plaintiffs' membership deposits. *Id*. Plaintiffs alleged that JGC breached the membership agreements by attempting to alter the membership refund policy and RBF failed to convey title to the club facilities, subject to the terms of the existing membership plan. *Id*. at *3. Plaintiffs moved for class certification, which the Court granted. At the outset, the Court found that the numerosity requirement was satisfied because there were 150 individuals who purchased one of the three types of Club memberships, paid a membership deposit, and had not received a full refund. *Id*. at *5. The Court noted that Defendants challenged the existence of commonality by citing the language of the membership agreement and other supporting documents, which addressed the merits of Plaintiffs' claim. *Id*. at *12. The Court opined that Plaintiffs need not prove their claim to get the class certified, but they did show that the questions such as whether Defendants breached the membership agreement were common across the class. *Id*. Accordingly, the Court concluded that commonality requirement was satisfied. Similarly, the Court found that common issues were predominant over individual issues, and that a class action was a superior method of adjudication. *Id*. at *15. Accordingly, the Court certified a class consisting of individuals who purchased a Club membership but did not receive a full refund of their membership deposit.

***Pagliaroni, et al. v. Mastic Home Exteriors, Inc.,* 2015 U.S. Dist. LEXIS 126543 (D. Mass. Sept. 22, 2015).** Plaintiffs, a group of consumers, brought a putative class action alleging defects in Oasis Decking ("Oasis"), a wood-plastic composite exterior decking product, manufactured by Defendant Deceuninck North American ("DNA") and distributed by Defendant Mastic Home Exteriors ("Mastic"). Plaintiffs installed Oasis decks at their homes and later noticed cracking, splitting, and other problems. Plaintiffs alleged that DNA licensed a patented composite formula and manufacturing process of using a high-density polyethylene ("HDPE") for making decks from Strandex Corp, but used more talc than the formula called for and a brand of HDPE other than the one recommended by Strandex. *Id.* at *5. Contending that defect in the formula caused the damages in the decks, Plaintiffs asserted claims against Mastic for breach of express warranty and negligent misrepresentation, and against both Defendants for breach of implied warranty, unjust enrichment, and negligence. *Id.* at *16. Plaintiffs also asserted claims under the consumer protection laws of Massachusetts, New York, and Minnesota and unjust enrichment claims under the laws of Massachusetts, Minnesota, New York, and Oregon. Plaintiffs filed a motion for class certification and proposed a class defined as all individuals and entities that own homes, residences, buildings, or other structures physically located in the states of Massachusetts, Minnesota, New York, and Oregon in which Oasis had been installed. *Id.* at *31. The Court denied class certification on the basis that Plaintiffs failed to meet Rule 23 requirements of commonality, typicality, and adequacy of representation. Plaintiffs raised two theories of express warranty liability, including: (i) Mastic breached an express warranty arising out of the statements Mastic made in the course of marketing Oasis about the product's durability; and (ii) Mastic breached the limited warranty it offered by suggesting that Oasis would last for 10 to 25 years. *Id.* at *40. The Court found that Plaintiffs offered no common questions that could drive the

resolution of the litigation of either of these express warranty theories. *Id.* The Court noted that Plaintiffs' expert warranty claims against Mastic were not common to the class because determining which representations by Mastic formed the basis of the bargain with each Plaintiff would require individual proof as Mastic used a multi-tiered distribution system and did not sell Oasis directly to Plaintiffs. *Id.* The Court found similar problems with Plaintiffs' implied warranty claims against Mastic and DNA. The Court noted that, while some consumers received Oasis decks that were alleged to be unfit for ordinary use, others found no performance problems with their decks, and thus, whether a particular Oasis deck failed ordinary expectations for use was not a common question susceptible to class-wide proof or determination. *Id.* at *41. The Court also rejected Plaintiffs' argument that their claims were typical of the class because they all bought Oasis decks that later split or cracked, noting that most class members had not reported problems with their decks and those who had reported problems had accepted warranty payments, which the named Plaintiffs had not. *Id.* at *44-47. Further, the proposed class included purchasers of Oasis and transferee owners who purchased a building that already had Oasis installed and the named Plaintiffs were all direct purchasers of Oasis decks, and thus the theory of Defendants' liability would differ from the claims of a transferee owner who did not view any representations by Mastic about Oasis and did not select or pay for Oasis. *Id.* at *48. For the same reasons, the Court found Plaintiffs to be inadequate representatives for the proposed class. *Id.* at *48-49. The Court also found that the questions of injury and causation were not amenable to common resolution for proposed class where the record raised individualized questions of proof as to whether an Oasis owner actually suffered any injury, whether that injury has been remedied by the Oasis warranty program, and whether a particular representation or action by Defendants caused that owner's damages. *Id.* at *42-43. For these reasons, the Court therefore denied Plaintiffs' motion for class certification.

***Richey, et al. v. Matanuska-Susitna Borough*, 2015 U.S. Dist. LEXIS 45166 (D. Alaska April 7, 2015).** Plaintiffs brought a putative class action alleging that Defendant illegally denied its employees the benefits of Alaska's Public Employees Retirement System ("PERS") in violation of state laws. The PERS provides retirement, disability, and death benefits to certain public employees. In 1968, Defendant entered into a contract with the state that required Defendant to enroll its employees in the PERS once "the employee is employed by [Defendant] in a qualified position, receives PERS-eligible compensation, and is eligible to make PERS contributions." *Id.* at *1-2. Plaintiffs filed their complaint in Alaska state court and moved for class certification before they conducted discovery. The state court denied their motion without prejudice, ruling that Plaintiffs failed to provide information to establish each of the requirements for class certification. Before renewing their motion, Plaintiffs amended their complaint to add a claim under 42 U.S.C. § 1983, and Defendant removed the case under federal question jurisdiction. *Id*. at *2-3. Plaintiffs then moved for class certification. The Court denied the motion. First, the Court found that Plaintiffs' seven-part class definition was unwieldy and failed definitively to identify the class. Plaintiffs had not attempted to demonstrate by reference to any objective criteria that it would be administratively feasible for the Court to identify, without individualized inquiries, all employees to whom Defendant provided "all equipment, tools, clothing, [and] supplies necessary to the performance of their duties," or all employees who "routinely" worked more than 15 or 30 hours per week for a "sufficient" amount of annual hours. *Id.* at *6-7. Because Plaintiffs did not explain why Defendant's provision of equipment, tools, clothing, and supplies was relevant to the case, or which employees had worked the "requisite" number of hours, the Court concluded that Plaintiffs failed to show that identifying the class members was administratively feasible. *Id*. at *7-8. Regarding numerosity, the Court found that, although Plaintiffs estimated that the number of class members exceeded 300, they did not explain how they arrived at that estimate and asserted they would obtain conclusive data in discovery. *Id.* at *11. The Court noted that, although Plaintiffs had submitted several documents, some of which contained information purportedly relevant to the class size, Plaintiffs had not established how many hours an employee had to work annually before becoming PERS-eligible, or the extent to which employees referenced in deposition testimony were excluded from the PERS. *Id.* at *12-13. Thus, the Court held that Plaintiffs failed to submit evidence sufficient to demonstrate numerosity. *Id.* at *13. Plaintiffs argued that they satisfied commonality by showing that class members' "common harm" was exclusion from the PERS "on account of arbitrary job classifications." Yet the Court noted that Plaintiffs failed to identify the elements of any of their claims or explain why a determination that Defendant improperly excluded the class members from the PERS would be central to the validity of any of them. *Id.*

at *15. Further, Plaintiffs did not specifically identify any allegedly arbitrary job classifications, did not explain the basis of those allegedly arbitrary classifications, and did not explain how or why Defendant applied those allegedly arbitrary classifications consistently among the purported class. *Id.* Regarding typicality, the Court noted that Plaintiffs did not mention any of the named Plaintiffs in their motion or point to facts that showed that their claims were typical of the class members' claims. *Id.* at *16. Finally, the Court concluded that Plaintiffs failed to demonstrate adequacy because they failed to cite facts or evidence to support their assertions that Plaintiffs confronted the same discriminatory barriers that the proposed class members confronted. The Court found that, without basic details regarding the Plaintiffs, it was unable to determine whether they had any conflicts of interest with the proposed class, or whether they were each qualified to serve as class representatives. *Id*. at *17-18. The Court noted that, because Plaintiffs' counsel failed to respond to many of Defendant's arguments, to propose a cogent class definition, or to demonstrate compliance with any of Rule 23(a)'s requirements in two consecutive class certification motions, they would not be satisfactory class counsel. *Id.* at *21-22. Accordingly, the Court denied Plaintiffs' motion for class certification.

(lviii) Amendments In Class Action Litigation

***In Re Lipitor Antitrust Litigation*, 2015 U.S. Dist. LEXIS 38887 (D.N.J. Mar. 16, 2015).** In this class action, after the Court dismissed the complaint, Plaintiffs filed a motion to amend the judgment and for leave to amend the complaint. Plaintiffs argued that the Court should allow an amendment of the complaint because the Court announced a new, heightened pleading standard in its last memorandum opinion. *Id*. at *12. The Court denied the motion. The Court remarked that the timing of the motion to dismiss expanded over a long period of time in order to await the Supreme Court's decision in *FTC v. Actavis*, 133 S. Ct. 2223 (2013). *Id*. at *12-13. The Court noted that after the decision in *Actavis*, the Court authorized amendments to the complaint, and a year had elapsed since then. The Court opined that after the Supreme Court decided *Actavis*, the parties knew the appropriate precedent from which to write a complaint. Moreover, after *Actavis*, the Court had allowed Plaintiffs to amend the complaint but Plaintiffs made only a few changes. The Court remarked that Plaintiffs' characterization that the Court employed an entirely new standard was overstated because the Court's memorandum opinion principally relied upon the cases of *Actavis*, *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Court observed that there was nothing "novel" in its memorandum opinion because it simply applied these precedents. *Id*. at *13. Accordingly, given the long timeframe and the existence of established precedent, the Court denied Plaintiffs' motion to amend.

***Strawser, et al. v. Strange*, 2015 U.S. Dist. LEXIS 33348 (S.D. Ala. Mar. 18, 2015).** Plaintiffs, several same-sex couples, brought an action alleging that Alabama's laws excluding same-sex couples from marriage and refusing to recognize their marriages violated the Fourteenth Amendment. Plaintiffs filed a motion for leave to file second amended complaint adding additional parties and Plaintiff and Defendant classes, which the Court granted. Defendant argued that the lawsuit had been pending for many months, and thus Plaintiffs should not be allowed now to convert the lawsuit into a class action between an ill-defined class of Plaintiffs and a class of 68 Defendants, very few of which resided within the U.S. District Court for the Southern District of Alabama. *Id*. at *2. The Court found that the case had only progressed to the preliminary injunction stage and although current Plaintiffs had all received marriage licenses, the licenses were of little value if they were not recognized as valid in Alabama. Thus, the Court found that allowing the amendment was not likely to delay resolution of the case for the current parties nor disturb the schedule set by the Court. *Id*. at *3. The Court determined that the proposed new Plaintiffs, like current Plaintiffs, were same-sex couples that sought to marry and have their marriages recognized, and presented a common legal question that current Plaintiffs asserted. As such, the Court opined that joinder of the new Plaintiffs was appropriate. *Id*. at *4. In addition, the Court found that it was a premature to decide whether Plaintiffs met the requirements for class certification. The Court explained that for Plaintiffs' motion to amend, it was required to consider only whether Plaintiffs had sufficiently alleged class claims. Thus, although the Court might dismiss class allegations where it is facially apparent from the pleadings that there is no ascertainable class, the Court concluded that Plaintiffs had alleged adequate facts to support a potential class claim. The Court determined that it would not engage in a detailed and rigorous

analysis of the class claims until all of the current parties had the opportunity to oppose or support the motion for class certification. *Id*. at *5-6. Accordingly, the Court granted Plaintiffs' motion to amend.

***Town Of Lexington, et al. v. Pharmacia Corp. Solutia, Inc.,* 2015 U.S. Dist. LEXIS 36814 (D. Mass. Mar. 24, 2015).** Plaintiff, the Town of Lexington, filed a putative class action against Defendants alleging that they breached the implied warranty of merchantability, based on design defects and failure to warn, in their manufacture and sale of polychlorinated biphenyls ("PCBs"). Plaintiff moved for class certification, and before the Court could rule on the motion, it moved for leave to file an amended motion for class certification to modify the class definition. The Court denied both motions. Plaintiff originally brought the action on behalf of a class consisting of all school districts in Massachusetts that had one or more buildings with airborne PCBs above public health levels. *Id*. at *6. When Plaintiff initially moved for class certification, Defendants argued that the class was not ascertainable because testing was the only way to establish the presence of PCBs, and school districts were not obligated to conduct testing. *Id*. at *9. Plaintiff moved to amend the class definition: (i) to exclude from the class any school district that, at the time of class certification, had filed its own individual action against any of the Defendants seeking the past or future costs of investigation; and (ii) to seek class certification of only certain liability-related issues under Rule 23(c)(4). *Id*. at *10. The Court first noted that Plaintiff requested an amendment of the class definition more than two years after it filed the lawsuit. Plaintiff asserted that its new definition did not prejudice Defendants because the gravamen of the case remained the same and Plaintiff did not add any new theories of liability. The Court noted that, with its motion to amend, Plaintiff altered its course by stating that it intended to prove only that the caulk in one of its school buildings had a level of contamination in excess of 50 parts per million, but did not allege that the caulk in any of the school buildings contained PCB. *Id*. at *13. The Court reasoned that the amendment would require Defendants to adapt their defense to Plaintiff's new theory of its case more than two years into the proceedings. *Id*. at *14. Accordingly, the Court concluded that Plaintiff's new theory unduly would prejudice Defendants. In addition, the Court found that Plaintiff's substantial change in the class definition and its proposed class issues likely would require additional discovery and a postponement of the scheduled trial date. *Id*. at *17. The Court ruled that the substantial delay in seeking amendment, along with the postponement of the scheduled trial date, favored denial of the motion to amend. Finally, the Court observed that, in Plaintiff's new class definition, Plaintiff proposed to include all school districts in Massachusetts that constructed or renovated schools within a specified time period, but Plaintiff failed to inform potential class members or the Court what claims Plaintiff asserted or what issues were central to the case. *Id*. at *20. Plaintiff also failed to describe the harm that the class members allegedly suffered. The Court, therefore, held that Plaintiff's proposed amendment would be futile because its proposed class definition was overbroad and vague. Accordingly, the Court denied Plaintiff's motion for class certification and denied Plaintiff leave to amend its motion for class certification.

(lix) Foreign Worker Class Actions

***David, et al. v. Signal International, LLC*, 2015 U.S. Dist. LEXIS 1482 (E.D. La. Jan. 6, 2015).** Plaintiffs, a group of former employees, filed a complaint in intervention, seeking prospective relief under 42 U.S.C. § 2000e-5(g) and compensatory damages for pecuniary and non-pecuniary losses. This action was brought on behalf of 578 workers from India alleging violations of the Trafficking Victims Protection Act ("TVPA"), the RICO, the Klu Klux Klan Act, and the Civil Rights Act of 1866. The workers contended that they were trafficked into the United States through the federal government's H2-B guest-worker program with dishonest assurances of becoming lawful permanent U.S. residents, and subjected to squalid living conditions, fraudulent payment practices, and threats of serious harm upon arrival. Plaintiffs contended that the recruiting agents hired by Defendants held the guest-workers' passports and visas; coerced them into paying extraordinary fees for recruitment, immigration processing, and travel; and threatened them with legal and physical harm if they did not work under Defendants' restricted guest-worker visas. Defendants filed a motion for partial summary judgment on Plaintiffs' TVPA claim, which the Court denied. Defendants sought summary judgment on three grounds, including that: (i) the TVPA claims were not extraterritorial and did not cover these claims; (ii) financial harm was not a component of serious harm under the pre-amendment version of the TVPA; and (iii) there was no evidence of the requisite scienter to support a TVPA claim. Defendant argued that in 2008, Congress amended the TVPA to provide

extraterritorial jurisdiction over certain claims; however, Plaintiffs claims were governed by the pre-amendment version of the TVPA, which restricted the claims to purely domestic trafficking claims. *Id*. at *199. The Court reasoned that Plaintiffs' claims were not extraterritorial, as the TVPA is not applied extraterritorially when it addresses trafficking people into United States to perform forced labor here, even if done by means of threats of serious harm in part elsewhere. *Id*. The Court remarked that although certain elements of the alleged trafficking scheme occurred abroad, the focus and the touchstone of the territoriality inquiry of the TVPA in this case was where the forced labor occurred and to where the victims were trafficked. Accordingly, the Court rejected Defendants' argument. The Court also noted that the pre-amendment version of § 1589 of the TVPA proscribed the knowing provision of labor by threats of serious harm to, or physical restraint against, the victim. *Id*. at *200. The Court observed that, unlike the previous version, the new version contained a broad definition of serious harm to include financial harm. Defendants argued that the addition of this definition demonstrated that serious harm under pre-amendment Section 1589 did not include financial harm. The Court disagreed, finding that the pre-amendment version distinguished between serious harm and physical restraint, which suggested that Congress intended that serious harm not be limited to physical harm, and instead include at least some non-physical harm. *Id*. at *201. In addition, the Court noted that at least two case precedents had squarely held that financial harm was cognizable as serious harm prior to the December 2008 amendment to the TVPA. Accordingly, the Court rejected the second ground for summary judgment as well. Finally, the Court found that Plaintiffs had introduced evidence from which a jury could infer that Defendants knowingly threatened immigration consequences as to Plaintiffs in order to maintain its labor force. *Id*. at *202. Accordingly, the Court rejected Defendants' motion for summary judgment.

***Joseph, et al. v. Signal International LLC,* 2015 U.S. Dist. LEXIS 33870 (E.D. Tex. Feb. 4, 2015).** Plaintiffs, a group of illegal immigrants, brought suit alleging that Defendants violated the Trafficking Victims Protection Reauthorization Act ("TVPRA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Civil Rights Act of 1866, and the Ku Klux Klan Act. Plaintiffs were among 590 men who were allegedly trafficked into the United States in the aftermath of Hurricane Katrina in 2005. *Id*. at *4. Plaintiffs claimed that Defendants made false promises of permanent work-based immigration to the United States, and as a result, Plaintiffs allegedly went into debt to pay mandatory recruitment, immigration processing, and travel fees. *Id*. Defendant Signal International, LLC, and its subsidiaries (collectively "Signal") moved for summary judgment. The Magistrate Judge issued a recommendation denying the motion. Signal primarily argued that the TVPRA did not apply extraterritorially at the time of the alleged trafficking and, because Plaintiffs' claim stemmed from conduct that was significantly extraterritorial, their claim failed as a matter of law. After reviewing the plain language of the TVPRA, as well as its legislative history, the Magistrate Judge remarked that critical to the TVPRA was where the forced labor "occurred" and "to where" victims were trafficked and not "from where" the victims were trafficked. *Id*. at *11. It was undisputed that Plaintiffs eventually were brought to the United States, and the Magistrate Judge found that imposing liability under § 1590 of the TVPRA required only a domestic application of the statute. *Id*. at *12. Signal also sought summary judgment on the grounds that there was no evidence that Signal knowingly trafficked Plaintiffs for forced labor, which is a prerequisite under § 1590. The Magistrate Judge found that there was a factual dispute as to whether Signal subjected Plaintiffs to forced labor. For example, most Plaintiffs testified that Signal made numerous threats that, if they left Signal, they would be handed over to immigration authorities. *Id*. at *19. Signal further argued that Plaintiffs' trafficking claim was not actionable under the TVPRA until 2008. In other words, in 2008, the TVPRA was amended, and "serious harm" was defined to include "any harm, whether physical or nonphysical including psychological, financial, or reputational harm." *Id*. at *21. Signal asserted that, because financial hardship was added to the TVPRA in 2008, it could not have been part of the statute prior to 2008. The Magistrate Judge remarked that, while financial coercion may be a part of Plaintiffs' claim, it was not their only basis for imposing liability under the TVPRA. *Id*. at *22. The Magistrate Judge found that there were other alleged actions taken by Signal that met the definition of forced labor under the TVPRA. The Magistrate Judge concluded that the goal of the TVPRA was to combat modern day slavery, which could take many forms, and therefore the term "serious harm" in the TVPRA should be interpreted broadly to include Plaintiffs' claim for financial coercion. *Id*. at *23-24. Accordingly, the Magistrate Judge ruled that summary judgment was not warranted.

***Tanedo, et al. v. Charlotte Placide, Universal Placement International, Inc.,* 2015 U.S. App. LEXIS 20824 (9th Cir. Dec. 1, 2015).** Plaintiffs, a group of Filipino school teachers, brought an action alleging violations of the Trafficking Victims Protection Act ("TVPA") and the Racketeer Influenced and Corrupt Organizations Act. *Id.* at *1. Defendants appealed the District Court's judgment following a jury verdict on claims brought against them by a class of 347 Plaintiffs. The Ninth Circuit affirmed the District Court's ruling. *Id.* First, the Ninth Circuit found that Defendants' challenge to class certification of the TVPA claim was moot, as the jury had returned a verdict for them on the TVPA claim and thus, there was nothing for them to challenge. *Id.* The Ninth Circuit also determined that the evidence admitted to prove the TVPA claim did not unfairly prejudice the jury. *Id.* Similarly, the Ninth Circuit found that the challenge to class certification of the negligent misrepresentation claim was also moot, as the recovery provided to the class was entirely subsumed within its recovery under the California Employment Agency, Employment Counseling and Job Listing Services Act ("CEAA"). *Id.* The Ninth Circuit held that the damages award did not provide class members a double recovery, as the District Court had required that each class member, before receiving any recovery in the case, submit an affidavit attesting that he or she had not received and would not pursue payment arising from other judgments or disbursements in related actions. *Id.* The Ninth Circuit also noted that the District Court's amended judgment prevented any double recovery, as it specified that any payment received by a class member as compensation for the fees recoverable in the action would partially satisfy the judgment. *Id.* at *3-4. Accordingly, the Ninth Circuit affirmed the District Court's judgement.

(lx) Juries In Class Actions

***In Re Oil Spill By The Oil Rig "Deepwater Horizon" In The Gulf Of Mexico,* 2015 U.S. Dist. LEXIS 54600 (E.D. La. April 27, 2015).** Plaintiffs, a group of business entities, individuals, and the government, brought class actions against British Petroleum Exploration & Production, Inc. ("BP") based on injuries resulting from the 2010 explosion aboard the Deepwater Horizon, an off-shore drilling rig, and the consequent discharge of oil into the Gulf of Mexico. BP moved to strike individual class member LeRoy G. Wilson's demand for a jury trial in his Back-End Litigation Option ("BELO") lawsuit, which the Court denied. At the outset, the Court dispelled BP's argument that no jury was available because general maritime law governed Wilson's personal injury claims. *Id*. at *4-5. The Court analyzed whether an individual class member's BELO complaint was bound by the Rule 9(h)/non-jury election in the class action complaint that gave rise to the Deepwater Horizon Medical Benefits Class Action Settlement Agreement ("Medical Settlement"). *Id*. at *5-6. While class counsel designated the claims in the class action complaint as admiralty or maritime claims and requested a non-jury trial, Wilson's BELO complaint prayed for a jury if allowable under the Medical Settlement terms and law of this case. *Id*. at *6. Wilson cited the BELO provision of the Medical Settlement and admiralty jurisdiction, and requested permission to amend his complaint to assert diversity jurisdiction in order to preserve his right to a jury trial. The Court opined that if it certified the class, and then conducted a bench trial, the class members would be bound in most instances by class counsel's Rule 9(h)/non-jury election. The Court, however, remarked that this was not the situation here. *Id*. While the Medical Settlement contained a general provision requiring that it be interpreted in accordance with general maritime law, the Court did not read this provision as mandating admiralty's traditional bench trial procedure for a BELO lawsuit. *Id*. at *8. While the class action complaint invoked admiralty jurisdiction and Rule 9(h), the Court found that there was nothing distinctively or uniquely maritime about that proceeding that would preclude a BELO Plaintiff from invoking some other jurisdiction. The Court concluded that a BELO Plaintiff who properly invokes diversity jurisdiction and timely demands a jury is entitled to a jury trial in his or her BELO lawsuit. *Id*. at *8-9. Thus, the Court denied BP's motion to strike Plaintiff's demand for a jury trial. *Id*. at *9-10.

(lxi) Disqualification Of Counsel In Class Actions

***Daniels, et al. v. Sanchelima & Associates*, Case No. 15-CV-21321 (S.D. Fla. Dec. 2, 2015).** Plaintiffs brought a collective action against Defendants, a law firm and an attorney, alleging violations of the FLSA. Defendants moved to disqualify Plaintiffs' counsel and strike Plaintiffs' demand for attorneys' fees, which the Court denied. Defendants sought to disqualify counsel based on counsel's communications with named Plaintiff Caridad Daniels following a trial on which Daniels served as a juror in an FLSA action with

which counsel was connected. *Id*. at 3. The Court observed that Florida Local Rule 4-3.5(d) (the "Florida Rule") prohibits a lawyer from communicating with the juror with limited exceptions. *Id*. at 4. Florida Local Rule 11.1(e) prohibits a lawyer from interacting with a juror, absent an application in writing and for good cause shown to the Court. *Id*. at 4. Defendants relied only on Rule 11.1(e) as support for their argument, and evidence that Defendants' counsel violated Local Rule 11.1(e) on another occasion and was disciplined by the *Ad hoc* Committee on Attorney Admissions, Peer Review, and Attorney Grievance. *Id*. The Court noted that the Florida Rule in comparison to Local Rule 11.1(e), was clearly less restrictive. The Court observed that the rationales of both the Florida Rule and Local Rule were predicated on preserving jury verdicts and insulating jurors from harassment from litigants after a trial. *Id*. at 5. The Court reasoned that violations of the rules proscribing contact with jurors typically arise where counsel on the losing side unilaterally initiates communications with the juror regarding the trial without prior approval from the court. *Id*. Here, the Court noted that the counsel's conduct did not appear to violate the Florida Rule. Accordingly, the Court ruled that counsel's conduct did not merit disqualification.

***Wise, et al. v. SLM Corp.,* Case No. 14-CV-1426 (S.D. Ill. Aug. 19, 2015).** In this class action, Defendants moved to disqualify Plaintiffs' counsel, contending that he was a family member of a member of the putative class. Defendants asserted that as a result, Plaintiffs' counsel could not fairly and adequately protect the interests of the class under Rule 23(a)(4). The Court denied the motion without prejudice. The Court found that the motion was premature because Plaintiffs had yet to move for class certification, and the class was still non-existent. *Id*. at 1.

(lxii) Statute Of Limitations Issues In Class Actions

***Garrison, et al. v. Oracle Corp.,* 2015 U.S. Dist. LEXIS 53653 (N.D. Cal. April 22, 2015).** Plaintiff, a senior account manager, brought a putative class action alleging that Defendant violated California and federal antitrust laws by entering into a "restricted hiring agreement" with Google, Inc. *Id*. at *3. Plaintiffs alleged that Defendant entered into the agreement with the intent and effect of fixing the compensation of employees at artificially low levels. *Id.* at *6. Defendant moved for judgment on the pleadings, asserting that the applicable statute of limitations ("SOL") barred Plaintiff's claims, that Plaintiff failed to plead injury-in-fact sufficient to establish Article III standing, and that Plaintiff failed to adequately allege an agreement between Defendant and Google. The Court granted Defendant's motion and agreed with Defendant that the SOL barred Plaintiff's claims. The Court noted that four-year SOL applied to all of Plaintiff's antitrust claims, the applicable SOL began to run in May 2007, and thus the limitations period ended in May 2011; however, Plaintiff had until March 18, 2012 to file the action as the SOL was tolled during the pendency of the U.S. Department of Justice's investigation of these claims. *Id.* at *18-19. Plaintiff brought this action on October 14, 2014, and argued that the doctrine of continuing violation and fraudulent concealment tolled the SOL. The Court, however, found that Plaintiff's assertion – that Defendant's conspiracy was a continuing violation through which Defendant repeatedly invaded Plaintiff's interests by adhering to enforcing, and reaffirming the anti-competitive agreements at issue – was insufficient to show a continuing violation. *Id.* at *21. Plaintiff's factual allegations revealed no alleged wrongful communications or specific conduct during the limitations period. Defendant and Google allegedly entered into the agreement in May 2007, and the complaint was largely bereft of any dates or details with regard to Defendant's specific conduct. Plaintiff alleged no new or independent actions Defendant took after October 14, 2010 – *i.e.*, within four years of the complaint's filing – that caused Plaintiff any new or accumulating injury. *Id.* Although Plaintiff alleged that Defendant communicated by phone, e-mail, and through in-person meetings to further the conspiracy, the Court was not convinced because Plaintiff offered no facts detailing when, where, or with whom the alleged phone calls, e-mails, and in-person meetings took place. *Id.* at *22. The Court therefore determined that Plaintiff failed to sufficiently plead a continuing violation. The Court also held that Plaintiff failed to sufficiently plead fraudulent concealment. Since Plaintiff provided no basis to find that Defendant owed Plaintiff a fiduciary duty, the Court concluded that Defendant had no obligation to affirmatively disclose its alleged illicit conduct. *Id.* at *25. Although Plaintiff alleged that Defendant provided pre-textual, incomplete, or materially false and misleading explanations for hiring, recruiting, and compensation decisions made under the conspiracy, Plaintiff failed to allege when, where, or to whom Defendant allegedly provided these explanations. *Id.* at *26. The Court opined these conclusory allegations were devoid of factual content and insufficient to meet the pleading standard. Thus, because

Plaintiff failed to adequately allege a plausible tolling, the Court concluded that the SOL barred Plaintiff's claims. Accordingly, the Court granted Defendant's motion for summary judgment.

***Howard, et al. v. U.S. Department Of Commerce,* 2015 U.S. App. LEXIS 77 (D.C. Cir. Jan. 6, 2015).** Plaintiffs, a group of employees of the U.S. Department of Commerce, brought an action following dismissal of complaint by an administrative law judge, alleging racial discrimination against African-American workers in violation of Title VII of the Civil Rights Act ("Title VII"). Plaintiffs alleged that Defendant maintained a system of racially discriminatory and subjective employment practices with respect to promotions, awards, and performance ratings. Plaintiffs initially sought relief pursuant to Title VII, on behalf of a class and the class representatives, for race discrimination and retaliation via injunctive relief; however, Plaintiffs later dropped the class requests for compensatory damages and added several individual claims, including claims related to disparate impact, a hostile work environment, and retaliation. *Id.* at *9-10. Defendant moved to dismiss on the grounds that the six-year statute of limitations for non-tort suits against U.S. barred the suit. The District Court agreed and dismissed Plaintiffs' action in 2010. The District Court found that the individual claims pursued by Plaintiffs in 2005 had accrued in 1995 and by 1998 respectively, when they could have filed suit 180 days after filing their initial charges. The District Court also rejected Plaintiffs' argument that the statute of limitations in 28 U.S.C. § 2401(a) did not apply to Title VII because the phrase "every civil action" in § 2401(a) meant that its six-year limitations period applied. *Id*. at *10. Plaintiffs appealed. While Defendant contended that a Title VII suit is a civil action under 42 U.S.C. § 2000e-16(c), a suit against a federal official acting in an official capacity is a suit against the U.S. and thus, § 2401(a) applied by its express terms to "every civil action commenced against the United States," Plaintiffs maintained that the plain text must give way where two statutes irreconcilably conflict, and a conflict existed here because applying § 2401(a) to § 2000e-16(c) would undermine Congress' goal of encouraging employees to resolve their employment discrimination disputes administratively. *Id.* at *12-14. The D.C. Circuit reversed the District Court's dismissal, finding that § 2401(a) did not apply to Title VII civil actions brought by federal employees. *Id*. at *3. The D.C. Circuit reasoned that there was an irreconcilable conflict such that the specific time limit of § 2000e-16(c) trumps the general limitations period § 2401(a). *Id*. at *16. The D.C. Circuit determined that Congress chose to address employment discrimination in a manner that emphasized using the employing agency and the EEOC to resolve complaints free of judicial involvement and vested broad remedial authority in them, and applying § 2401(a) would irreconcilably conflict with Congress' intent that federal employees not be at a disadvantage relative to private-sector Title VII employees in pursuing administrative remedies. *Id.* at *18-28. The D.C. Circuit further found that applying § 2401(a)'s limitation period to Title VII claims would run counter to the understanding that "Title VII 'is remedial legislation dependent for its enforcement on laymen,' and that 'resort to technicalities to foreclose recourse to administrative or judicial processes is particularly inappropriate.'" *Id*. at *28. According to the D.C. Circuit, Title VII has no "jurisdictional outer-limit" because Congress chose not to impose one given its "hope that recourse to the private lawsuit would be the exception and not the rule," and "its knowledge that there would be long administrative delays." *Id*. at *30. Further, Defendant neither cited any Title VII text or legislative history, or judicial precedent regarding Title VII, indicating that Congress intended employees – who were aggrieved by agency inaction less than six-and-a-half years after filing their initial charges – to be treated differently from those who are not aggrieved until six-and-a-half years have passed. Furthermore, Defendant did not point to anything in Title VII or its legislative history indicating that Congress intended to preclude civil suits whenever the administrative process lasted more than six-and-a-half years. *Id*. at *33. The D.C. Circuit therefore concluded that the District Court erred in applying § 2401(a)'s six-year statute of limitations to Plaintiffs' Title VII claims, and accordingly, reversed the dismissal of the complaint.

***In Re NHL Players' Concussion Injury Litigation*, 2015 U.S. Dist. LEXIS 38755 (D. Minn. Mar. 25, 2015).** Plaintiffs, a group of former National Hockey League players, brought multiple class actions alleging that Defendant National Hockey League ("NHL") was responsible for the pathological debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained during their professional careers. The six named Plaintiffs played in the NHL from 1977 through 2008. *Id*. at *3. The cases were subsequently consolidated. Then the NHL moved to dismiss the complaint. The NHL argued that complaint was time-barred because the relevant statute of limitations periods began running on the

dates on which the head injuries were allegedly suffered, and the fact that those injuries may have progressed into more complicated medical conditions did not restart the limitations periods. *Id*. at *13-14. The NHL pointed out that, when the cases were transferred for consolidation, the transferee Court must apply the state law of the transferor Courts. Accordingly, the NHL argued that laws of Minnesota, District of Columbia, and New York governed the statute of limitations analysis claims by named Plaintiffs, who brought suits in those respective jurisdictions. Plaintiffs argued that the injuries at issue were not the discrete head injuries they suffered while playing in the NHL, but rather were the increased risk and development of permanent degenerative brain diseases that result from the repeated head injuries and which arose and of which Plaintiffs became aware only after they retired from the NHL. The Court noted that under Minnesota law, a Plaintiff must file suit for personal injuries on claims of negligence, fraud, and misrepresentation within six years after the claim accrues. *Id*. at *15. The Court further noted that although the cause of action accrues when the accident occurs, the Minnesota Supreme Court has held that an action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence. *Id*. at *15-16. For relief on the ground of fraud, the cause of action cannot be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. *Id*. at *16. Similarly, the Court observed that District of Columbia law provides for the application of a discovery rule and the statute of limitations will not run until Plaintiff knows or reasonably should know that an injury has been suffered due to the defendant's wrong-doing. *Id*. Finally, under New York law, personal injury tort claims must be commenced within three years from the date of the injury. *Id*. at *17. The Court remarked that even assuming that NHL properly identified which states' statute of limitations applied to Plaintiffs' claims, it was not clear from the face of the complaint that those limitations periods had run. The Court reasoned that Plaintiffs alleged injuries in the form of an increased risk of developing serious latent neurodegenerative disorders and diseases that are caused due to repeated brain trauma of the sort that Plaintiffs repeatedly suffered. *Id*. Thus, the Court ruled that when such injuries occurred or resulted were matters that could not be determined from the face of the complaint and were proper subjects of discovery. Because it could not be determined from the face of the complaint when Plaintiffs' causes of action accrued, the Court denied NHL's motion. *Id*.

***Pedersen, et al. v. National Collegiate Athletics Association,* 2015 U.S. Dist. LEXIS 159067 (D.N.J. Nov. 24, 2015).** Plaintiffs, a group of current and former female athletes, brought an action asserting claims for gender discrimination arising out of penalties imposed on them. *Id.* at *1. Defendants filed motion to dismiss, which the Court granted. First, Defendants argued that the two-year statute of limitations barred Plaintiffs' claims under Title IX, equal protection violations under 42 U.S.C. § 1983, conspiracy under 42 U.S.C. § 1985, New Jersey Law Against Discrimination ("NJ LAD") violations, and negligence. *Id.* at *7. The Court found that these claims have no statute of limitations, and therefore, New Jersey's two-year statute of limitations for personal injury torts applied. *Id.* The Court found that the five claims revolved around Defendants' revocation of Plaintiffs' scholarships in September 2011; consequently, because Plaintiffs instituted this action in April 2014, their claims were time-barred. *Id.* at *8. Plaintiffs, however, argued that the continuing violation doctrine should apply to Defendants' continued refusal to grant scholarships. The Court determined that Defendants' refusal was simply a residual effect of the original scholarship revocation and that the fist denial alerted Plaintiffs to the existence of their claim. *Id.* at *10. Accordingly, the Court dismissed these claims as time-barred. *Id.* Finally, the Court declined to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims for interference with contractual advantage, breach of contract, breach of the covenant of good faith and fair dealing and promissory estoppel because they involved interpretation of wholly state-based claims sounding in tort and contract. *Id.* at *17. For these reasons, the Court granted Defendants' motion to dismiss.

***Thompson, et al. v. North American Terrazo, Inc.,* 2015 U.S. Dist. LEXIS 27287 (W.D. Wash. Mar. 4, 2015).** Plaintiffs, a group of employees from various ethnic backgrounds, brought an action alleging that Shawn Novoa, a foreman at Defendants' facility, discriminated against employees in violation of Title VII of the Civil Rights Act ("Title VII"), the Washington Law Against Discrimination ("WLAD"), and the Fair Labor Standards Act ("FLSA"). The parties filed cross-motions for summary judgment. The Court granted Defendants' motion in part, and denied Plaintiffs' motion. Defendants argued that various statute of limitations doomed all or part of Plaintiffs' claims. At the outset, the Court noted that Plaintiffs' state law

claims for violation of the WLAD, negligence, breach of implied contract, and wrongful discharge were subject to statute of limitations of three years or less. *Id*. at *12. The Court concluded that Plaintiffs could sue only to the extent that their claims accrued on or after June 11, 2010, and dismissed Plaintiffs' claims based on occurrences prior to June 11, 2010. As to the FLSA claims, the Court noted that the FLSA provides a two-year statute of limitations. Because Plaintiffs stopped working at Defendants' facility more than two years before filing their action, the Court found their claims time-barred and granted summary judgment to Defendants. As to the Title VII claims, the Court noted that a Title VII Plaintiff suing over a discrete act must file a complaint with the EEOC within 180 days of the act, or within 300 days if the complaint was made to a qualifying state or local agency. *Id*. at *17. The Court found that, with the exception of named Plaintiff Vitaliy Ostapyuk, the remaining Plaintiffs had filed timely charges with the Seattle Office of Civil Rights. Accordingly, the Court granted Defendants summary judgment on Plaintiff Ostapyuk's claims and allowed the remaining claims to continue. Finally, as to the WLAD claims, the Court observed that the key difference between the WLAD and Title VII was that the WLAD did not require a Plaintiff to exhaust his or her administrative remedies, but required a claim to be filed within three years after the alleged incident. Therefore, except for Plaintiff Ostapyuk's claims, which occurred more than three years before the action was filed, the Court denied summary judgment as to Plaintiffs' WLAD claims. *Id*. at *22. Accordingly, the Court granted in part Defendants' motion for summary judgment.

(lxiii) Medical Monitoring Class Actions

***Riva, et al. v. PepsiCo, Inc.,* 2015 U.S. Dist. LEXIS 26494 (N.D. Cal. Mar. 4, 2015).** Plaintiffs, a group of Pepsi consumers, brought a putative class action alleging that the beverage contained a chemical – 4-methylimidazole ("4-MeI") – that increased the risk of lung cancer in humans. Plaintiffs sought medical monitoring as a remedy for their claims of negligence, strict liability based on defective design, and strict liability based on failure to warn. Specifically, Plaintiffs sought an order requiring Defendant to establish a "fund from which those individual class members can seek monetary recovery for the costs of actual or anticipated medical monitoring expenses incurred by them." *Id.* at *6. Defendant moved to dismiss, arguing that Plaintiffs lacked standing. The Court granted Defendant's motion. The Court agreed with Defendant that Plaintiffs failed to establish standing because they did not establish that the alleged risk of cancer was both credible and substantial. *Id.* at *13. Although Plaintiffs claimed that 4-MeI has been found to cause lung tumors in lab mice and rats, the Court determined that it was speculative to infer an increased risk of harm to humans. *Id*. The Court noted that "even considering the rodent studies, the levels allegedly consumed by the named Plaintiffs herein would not appear to come close to the equivalent exposure in those studies." *Id.* at *33. According to the Court, "[t]he specific problem here is not the general value of animal studies but the lack of any factual content to show that 4-MeI causes bronchioloalveolar cancer in humans and the failure to plead that the level of consumption alleged herein are sufficient to trigger credible risk of such cancer." *Id.* at *43. Citing *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965 (1993), the Court pointed out that to obtain medical monitoring, Plaintiffs must show that a chemical would significantly increase the chances of serious disease. In this case, Plaintiffs could not show how much 4-MeI would have to be exposed to humans in order to bring the risk of cancer to a credible level. None of the articles relied on by Plaintiffs linked 4-MeI to lung cancer in humans. *Id.* at *30. Plaintiffs provided no context as to the significance and extent of exposure to make the necessary ultimate showing that "the need for future monitoring is a reasonably certain consequence of [the] toxic exposure." *Id.* at *25. The Court therefore concluded that Plaintiffs failed to adequately plead their specific theory of injury – an increased risk for bronchioloalveolar cancer sufficient to warrant medical monitoring – "above the speculative level." *Id.* at *29. Further, because the very scientific studies that Plaintiffs relied on to plead necessary elements in their claims failed to support their claims, and because Plaintiffs conceded the non-availability of any additional scientific studies they could cite to support their claims, the Court concluded that any amendment to the complaint would be futile. *Id.* at *43. Accordingly, the Court dismissed the class action with prejudice.

***Vietnam Veterans Of America, et al. v. CIA*, 2015 U.S. Dist. LEXIS 11193 (9th Cir. June 30, 2015).** Plaintiffs, a group of veterans' organizations and individuals who were subject to United States military conducted chemical and biological weapons experiments, brought a class action seeking declaratory and injunctive relief against the Department of Defense, the Army, the CIA, and the Department of Veterans

Affairs ("VA"). Plaintiffs contended that in these experiments, tens of thousands of members of the U.S. armed services were intentionally exposed to a range of chemical and biological agents. *Id*. at *3-4. Plaintiffs claimed that the Army unlawfully failed to notify test subjects of new medical and scientific information relating to their health as it becomes available. *Id*. at *4. Plaintiffs also asserted that the Army unlawfully withheld medical care for diseases or conditions proximately caused by their exposures to chemicals during the experiments. *Id*. On cross-motions for summary judgment, the District Court held that Army Regulation 70-25 ("AR 70-25") imposed on the Army an on-going duty to notify former test subjects of relevant new health information as it becomes available. *Id*. at *4-5. The District Court issued an injunction requiring the Army to comply with that duty. Hence, the District Court further held that AR 70-25 imposes on the Army an on-going duty to provide medical care, but it declined to compel the Army to provide such care on the ground that Plaintiffs could seek medical care from the VA. On appeal, the Ninth Circuit affirmed in part. At the outset, the Ninth Circuit noted that § 706(1) of the Administrative Procedure Act ("APA") provides that a District Court shall compel agency action unlawfully withheld or unreasonably delayed. *Id*. at *17. The Ninth Circuit also observed that AR 70-25 imposes unequivocal commands on the Army to provide former test subjects with current information about their health, and to provide medical care for diseases caused by the experiments. *Id*. The Ninth Circuit also reasoned that AR 70-25 obligates the Army to warn volunteers of the risks of participating in the experiments, and to provide them with new information that may affect their well-being as it becomes available. *Id*. at *18. The Ninth Circuit further opined that sub-section (h) of AR 70-25, included in 1988, makes it clear that the duty to provide notice applies not only to possible future subjects, but also to former subjects. *Id*. at *19. Despite this, Defendants contended that sub-section (h) applied only to human subjects upon whom experiments were performed after 1988, and that under *Auer v. Robbins*, 519 U.S. 452 (1997), the Court must defer to the interpretation that the Army proposed during this litigation. *Id*. at *22. The Ninth Circuit observed that under *Auer*, an administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. *Id*. However, that deference is not warranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fait and considered judgment on the matter in question. *Id*. Accordingly, the Ninth Circuit concluded that the agency had a duty to warn Plaintiffs. The Army argued that the District Court's injunction was improper in its scope and duration. Specifically, the injunction directed the Army to provide to members of the class any information that may affect their well-being that had been acquired by the Army and/or its agents since June 30, 2006, or would be acquired in the future. *Id*. at *27. The Ninth Circuit held that the injunction was appropriately tailored to direct the Army to carry out its duty to warn, and therefore, the District Court did not abuse its discretion. The Ninth Circuit noted that Chapter 3-1(k) of AR 70-25 provides that volunteers are authorized all necessary medical care for injury or disease that is a proximate result of their participation in research. *Id*. at *29. The Ninth Circuit, therefore, concluded that the text of sub-section (k) compelled the conclusion that the Army must provide care to former test subjects. *Id*. at *33. For this reason, the Ninth Circuit held the District Court was right to find that Chapter 3-1(k) imposed a duty to provide medical care. The Ninth Circuit, however, found that the District Court did not have the power to decline the power to compel care on the grounds that another agency was providing similar care to some former test subjects. *Id*. at *3. The Ninth Circuit, therefore, vacated the District Court's summary judgment for the government on this claim and remanded the action.

(lxiv) Pseudonyms And Confidential Witnesses In Class Action Litigation

***Doe, et al. v. Avid Life Media, Inc.,* Case No. 15-CV-640 (E.D. Ark. Dec. 14, 2015).** After hackers broke into Defendants' website ashleymadison.com, the self-described "world's leading married dating service for *discreet* encounters," and stole information about Defendants' customers, Plaintiff, a customer, brought a class action alleging that Defendants were negligent in storing the personal information and were unjustly enriched when they charged customers for a "paid-delete" service. *Id.* at 1. Defendants filed a motion to dismiss, and the Court denied the motion. Defendants contended that Plaintiff improperly filed the case under a pseudonym. The Court noted that under the Federal Rules of Civil Procedure, a complaint must name all the parties. The Court noted that Eleventh Circuit case law precedents have created exceptions to this rule, which provide that to determine privacy concerns that may warrant proceeding anonymously, a judge should consider whether Plaintiff would be required to disclose information of the utmost intimacy. *Id.* at 2. The Court found that requiring Plaintiff to proceed without anonymity simply revealed that he was

a member of a website that catered to individuals who wanted to have discreet relationships. *Id.* The Court further held that the details of whether Plaintiff did anything beyond signing up were not relevant to the claims. *Id.* Consequently, the Court held that Plaintiff's privacy concerns did not outweigh the strong presumption in favor of requiring a party to proceed under his own name. *Id.* Accordingly, the Court denied Defendant's motion to dismiss and directed Plaintiff to file an amended complaint, using his real name.

***In Re Millennial Media, Inc. Securities Litigation*, 2015 U.S. Dist. LEXIS 69534 (S.D.N.Y. May 29, 2015).** Plaintiffs, purchasers of Millennial Media, Inc. ("MM") securities, brought a putative class action alleging that Defendants made false and misleading statements about MM's technological capabilities and outlook that inflated the stock price. The Court accepted Plaintiffs' voluntary dismissal of their claims without prejudice. Plaintiffs then filed a letter with the Court seeking leave to file a supplemental amended complaint that removed all references to an individual designated as "Confidential Witness-4" ("CW-4"). *Id*. at *4. Plaintiffs explained that, after they filed an amended complaint, CW-4 had informed Plaintiffs that he did not wish to be quoted in the complaint. The Court granted Plaintiffs leave, and Plaintiffs filed a supplemental amended complaint that removed all references to CW-4. *Id*. at *6. Plaintiffs also submitted four affidavits, including one from CW-4 and three from personnel affiliated with one of Plaintiffs' law firms. *Id*. at *7. These materials revealed that CW-4 learned that Plaintiffs quoted him in their amended complaint as a confidential witness only after they publicly filed the amended complaint and Plaintiffs' counsel sent him a copy. *Id*. They also revealed that CW-4 disputed the accuracy of various statements that Plaintiffs attributed to him in the amended complaint and that he had told Plaintiffs' counsel as much. The Court subsequently authorized Plaintiffs to redact the publicly filed versions of the documents to protect witness identities and to protect counsel's work-product. *Id*. at *10. Plaintiffs then filed a notice of voluntary dismissal with Defendants' consent. The Court ruled that, notwithstanding the anticipated dismissal, counsel remained obliged to publicly file the redacted versions of their *ex parte* submissions. *Id*. at *12. The Court noted that the facts revealed by the parties' submissions, including the four CWs' request that all references to them be stricken, were "problematic." *Id.* at *17. Plaintiffs' counsel explained in his affidavit that his law firm's practice was to identify all witnesses referenced in a complaint as confidential witnesses rather than by name and that this practice was consistent with the practice of other law firms. *Id*. at *16. The Court found such practice problematic for two reasons. First, Plaintiffs did not provide the CWs an opportunity to verify or refute their quotes, which created the potential for inaccuracy. *Id*. at *17. The Court noted that these deficiencies could have been avoided if Plaintiffs' counsel had sought to confirm with those witnesses the facts and quotations that counsel proposed to attribute to them before filing. *Id*. at *31. Second, Plaintiffs' designation in a complaint of 11 witnesses as CWs without their knowledge also raised issues of fairness to those witnesses. *Id*. at *37. The Court explained that ideally a witness would know what questions to ask and what directives to give the investigator to protect his interests, including remaining anonymous, but not all witnesses would have the sophistication or intuition to ask the right questions. *Id*. at *38-39. Accordingly, the Court granted Plaintiffs' motion seeking voluntary dismissal without prejudice and approved Plaintiffs' application to permit redactions of their filings.

(lxv) Consumer Fraud Class Actions

***Casey, et al. v. Florida Coastal School Of Law, Inc.,* Case No. 14-CV-1229 (M.D. Fla. Aug. 11, 2015).** Plaintiffs, a group of law school graduates, brought a class action alleging that Defendant publicized deceptive and unfair employment and salary data in violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Defendant, one of the country's largest law schools, published its employment statistics on its website after obtaining the employment and salary data from surveys it sent to all recent graduates. *Id.* at 4-5. Defendant published the employment data and salary information for the classes of 2004, 2005, 2006, and 2009, and reported placement rates of 88% to 92%. For the class of 2010 graduates, Defendant published a rate of employment within nine months of graduation of 80%, breaking down the percentage by private practice, business, government, public interest, judicial clerkship, academia, seeking employment, unemployment, and not seeking employment and unknown. *Id.* at 5-6. Defendant added that 82% of those employed had jobs for which a J.D. was required or preferred. *Id.* Defendant also disclosed a $48,615 average starting salary, with 29% of employed graduates providing salary data, and the average salary for all graduates in private practice as $51,981. *Id.* Defendant,

however, did not disclose the exact percentages of graduates for each particular job category who reported salary information, and calculated the average salary based only on those who submitted their salaries, who were mostly the private practitioners. *Id.* at 6. Plaintiffs alleged that Defendant's employment data was misleading because Defendant included part-time, non-legal, temporary, voluntary, school-funded, and solo-practitioner jobs in calculating the employment percentages. *Id.* at 9. Plaintiffs also alleged that Defendant reported higher salary averages because it calculated them based on a small, deliberately selected sub-set of compensated graduates who reported their salary information. *Id.* Plaintiffs claimed that Defendant's action constituted unlawful, unfair, deceptive, and fraudulent practices prohibited by FDUTPA, and Defendant engaged in a pattern or practice of knowingly and intentionally making numerous false representations and omissions of material facts with the intent to deceive and fraudulently induce reliance by Plaintiffs and members of the class. *Id.* at 12. Defendant moved to dismiss, arguing that Plaintiffs insufficiently alleged deception, causation, and actual damages. Specifically, Defendant argued that Plaintiffs' allegations were insufficient because they did not allege that Defendant ever claimed that its figures for employment data represented only full-time, J.D. required, or preferred positions. *Id.* at 25. Defendant further argued that Plaintiffs alleged no knowledge about its employment or salary data when they enrolled or stayed enrolled and how they would have proceeded differently, and thus their allegations that the data was material to their decision to enroll at Defendant's law school and proximately caused them to pay inflated tuition were legal conclusions entitled to no consideration. *Id.* at 26. Defendant contended that it provided Plaintiffs with a thorough legal education that prepared them to practice law, if they wished, and thus Plaintiffs could not allege that they suffered actual damages. *Id.* The Court granted Defendant's motion. *Id.* at 36. The Court found that Plaintiffs did not allege that Defendant ever affirmatively and wrongfully stated that the employment rate was based on a limited sub-set of lucrative jobs, or that Defendant published the data alongside "full-time legal employers" or another misleading heading. *Id.* at *36-37. Further, Defendant's website provided information about a variety of jobs and specified the salary data based on responses supplied by only 29% of the employed graduates, and according to the Court, a reasonable consumer would not draw from that small sampling that it reflected the average salary of all employed graduates or that nearly all employed graduates were in working in a full-time, permanent job for which a J.D. was required or preferred. *Id.* at 38. The Court therefore concluded that Plaintiffs failed to allege facts that stated a plausible deceptive or unfair act or practice under FDUTPA, and therefore failed to state a FDUTPA claim upon which relief could be granted. Accordingly, the Court granted Defendant's motion to dismiss.

***Ciser, et al. v. Nestle Waters North America, Inc.,* 2015 U.S. App. LEXIS 195 (3d Cir. Jan. 7, 2015).** Plaintiff brought a putative class action against Defendant alleging violations of the New Jersey Consumer Fraud Act ("CFA"), breach of contract, and unjust enrichment for charging exorbitant late fees to its customers. Plaintiff contracted with Defendant for the delivery of bottled water to his home office, and Defendant allegedly charged a flat late fee of $15 for each overdue bill. Plaintiff alleged that Defendant's late payment fee was grossly disproportionate to the actual costs it incurred as a result of Plaintiff's late payment, and, therefore, Defendant engaged in an "unconscionable commercial practice" under the CFA as well as actionable conduct under New Jersey common law. *Id.* at *3. The District Court dismissed Plaintiff's complaint in its entirety with prejudice. The District Court found that Plaintiff failed to plead sufficient facts to create a plausible claim for relief and that the CFA did not prohibit the disclosed and contractually agreed late fees because they did not have the capacity to "mislead." *Id.* at *4. Upon Plaintiff's appeal, the Third Circuit affirmed the District Court's judgment. The Third Circuit rejected Plaintiff's suggestion that the CFA allows a Plaintiff to bring a claim challenging late fee assessments without alleging any deception or misleading contractual provisions. *Id.* at *12. The Third Circuit found no binding authority for such an argument and, to the contrary, it relied on precedent suggesting that the CFA requires some elements of deceptive conduct, explicit or implicit. *Id.* Further, even assuming a cognizable claim existed under the CFA, the Third Circuit disregarded Plaintiff's conclusory allegations that Defendant's scheme was oppressive, exorbitant, illegal, and stratospheric and found that Plaintiff failed to state a plausible claim for relief. *Id.* at *15. Plaintiff asserted that the only two components of "actual costs" incurred from late payments were lost interest on the overdue balances and the incremental administrative costs to send letters to customers, which according to Plaintiff, would incur Defendant a maximum cost of $1.14. *Id.* at *16. The Third Circuit, however, held that the dearth of factual information did not result in a

plausible claim that Defendant's only incurred costs were $1.14, and, therefore, without more information, a $15 late fee on its face did not plausibly suggest an unfair penalty or an unconscionable practice, especially when competitive with an industry standard. *Id.* at *16-17. The Third Circuit, therefore, concluded that Plaintiff failed to plead facts sufficient to show that Defendant's late fee charges resulted in an injustice for the purpose of the CFA, and accordingly, affirmed the decision of the District Court.

***Ehret, et al. v. Uber Technologies, Inc.,* 2015 U.S. Dist. LEXIS 161803 (N.D. Cal. Dec. 2, 2015).** Plaintiff, a customer, brought a putative class action alleging that Defendant violated the California Unfair Competition Law and the Consumers Legal Remedies Act by misleading customers about how it shared gratuities with drivers. According to the complaint, Defendant advertised on its website and in various blog posts and e-mails that it charged 20% as a gratuity for the drivers when in fact it took a fee of approximately 10% of the metered fare, including a 2% credit processing fee, leaving about half of the 20% gratuity to drivers. *Id.* at *4-5. Alleging that Defendant's representations were false, misleading, and likely to deceive members of the public, Plaintiff moved for certification of a class of individuals who arranged and paid for taxi rides through Defendant's service for a defined period. The Court granted Plaintiff's motion in part and certified the class as to all individuals who received Defendant's e-mail with the representation that the 20% charge would be gratuity only, who then arranged and paid for taxi rides through Defendant's service. *Id.* at *48-49. The Court expressed concerns as to how the customers would be able to prove that Defendant's alleged misrepresentation violated the law, but found that the inclusion of reference to e-mails justified certification of a limited class of passengers. *Id.* at *39-40. The Court determined that the e-mails specifically and heavily promoted Defendant's services, as they featured three bullet points expressly stating that "metered fare+20% gratuity" would be charged to the rider. *Id.* at *41. Thus, according to the Court, the customers who received the e-mail were highly likely to have seen and been exposed to the alleged misrepresentation about the 20% tip, and thus sufficient class-wide exposure could be inferred. *Id.* The Court, however, declined to include in the class certain customers who relied on Defendant's website or blog posts before deciding to use the taxi service, finding insufficient evidence of customers' exposure to the misrepresentation. *Id.* at *38. The Court explained that, just because the information was available on the website, it did not necessarily imply that visitors would have seen it, especially when there was a good deal of other information on the website. *Id.* Since Plaintiff met all other requirements of Rule 23 – including commonality by raising the common questions of law of whether Defendant represented that the 20% additional was gratuity only, and typicality, by showing that Plaintiff's claim was substantially similar to those of other class members who received the misleading e-mail – the Court concluded that a class action would be the superior method to resolve the class members' claims. Accordingly, the Court granted Plaintiff's motion for class certification in part.

***Harnish, et al. v. Widener University School Of Law,* 2015 U.S. Dist. LEXIS 86124 (D.N.J. July 1, 2015).** Plaintiffs, a group of alumni of Widener Law School, brought a putative class action alleging that Defendant violated the consumer fraud statutes of New Jersey and Delaware by publishing misleading employment statistics. *Id.* at *2-5. Between 2005 and 2011, Defendant advertised that over 90% of its alumni found jobs involving their law degrees within nine months of graduation. Plaintiffs alleged that the statistics were misleading because Defendant did not disclose that the employment rates included part-time legal, law-related, and non-legal positions. *Id.* at *4. Plaintiffs also alleged that Defendant failed to disclose that many graduates did not respond to the law school's employment surveys and, therefore, were not included in the data. Plaintiffs moved to certify a class of all individuals who enrolled at Defendant's law school within the six-year period prior to the filing of the complaint. *Id.* at *7. The Court denied class certification, finding that Plaintiffs failed to meet the typicality requirement under Rule 23(a) and the predominance requirement under Rule 23(b)(3). First, the Court held that Plaintiffs failed to meet the typicality requirement. Although Defendant allegedly advertised misleading employment statistics between 2005 and 2011, Defendant changed its reporting practices in 2012, and the proposed class included law students who enrolled through 2014. *Id.* at *22-23. The Court, therefore, noted that Plaintiffs, who graduated between 2008 and 2011, had very different factual circumstances than members of the proposed class who enrolled after 2011. *Id.* at *23. The Court also found that Plaintiffs failed to demonstrate typicality because some alumni, particularly those pursuing full-time legal careers, might not want their alma mater to be found liable for consumer fraud. *Id.* Second, the Court held that Plaintiffs

failed to meet the predominance requirement because Plaintiffs could not prove damages under the New Jersey and Delaware consumer fraud statutes using common, class-wide evidence. Plaintiffs based their damages theory on their allegation that Defendant's misleading job statistics inflated tuition prices, and they intended to use an expert price inflation analysis to show the amount of inflation. *Id.* at *16. The Court reasoned that Plaintiffs' theory that all of Defendant's students sustained corresponding damages ignored the reality that many students obtained the full-time legal jobs they sought when enrolling, and, therefore, the losses incurred by students who did not obtain full-time legal employment were different from the losses incurred by those who merely experienced Defendant's alleged misrepresentations. *Id.* at *17-18. Further, Plaintiffs relied on a "fraud on the market" damages theory, which New Jersey case law authorities have limited to the federal securities fraud context, and the Court was not persuaded that law school tuition costs followed the same market dynamic with regard to advertised employment statistics. *Id.* at *18. The Court, therefore, concluded that Plaintiffs could not prove that the proposed class members sustained common damages from Defendant's alleged misrepresentations. *Id.* at *20. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Pulaski & Middleman, LLC, et al. v. Google, Inc.,* 2015 U.S. App. LEXIS 16723 (9th Cir. Sept. 21, 2015).** Plaintiffs, a group of internet advertisers who purchased Defendant's ad-placement service known as AdWords, brought a putative class action under the California Unfair Competition Law ("UCL") and Fair Advertising Law ("FAL") alleging that Defendant misled them as to the type of websites on which their advertisements could appear. *Id.* at *2-3. Plaintiffs alleged that they bought pay-per-click ads through AdWords on-line advertising service, which displayed ads consistent with results returned by the popular search, and that Defendant purposely concealed the fact that their ads would sometimes end up on less valuable "parked domain and/or error page websites." *Id.* at *6. Alleging that Defendant misled the advertisers, Plaintiffs moved to certify a purchaser class seeking restitution of money Defendant wrongfully obtained from the putative class. *Id.* at *7. The District Court denied the motion, finding that common questions did not predominate. Specifically, the District Court noted that individual inquiries would be required to determine which advertisers were entitled to restitution and to determine the amount of restitution owed to each advertiser. *Id.* at *10. On appeal, the Ninth Circuit reversed. The Ninth Circuit found that the District Court erred to the extent it held that individual inquiries would be required to identify each class member's entitlement to restitution. *Id.* at *13. The Ninth Circuit reasoned that "restitution is available on a class-wide basis once the class representative makes the threshold showing of liability under the UCL and FAL," and thus the District Court need not make individual determinations regarding entitlement to restitution. *Id.* at *17. Citing *Yokoyama v. Midland National Life Insurance Co*., 594 F.3d 1087 (9th Cir. 2010), the District Court acknowledged that damage calculations alone do not defeat class certification, and held that this rule did not apply in this instance because of the complexity of the individual inquiries that predominated. *Id.* at *3. The Ninth Circuit found that the District Court erred in failing to follow *Yokoyama* because its holding applies regardless of the degree of individualized calculations required. Likewise, the Ninth Circuit rejected Defendant's argument that the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013), cast *Yokoyama* in doubt. *Id.* at *18. The Ninth Circuit viewed *Comcast* as requiring only that any proposed class damages method align with the case's theory of liability, and reaffirmed that "*Yokoyama* remains the law of this [circuit], even after *Comcast." Id.* at *20-21. The Ninth Circuit further rejected Defendant's argument that any restitution measure must also account for any subsequent benefits a putative class member received in having ads placed by Defendant on parked domain and error page websites, holding that restitution "need not account for benefits received after purchase because the focus is on the value at the time of purchase." *Id.* at *24. Plaintiff's primary main method of calculating restitution used Defendant's smart pricing ratio, which directly addressed Defendant's alleged unfair practice by setting advertisers' bids to the levels a rational advertiser would have bid if it had access to all of Defendant's data about how ads performed on different websites. *Id.* The Ninth Circuit concluded that Plaintiffs' proposed UCL and FAL restitution calculation measures were not arbitrary because the method targeted to remedying the alleged harm and did not turn on individual circumstances. *Id.* at *23-24. Accordingly, the Ninth Circuit reversed the District Court's order denying class certification of Plaintiffs' UCL and FAL claims.

(lxvi) Recusal Issues In Class Actions

***Case, et al. v. Miami Beach Healthcare Group. Ltd.,* Case No. 14-CV-24583 (S.D. Fla. May 29, 2015).** In this data breach action, the District Judge recused herself from the action based on a potential conflict of interest. After the District Judge received a notice from Defendants that the Judge's personal data had been breached, and that the Judge was therefore potentially a member of the proposed class at issue in this case, the Judge notified the parties and disclosed these facts. All parties, however, consented for the Judge to remain on the case despite her potential conflict of interest. The Judge, however, keeping in mind her continuing obligation to avoid even the slightest appearance of impropriety, determined to recuse herself from the action.

***Fero, et al. v. Excellus Health Plan, Inc.,* 2015 U.S. Dist. LEXIS 152751 (W.D.N.Y. Nov. 10, 2015).** Several class actions involving common questions of law and fact were filed alleging that Defendants failed to protect customer information. *Id.* at *6. In 2015, the cases were consolidated and transferred to the District Judge. *Id.* In reviewing the cases, the District Judge determined that she might be a putative member of the alleged class. *Id.* The District Judge found that it was likely that many judges would qualify as putative class members. *Id.* Consequently, the District Judge determined that the appropriate course was to renounce any financial interest that could arise from her potential membership in the class. *Id.* Thus, the District Judge renounced any putative class membership and waived any future claims. *Id.* Accordingly, the District Judge held that she would forego any financial interest in any future settlement or adjudication resulting in any payment to members of the class, would refuse to accept any future payments made to the members of the putative class, and waive any individual right to recover against Defendants on the claims alleged in these consolidated matters.

***Rock, et al. v. National Collegiate Athletic Association*, 2015 U.S. Dist. LEXIS 10216 (S.D. Ind. Jan. 29, 2015).** Plaintiff, a college football player, brought a putative class action challenging the National Collegiate Athletic Association's ("NCAA") prohibition on multi-year Division I football scholarships and its cap on the number of Division I football scholarships that Division I member institutions can award. Plaintiff moved for leave to file a third amended complaint ("TAC") and a motion to vacate the deadline to file a reply in support of his motion for leave. After the Judge denied his motion to vacate, Plaintiff moved to disqualify the Judge. Thereafter, the Chief Judge of the District reassigned Plaintiff's motion to amend to himself and granted Plaintiff leave to file the TAC. *Id.* at *8-9. The Judge then addressed Plaintiff's motion for disqualification and recused himself from the action. Plaintiff sought disqualification pursuant to 28 U.S.C. § 455(a), arguing that a reasonable observer could question the Judge's impartiality to preside over the action because the Judge was a member of the Butler University Board of Trustees, and Butler University ("Butler") was a Division I football school within the NCAA. *Id.* at *9. Plaintiff also sought disqualification pursuant to § 455(b)(1) on the basis that the Judge's position as a Butler Trustee allegedly gave him personal knowledge of disputed evidentiary facts. *Id.* at *9-10. Finally, Plaintiff sought disqualification pursuant to § 455(b)(4) because Butler had an interest in the outcome of the litigation. *Id.* at *10. When the Judge had become a Butler Trustee, Plaintiff's second amended complaint ("SAC") was the operative pleading. In Plaintiff's arguments for disqualification, Plaintiff assumed that the Court would grant him leave to file his proposed TAC, and because some Butler football players would be included in the putative classes proposed in the TAC, his request for injunctive relief substantially would impact Butler. *Id.* at *13. The Judge noted that Plaintiff's claims had never been a topic at a Butler Trustee meeting during his tenure on the Board because Butler was a member of the Pioneer Football League, which did not award athletic-based scholarships. *Id.* Further, because Butler did not award football scholarships, its student athletes who played football could not have been part of the putative classes that Plaintiff proposed in his SAC. Therefore, because the Judge had no personal knowledge regarding any disputed evidentiary fact at issue in Plaintiff's action, and because Butler did not have an interest that could be substantially impacted by the outcome of Plaintiff's claims as they proceeded before him, the Judge stated that disqualification under § 455(b)(1) and § 455(b)(4) was inappropriate. *Id*. at *15. In addition, because a well-informed, reasonable observer would realize that Plaintiff challenged NCAA practices regarding Division I football scholarships, which Butler did not award, the Judge opined that disqualification under § 455(a) was also unwarranted. *Id*. The Judge considered Plaintiff's motion in light of the changes that Plaintiff made to his allegations in the TAC. In the TAC, Plaintiff proposed an injunctive relief class

comprised of individuals who had been classified under NCAA rules as an "initial counter" on an NCAA Division I football team. *Id.* at *16. Plaintiff asserted that seven Butler football players were classified as "initial counters" and, therefore, were members of his proposed injunctive relief class. In light of the TAC, the Judge found a dispute regarding whether any Butler football players could be members of the putative classes and whether Butler could be substantially impacted by the injunctive relief Plaintiff requested. Although such issues were not previously present in the case, Plaintiff raised the issues with his filing of the TAC, and they existed solely because of the Judge's role as a Butler Trustee. *Id*. at *19. Accordingly, considering the TAC, the Judge recused himself from the action.

(lxvii) Settlement Administration Issues In Class Actions

***Flo & Eddie, Inc., et al. v. Sirius XM Radio, Inc.*, Case No. 13-CV-5693 (C.D. Cal. July 22, 2015).** Plaintiff brought a putative class action in state court on behalf of sound recordings owners, alleging that Defendant infringed on the property rights of recording owners by publicly performing their recordings without authorization. *Id.* at *1. Defendant later removed the case. *Id.* Plaintiff's law firm, Gradstein & Marzano, P.C. ("G&M"), also filed similar actions on behalf of Plaintiff in New York and Florida. *Id.* Subsequently, Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records (the "Record Companies") brought a similar action in California state court. *Id.* at *1-2. In September 2014, the Court granted summary judgment in favor of Plaintiff as to all causes of action. *Id.* at *2. In May 2015, the Court granted Plaintiff's motion for class certification and appointed G&M as class counsel. *Id.* Defendant appealed the certification order, and the Court stayed the case pending the ruling. *Id.* While the appeal was pending in the Ninth Circuit, the Record Companies and Defendant reached a settlement (the "Capitol Records Settlement). *Id*. G&M claimed in its opposition to the settlement that they requested inclusion in Defendant's settlement talks, but Defendant refused. *Id.* Plaintiff and G&M requested that the Court lift the stay to impose *ex parte* relief, including: (i) enjoining Defendant from paying the Capitol Records Settlement; (ii) imposing a lien on the Capitol Records Settlement in favor of G&M; (iii) permitting discovery regarding the Capitol Records settlement; and (iv) barring Defendant and its counsel from directly or indirectly communicating with class members. *Id.* at *4. Plaintiff argued it was an ethical violation for Defendant and the Record Companies to meet and settle the Capitol Records lawsuit without including G&M in the process. *Id.* Plaintiff argued that the Capitol Records Settlement was improper because it purported to settle the claims of class members other than the Record Companies. *Id.* The Court declined to lift the stay. *Id*. at *5. The Court opined that G&M's delay in challenging Defendant's communications with the Record Companies and even the settlement itself suggested they did not care to enjoin the settlement payment or seek to recover a portion of it until they learned the size of the settlement. *Id.* The Court pointed out that if class counsel took issue with Defendant communicating with the Record Companies post-certification, they should have moved to restrict such communication after the Court certified the class on May 27, 2015. *Id.* The Court noted that G&M had notice of the Record Companies' scheduled mediation with Defendant as of May 7, 2015. Further, the Court observed that after the Capitol Records Settlement took place, if G&M believed that it was entitled to recover fees out of the settlement fund, it should have so moved when it discovered that the parties had reached a settlement. *Id.* The Court noted that G&M was not spurred to action until Defendant disclosed the amount on the settlement – $210 million – in its June 26, 2015 SEC filing; it was only then that G&M filed the *ex parte* application on July 8, 2015. *Id.* The Court concluded the size of the settlement payment was not germane to any of the arguments proposed in the application. *Id.* The Court found that under the circumstances of this case, distribution of the alleged common fund from the Capitol Records Settlement would not irreparably injure G&M because G&M could later recover its fees directly from the five Defendant entities, comprising the Record Companies. *Id*. at *7. The Court cited *Savoie v. Merchants Bank*, 84 F.3d 52, 58 (2d Cir. 1996), which held that distribution of a common fund constitutes irreparable harm when the beneficiaries are so numerous that recovering from them directly would be highly impractical. *Id.* at *8. The Court reasoned that no such impediment existed here. Accordingly, the Court declined to lift the stay in this case to grant the *ex parte* application. *Id*.

***In Re Diet Drugs Products Liability Litigation*, 2015 U.S. App. LEXIS 2585 (3d Cir. Feb. 20, 2015).** In this consolidated class action alleging that diet drugs caused primary pulmonary hypertension, Wyeth LLC entered into a nationwide class action settlement agreement. The agreement provided compensation to

qualifying diet drug users based on their age and the severity level of their medical condition. The agreement had two payment matrices to calculate compensation, including: (i) Matrix A applied to claimants who ingested diet drugs for fewer than 61 days and did not have any of the alternative causation factors listed in the agreement; and (ii) Matrix B applied to resolve all other qualifying claims. Two claimants submitted claims for Matrix A, Level III benefits. The settlement trust denied Randall Herman's claim, and limited Rayna Hirschbein's claim to Matrix B benefits. *Id.* at *2. The trust credited the findings of the auditing cardiologists, who determined there was no reasonable basis for the representation of Herman's treating physician that he had mild aortic regurgitation or the representation of Hirschbein's treating physician that he did not have aortic stenosis. *Id.* at *2-3. The District Court then referred the matters to the Special Master, who appointed a Technical Advisor. The Technical Advisor came to a similar finding as the auditing cardiologists. The District Court found that both claimants failed to meet their burden of establishing a reasonable medical basis for their claims, and affirmed the denial of their claims for Matrix A, Level III benefits. *Id.* at *3. On appeal, the Third Circuit affirmed. The Third Circuit opined that the District Court did not abuse its discretion in holding that Herman failed to rebut the opinions of the auditing cardiologist and the Technical Advisor that he did not have mild regurgitation. Although Herman cited his own physicians' affirmations, which disagreed with those findings, the Third Circuit remarked that disagreement is not enough to show that the District Court abused its discretion. *Id.* at *5. Herman also argued that he met his burden by submitting an aortic regurgitation measurement based on more than a single frame and including some indication of the maximum jet's representativeness. The Third Circuit, however, noted that Herman relied on a prior decision in this litigation, which had merely stated that the identification of a single jet without any explanation or indication of its representativeness will not satisfy a claimant's burden. *Id.* Although claimants also asserted that the auditing cardiologist's findings were unreasonable because they did not include regurgitation measurements, the Third Circuit reasoned that quantitative measurement was unnecessary where, as here, an auditing cardiologist indicated that regurgitation is well below the necessary threshold. *Id.* at *5-6. The Third Circuit also observed that because Herman mischaracterized the auditing cardiologist's method for measuring his aortic regurgitation, he did not demonstrate that the cardiologist's approach departed from accepted medical standards. *Id.* at *6. Finally, the claimants contended that the District Court abused its discretion by not considering the representative measurements by Hirschbein's treating physicians. The Third Circuit, however, noted that the District Court had conducted an extensive review of the record, and simply chose to credit different findings. *Id.* Accordingly, the Third Circuit affirmed the District Court's order.

***In Re Oil Spill By The Oil Rig "Deepwater Horizon" In The Gulf Of Mexico,* 2015 U.S. Dist. LEXIS 20324 (E.D. La. Feb. 19, 2015).** In this multi-litigation class action resulting from the 2010 explosion aboard the Deepwater Horizon, the Court had granted final approval to a settlement agreement resolving economic loss and property damage. The United States and BP Exploration & Production Inc. ("BPXP") cross-moved regarding the maximum per-barrel civil penalty that could be imposed under § 311(b)(7)(D) of the Clean Water Act ("CWA"). The Court agreed with the United States that the maximum penal amount was $4,300 per barrel of oil discharged. The CWA prohibits the discharge of harmful quantities of oil into covered waters or in connection with activities under the Outer Continental Shelf Lands Act. *Id.* at *30. The CWA imposes administrative penalties as well as civil penalty of an amount not exceeding $1,000 per barrel of oil discharged, and $3,000 per barrel for discharges resulting from gross negligence or willful misconduct. *Id.* The Court noted that the Inflation Adjustment Act (the "Act") establishes a mechanism that allows for regular adjustment for inflation of civil monetary penalties in order to maintain the deterrent effect of civil monetary penalties and promote compliance with the law. *Id.* at *31-31. At the time of the Deepwater Horizon oil spill, the Environmental Protection Agency ("EPA") had set the maximum civil penalty at $4,300, while the Coast Guard set the amount at $4,000. *Id.* at *32. Because the Court had previously found that the discharge resulted from BPXP's gross negligence and willful misconduct and BPXP was thus subject to the higher maximum civil penalty, the United States argued that the maximum CWA civil penalty that may be imposed on BPXP was $4,300 per barrel. *Id.* at *33. The Court opined that the EPA had the authority under the Act to adjust the civil penalty contained in sub-section (b)(7)(D). *Id.* at *35. The Court found that because § 1321(b)(7) does not expressly provide that the EPA Administrator does not administer that provision, the civil penalties at issue were within the jurisdiction of the EPA for purposes of the Act. *Id.* The Court disagreed with BPXP's position that the U.S. Attorney General's

authority to bring and control a civil action for penalties meant that the penalty was not within the EPA's jurisdiction for purposes of the Act. *Id.* at *35-36. The Court remarked that neither the Act nor the CWA equates the authority to bring a lawsuit with the authority to promulgate the regulations to be enforced by that suit. Further, the Court reasoned that the CWA does not divest entirely the EPA's ability to represent the United States in a civil action under the CWA. *Id.* at *36. Alternatively, BPXP argued that the EPA's regulation was procedurally defective because it did not follow the notice and comment procedure typically required under the Administrative Procedure Act. The Court observed that the Administrative Procedure Act does not require notice and comment when the agency, for good cause, finds that notice and public procedure therein are impracticable, unnecessary, or contrary to the public interest. *Id.* at *37-38. The Act required agencies to issue regulations promulgating inflation adjustments every four years. *Id.* at *38. More than four years had passed between the time the EPA adjusted the sub-section (b)(7) penalty to $4,300. Further, the Act also provided a detailed formula for calculating these adjustments. *Id.* Thus, the Court found that the EPA had no discretion and it was instead required by Congress to adjust the penalty according to the formula. The Court opined that the usual notice and comment procedure was unnecessary in this instance. Accordingly, the Court imposed a maximum CWA civil penalty against BPXP at $4,300 per barrel of oil discharged, and $1,100 per barrel against Anadarko Petroleum Corporation.

Editor's Note: As a result of the Court's order, BPXP would be subject to a $13.7 billion cap.

***Keepseagle, et al. v. U.S. Department Of Agriculture,* 2015 U.S. Dist. LEXIS 53365 (D.D.C. April 23, 2015).** Plaintiffs brought a putative class action alleging that Defendant engaged in systemic racial discrimination in its Farm Loan Program from 1981 to 1999. After nearly eleven years of litigation, the parties reached a settlement. The settlement agreement created a $680 million fund, most of which was dedicated to providing compensation to class members submitting claims through a non-judicial claims process. *Id.* at *17-18. The parties also agreed that the claims administrator would direct any leftover funds, after the completion of non-judicial claims process, to a *cy pres* fund. Nearly three years after the settlement approval, class counsel notified the Court that approximately $380 million remained unclaimed. *Id.* at *19. Class counsel then filed a proposed modification of the settlement agreement to create a trust with a 20-year life span, which would distribute the funds to organizations that were deemed to serve Native American farmers and ranchers. *Id.* at *20. The parties asked the Court to approve the modification without directing notice to the class or holding a fairness hearing. The named Plaintiff, Marilyn Keepseagle, opposed the modification and proposed to redistribute the *cy pres* funds to the successful class members. Following this opposition, the Court held further proceedings in abeyance. Later, Keepseagle filed a motion seeking to remove the named class representatives and a motion to compel class counsel to produce certain materials. The Court denied both the motions. The Court found that it was not authorized to remove the class representatives after a final judgment has been approved, and when the modification did not implicate the legal rights of class members. *Id.* at *25. Keepseagle argued that the named class representatives were no longer adequate because they abdicated their fiduciary duties by supporting class counsel's proposal even though a substantial minority opposed the proposal, and because they had been proposed as potential trustees of the trust to be created by modification of the settlement agreement, thereby rendering their interests divergent from those of the class. *Id.* at *24. The Court, however, found that class members had no legal right to the *cy pres* fund. The Court noted that the class members had agreed to a final settlement that entirely extinguished their legal claims, provided a framework for the distribution of damages, and mandated that all excess funds be distributed pursuant to *cy pres* remedy. *Id.* at *31. The Court concluded that it had no authority to remove the class representatives, because class counsel's modification targeted only the process of distributing the *cy pres* fund according to the mandate of the settlement agreement. The Court also found that the class representatives did not become inadequate merely because other class members disagreed with their strategic decisions, and that they had no conflict of interests that rendered them inadequate. *Id.* at *36-39. Although Keepseagle argued that the class representatives would be eligible to receive up to $10,000 annually, and this created an incentive to support the modification, the Court noted that their nomination was contingent on Court's approval and subject to terms and reappointment. *Id.* at *41. The Court further opined that the class representatives stood to gain more from the proposal of distributing the *cy pres* fund to successful class members because they would have been among those who directly benefitted, without

the need for approval of a nomination, continue service, years of work, or reappointment. *Id.* at *40-42. The Court therefore denied Keepseagle's motion to remove the class representatives on the basis of adequacy. The Court further denied Keepseagle's motion to compel the submission of materials related to "in-person informational meetings" held by class members and the class counsel relating to the proposed modification. *Id.* at *44-46. The Court found that Keepseagle failed to clarify the legal basis for obtaining the information sought. *Id.* at *47. Accordingly, the Court denied Keepseagle's motion to compel and the motion to remove the named class representatives.

***Keepseagle, et al. v. U.S. Department Of Agriculture*, 2015 U.S. Dist. LEXIS 57986 (D.D.C. May 4, 2015).** Plaintiffs brought a putative class action alleging that Defendant engaged in systemic racial discrimination in its Farm Loan Program from 1981 to 1999. After litigating for over a decade, the parties reached a settlement creating a compensation fund ("the Fund") of $680 million, which covered attorneys' fees, individual awards, liquidated awards, and Debt Relief Tax Awards on behalf of the class pursuant to an agreed upon non-judicial claims process. *Id*. at *161. The Court preliminarily approved the settlement and emphasized that the provisions of the settlement agreement regarding leftover funds "mandated that all excess funds be distributed pursuant to a *cy pres* remedy." *Id*. at *162. After the parties commenced the non-judicial claims process, class counsel filed a status report notifying the Court that approximately $380 million remained leftover, and class counsel noted that this rendered some of the conditions for *cy pres* distribution impractical. *Id*. at *164. Class counsel subsequently filed an unopposed motion to modify the settlement agreement and proposed that 10% of the *cy pres* fund be distributed immediately to non-profit organizations approved by the Court and the remainder of the fund be utilized to create a trust for the purpose of distributing the *cy pres*. *Id*. at *164-65. The Court raised three questions for the parties in connection with class counsel's proposal, including: (i) whether the Court must direct notice to the class and hold a fairness hearing pursuant to Rule 23(e); (ii) if Rule 23 does not permit the Court to require such notice and hearing, whether the Court may exercise discretion to direct notice to the class; and (iii) what form the notice should take. *Id*. at *166. At the status hearing, the Court heard from Marilyn Keepseagle, a class representative, who opposed class counsel's motion. The Court nevertheless concluded that Rule 23(e) did not apply but that the settlement agreement and the Court's supervisory authority over the case permitted it to direct class counsel to provide notice to the class to allow the class members to submit written comments on class counsel's motion. Class counsel and Defendant asserted that Rule 23(e) did not apply to the motion for modification of the settlement agreement because the modification would not materially alter the legal rights of any class member. The Court noted that Rule 23's procedural protections were to protect the rights of absent class members whose legal claims would be resolved by adjudication of the class' claims. *Id*. at *168. The Court also noted that Rule 23(e) provides that, when the class claims are settled or voluntarily dismissed, the Court must direct notice to the class members. *Id*. at *169. The Court, however, remarked that modifications to a previously approved settlement raised a different issue because, by definition, the class' underlying legal claims already had been extinguished by the original settlement. *Id*. at *170. Therefore, it found that Rule 23(e) applied to a modification of a previously-approved settlement only when the settlement would be materially altered. *Id*. Because no legal right was hindered in this case, the Court concluded that Rule 23(e)'s procedural protections did not apply because the absent class members were under no risk and would not be legally harmed by the approval of the modification. *Id*. at *173. The Court remarked that, because all class members had settled their legal claims and retained no property interest in the unclaimed funds, a modification of the procedures for distributing the unclaimed funds as *cy pres* would not alter the legal rights of any class member. *Id*. at *177. The Court further reasoned that, although it was not empowered to hold a Rule 23(e) fairness hearing, it retained the authority to hear from any class member who wished to speak at the motion hearing. *Id*. at *179. Accordingly, the Court ordered notice to the class members to present their comments about class counsel's motion.

***Pigford, et al. v. Vilsack*, 2015 U.S. App. LEXIS 1889 (D.C. Cir. Feb. 6, 2015).** A group of African-American farmers brought an action under the Equal Credit Opportunity Act alleging that Defendant, the U.S. Department of Agriculture ("USDA"), discriminated against them by denying their applications for credit and benefit programs on the basis of race. In 1999, the District Court certified a class for the purpose of determining Defendant's liability. After several months, the parties reached a settlement of their

claims, and the District Court approved a consent decree. The consent decree established a two-track claim resolution process. In Track A, an adjudicator reviewed a claimant's allegations under the forgiving "substantial evidence standard," and a prevailing claimant could obtain a one-time payment of $50,000 and forgiveness of any debt he owed the USDA. In Track B, an arbitrator required claimants to establish their claims by a preponderance of the evidence, but allowed claimants to seek an unlimited amount in monetary damages if they prevailed after a day-long live hearing. *Id.* at *3-4. In the consent decree, the District Court appointed a facilitator to publicize the settlement, and it retained jurisdiction to remedy any violations of the provisions of the consent decree. Plaintiff initially brought his claim under Track B, but later changed to Track A, and then attempted to change back to Track B. In the meantime, an adjudicator responsible for determining entitlement to relief under Track A found for Plaintiff and awarded him $50,000. *Id.* at *8. Plaintiff refused to accept payment and petitioned the District Court to vacate the Track A adjudication and to order arbitration of his claim under Track B. Plaintiff contended that the facilitator erred by not reassigning his claim to Track B despite his request and, therefore, violated the consent decree. The District Court granted Plaintiff's petition, vacated his Track A award, and remanded his claim to the arbitrator for Track B consideration. Upon appeal, the D.C. Circuit affirmed the District Court's judgment. The D.C. Circuit found that the consent decree empowered the District Court to correct the facilitator's error in transmitting a claim to the wrong track. *Id.* at *12. Whereas the D.C. Circuit acknowledged that the consent decree rendered any determination by the adjudicator "final" and unreviewable by any court, it noted that Plaintiff's petition and the District Court's review did not focus on the adjudicator's conduct but on the facilitator who sorted Plaintiff's claim into Track A adjudication. *Id.* at *13. The D.C. Circuit noted that, after submitting a claim sheet that manifested his indecision between the two tracks, Plaintiff initially called and wrote to the facilitator in 1999 requesting that his claim proceed under Track B. *Id.* at *23. According to the D.C. Circuit, given the centrality of Plaintiff's choice of track to his ability to obtain relief and the amount of monetary damages available if he could establish his claim, the facilitator either should have informed Plaintiff that his initial choice of Track A was irrevocable, or honored his wishes and forwarded his claim package to the arbitrator. *Id.* at *23. Because the facilitator did not do either, the facilitator allowed Plaintiff to think that he successfully had switched to Track B, only to be surprised nearly a year later when he received an initial decision denying his claim. *Id.* at *24. After Plaintiff petitioned for review and requested to remand his claim to the arbitrator under Track B, neither the facilitator nor the monitor attempted to confirm which track Plaintiff wanted. *Id.* The D.C. Circuit, therefore, found that the facilitator erred in sorting Plaintiff's claim into Track A and remanded Plaintiff's claim to the arbitrator.

(lxviii) Removal Issues In Class Actions

***Alaska, et al. v. Merck & Co., Inc.*, 2015 U.S. Dist. LEXIS 14445 (D. Alaska Feb. 6, 2015).** The State of Alaska brought an action under the Unfair Trade Practices and Consumer Protection Act ("UTPA"), alleging that Defendant marketed Vioxx, a drug for osteoarthritis, to consumers in Alaska while knowing that Vioxx was unsafe and presented significant health risks. Based on Defendant's representations that Vioxx was a safe drug, the State had placed Vioxx on the Alaska Medicaid Program's list of drugs. *Id.* at *2. Research and clinical trials revealed that the use of Vioxx increased the risk of a heart attack and other serious cardiovascular and cerebrovascular medical complications. *Id.* at *3-4. Alleging that Defendant induced it to authorize expenditures of Medicaid funds for the purchase of Vioxx, the State sought the recovery of the value of all payments made for Vioxx prescriptions. Defendant removed the case, asserting federal question jurisdiction on the basis that the State's claim implicated two federal laws, including the Food, Drug & Cosmetic Act and statutes relating to Medicaid. *Id*. at *4. The State moved for remand, which the Court granted. Defendant contended that the State's theory of recovery was that it would not have covered Vioxx prescriptions under Medicaid if Defendant had adequately disclosed the drug's risks. Based on this allegation, Defendant argued that the action was governed by *Grable & Sons Metal Products, Inc. v. Darue Engineering's & Manufacturing*, 545 U.S. 312 (2005), which held that federal jurisdiction encompasses actions where the state law claim implicates significant federal issues. *Id.* at *8. Here, however, the State did not contest its obligations to pay for approved drugs under Medicaid law; instead, the State claimed that Defendant fraudulently induced it to cover Vioxx, for which it was obligated to reimburse payments spent on Vioxx prescriptions. Thus, the Court opined that it was not required to analyze the Medicaid statutes in determining whether the State was entitled to relief, and that federal law was not implicated by the State's claims. *Id.* at *9. Additionally, the Court noted that in *Grable*, federal jurisdiction was appropriate because

the issue of whether Plaintiff was given notice within the meaning of the federal statute was an essential element of his state common law claim. *Id.* Here, however, the federal Medicaid law raised in the State's complaint was not an essential element of the state law claims, and the Court remarked that it did not have to assess the construction of Medicaid law or Medicaid regulations or apply them to the facts of the case to resolve whether Defendant violated the UTPA. *Id.* at *10. Thus, because state law independently supported the State's theory for relief, the Court granted the State's motion for remand.

(lxix) Employee Testing Issues In Class Actions

***Gulino, et al. v. Board Of Education Of The City School District Of The City Of New York*, 2015 U.S. Dist. LEXIS 48294 (S.D.N.Y. April 13, 2015).** In 1996, Plaintiffs brought an action on behalf of a class of African-American and Latino teachers in the New York City public school system, alleging that Defendant discriminated against them in violation of Title VII of the Civil Rights Act by requiring them to pass certain discriminatory certification exams in order to secure a teaching license. To teach in city public schools, teachers must obtain certification from the New York State Education Department ("SED"). *Id.* at *2. Prior to 2014, the SED required prospective teachers to pass three exams, including the Liberal Arts and Science Test ("LAST"), which the Court held was discriminatory pursuant to Title VII. *Id*. at *4-5. In 2014, however, the SED introduced the Academic Literacy Skills Test ("ALST"). Plaintiffs had since asked the Court to assess whether that test was similarly discriminatory. *Id.* On March 30, 2015, the Court established a schedule for assessing the validity of the ALST. Several days later, the SED submitted a letter to the Court objecting to the entirety of the March 30, 2015 order, specifically arguing that the Court lacked the authority to assess the ALST. *Id.* The SED asserted that pursuant to Rule 65, the Court may not enjoin it because it was not a party to the action, and because a previous appellate decision in this case allegedly established that the SED was not "in active concert or participation with anyone" whom the Court could otherwise enjoin. *Id.* at *5-6. The Court remarked that it had no plans to enjoin SED. *Id.* at *6. Defendant, however, continued to follow the SED's requirement that passage of the ALST was a prerequisite to employment as a New York City public school teacher. *Id.* The SED asserted that facially neutral state licensing requirements should not be actionable under Title VII. The Court, however, did not consider that argument because it had already been dismissed. *Id.* at *7. Finally, the SED argued that the Court lacked jurisdiction to consider the ALST because the ALST was not a "subsequent exam" pursuant to the decision in *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission of the City of New York*, 630 F.2d 79 (2d Cir. 1980). *Id.* at *8. The Court pointed out that although the SED read the discussion in *Guardians* of a "subsequent exam" to mean "successor exam," that was by no means an obvious reading; all that was required for the ALST to fall within the Court's remedial authority was for the ALST to be an exam that followed the LAST in time. *Id.* at *9-10. The Court found that SED phased in the ALST at the same time when it phased out LAST, and under that reading of *Guardians*, it was clear that the ALST was an exam "subsequent" to the LAST. *Id.* at *10. Thus, the Court concluded that assessing ALST's validity was within the Court's remedial authority. *Id.* The Court observed, however, that even if it accepted the SED's more narrow reading of *Guardians*, the ALST was also a "successor" of the LAST. *Id.* at *13. The Court noted that the Assistant Commissioner for the New York State Education Department testified at a hearing before the Court that "the replacement for the LAST was the ALST, the Academic Literacy Skills Test," and the remainder of her testimony confirmed the direct link between the two exams. *Id.* The Court also found that the SED provided a chart in its website to inform prospective teachers about the certification exams they must pass in order to receive their teaching license and that chart clearly depicted the ALST as being a replacement for the LAST. *Id.* at *13-14. Further, the Court maintained that the function of the ALST within the SED's certification scheme was similar to that of the LAST in requiring applicants to demonstrate three areas of aptitude before they become certified. *Id.* at *14-15. Accordingly, the Court concluded that because the ALST was a successor of the last ALST, and it had remedial authority pursuant to Title VII, as interpreted by *Guardians*, to assess the validity of the ALST, the validity of its March 30, 2015 order remained in effect.

***Gulino, et al. v. Board Of Education Of The City School District Of The City Of New York,* 2015 U.S. Dist. LEXIS 103952 (S.D.N.Y. Aug. 7, 2015).** Plaintiffs, a group of African-American and Latino individuals employed as New York City school teachers, brought a class action against the New York City Board of Education ("BOE") and the New York State Educations Department ("SED"), alleging that BOE's use of an

Academic Literacy Skills Test ("ALST") violated Title VII of the Civil Rights Act of 1964, as it had disparate impact on African-American and Latino applicants. Plaintiffs originally filed the action in 1996 claiming that Defendants' two certification tests, the Liberal Arts and Sciences Test ("LAST") and a predecessor test, violated Title VII because they had a disparate impact on minority test-takers and were not job-related. *Id.* at *8. In 2012, the Court held that the BOE violated Title VII, finding that LASTs had not been validated properly and was thus not "job-related." *Id.* at *9-10. The SED recently required prospective teachers to pass the ALST, an exam that purported to measure a teacher candidate's academic literacy skills by assessing knowledge, skill, and abilities within the domains of reading and writing. *Id.* at *5-6. Plaintiffs alleged that the ALST was also discriminatory under Title VII. The Court disagreed and held that the ALST was job-related. *Id.* at *37. The Court noted that the SED adopted new federal and state pedagogical and curricular standards – called the common core standards – that redefined the role of teachers, and because Defendants derived the ALST from those standards, it was appropriately designed to ensure that only those applicants who possess the necessary knowledge, skills, and abilities to teach successfully might be hired to do so in New York's public schools. *Id.* at *3. According to the Court, the standards were a particularly sound basis for validation because they contained so much detail about how and what teachers should teach. *Id.* at *46. The Court rejected Plaintiffs' argument that the standards were no different from the documents from which Defendants derived the LAST, finding that the standards were different in meaningful ways from the documents used to develop the LAST. The Court determined that the applicable common core standards defined with great specificity the degree of literacy that teachers were expected to instill in their students, and Defendants used reasonable competence in constructing the ALST and showed that it was job-related. *Id*. Although the ALST was flawed to a certain extent because it used overly broad terms to describe performance indicators and the ALST did not meaningfully describe the skill being tested, the Court determined that the error was not fatal because Defendants clearly linked the ALST to the common core standards and this ensured that it was job-related. *Id.* at *69-70. The Court therefore concluded that the BOE did not violate Title VII by complying with the SED's requirement that teachers pass the ALST before becoming eligible for employment.

(lxx) Consolidation Issues In Class Actions

***City Of San Jose, et al. v. Office Of The Commissioner Of Baseball,* Case No. 13-CV-2787 (N.D. Cal. Mar. 2, 2015).** Plaintiffs brought a class action alleging that Defendants failed to approve the Oakland Athletics Baseball Club's proposed relocation from Oakland to San Jose in violation of the Sherman Antitrust Act and California's Cartwright Act. Defendants moved to relate *Miranda, et al. v. Office of the Commissioner of Baseball,* to either this action ("*City of San Jose*") or *Senne, et al. v. Office of the Commissioner of Baseball*. The Court denied Defendants' motion. Defendants argued that the *City of San Jose* and *Miranda* cases both accused Major League Baseball ("MLB") of restraining competition in violation of federal antitrust laws. *Id*. at 1-2. Defendants contended that because both the actions revolved around the same determinative legal question – whether the Supreme Court's long-standing antitrust exemption continues to apply to the business of baseball – there would be an unduly burdensome duplication of labor and expense or conflicting results if the cases were conducted before different judges. *Id*. at 2. The Court, however, disagreed, and opined that although both *City of San Jose* and *Miranda* generally involved the application of the long-standing baseball antitrust exemption, the cases arose from different properties, transactions, or events, did not involve substantially the same parties, and implicated different legal questions. *Id*. The Court observed that while *City of San Jose* arose out of the proposed relocation of the Oakland Athletics Baseball Club from Oakland to San Jose, *Miranda* challenged MLB's practices regarding the compensation of minor league professional baseball players, including the use of reserve clauses in minor league players' contracts. *Id*. The Court also noted that although MLB and its member franchises were Defendants in both the *City of San Jose* and *Miranda* cases, the cases involved different Plaintiffs and Plaintiffs' counsel. *Id*. Further, the Court opined that the cases involved different applications of baseball's antitrust exception. While the *Miranda* case challenged the legality of the antitrust exemption's application to minor league players and the reserve clause in their contracts, *City of San Jose* involved the question of whether club relocation was a part of the "business of baseball." *Id*. at 2-3. Although both cases ultimately turned on the application of the baseball antitrust exemption, the Court reasoned that the specific legal issues were largely distinct. *Id*. at 3. Accordingly, the Court denied Defendants' motion to relate *City of San Jose* and *Miranda*. *Id*.

***Hall, et al. v. SeaWorld Entertainment, Inc.*, Case No. 15-CV-660 (S.D. Cal. Aug. 7, 2015).** Plaintiffs filed a putative class action alleging violations of California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law. Plaintiffs moved to consolidate this case with two other related cases entitled *Gaab v. SeaWorld Entertainment, Inc.*, and *Simo v. SeaWorld Entertainment, Inc.*, which alleged identical facts and claims related to alleged deceptive practices at Defendant's parks in San Diego, California, Orlando, Florida, and San Antonio, Texas. *Id*. at *2-3. The Court granted the motion and consolidated the three cases. Defendant's only argument in opposition was that the ruling on this motion should be deferred until the Judicial Panel for Multi-District Litigation ruled on its pending motion to transfer various cases for coordinated or consolidated pre-trial proceedings. *Id*. at *3. By the time of its ruling, however, the Court noted that the MDL Panel had since denied Defendant's motion. The Court, therefore, remarked that the most efficient course of action was to consolidate the three related putative class actions to reduce case duplication; to avoid harassment to parties and witnesses from multiple inquiries and proceedings, and to minimize expenditure of time and money by all concerned persons. *Id*. at *3. Accordingly, the Court granted Plaintiffs' motion to consolidate.

***Swank, et al. v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 41789 (W.D. Pa. Mar. 31, 2015).** Plaintiffs, Andrew Swank and James Paolicelli, for themselves and on behalf of Defendant's other assistant store managers, brought two separate class actions to recover unpaid overtime compensation. While the *Swank* lawsuit alleged violations of Pennsylvania law and sought to represent a class of employees in that state, the *Paolicelli* lawsuit alleged violations of the FLSA and sought to represent a collective action of employees nationwide. *Id.* at *2. The *Swank* Plaintiffs opted-in to the *Paolicelli* FLSA action, and the *Paolicelli* Plaintiffs fell within the definition of the putative class in *Swank*. Due to this overlap, Plaintiffs moved to consolidate the cases. *Id.* at *4. In turn, Defendant moved to dismiss the Second Amended Complaint ("SAC") in the *Swank* action, arguing that Plaintiffs failed to plead that assistant managers across Pennsylvania worked more than 40 hours in a workweek and that the *Swank* case could never be certified as a class action. *Id.* at *4-5. The Court denied both of the motions without prejudice. The Court concluded that the *Swank* Plaintiffs pled a plausible claim for relief. Although Defendant argued that Plaintiffs could not possibly know about the working situations of the more than 1,000 assistant managers across Pennsylvania, Plaintiffs alleged otherwise in the SAC. Plaintiffs alleged that, through a number of training and other business meetings of Defendant's assistant managers, Defendant employed a highly-integrated, systemic approach to store operations that affected the work of assistant managers such that it was likely that they utilized a single system of work assignments. *Id*. at *9. Plaintiffs also alleged that, in training for their roles, Defendant regularly and routinely used such a comprehensive system and that Defendant scheduled, assigned, and paid assistant managers in the same ways. *Id.* Defendant argued that Plaintiffs could not have personal knowledge about how many hours assistant managers worked (and how many hours they worked each workweek) at every Pennsylvania store, and that they had not expressly pled that any other assistant managers worked more than 40 hours in a workweek. *Id.* at *9-10. The Court noted that, in the SAC, Plaintiffs alleged that all of the other assistant managers worked and received pay in substantially the same fashion as Plaintiffs, including in terms of hours worked over each week. Plaintiffs also laid out a detailed foundation from which the Court could draw a permissible inference that supported the conclusion that it was much the same for assistant managers across Defendant's stores in Pennsylvania. *Id*. at *12. The Court noted that, although Defendant could prevail when the issue arrived at the decision point as to whether the cases could proceed to disposition as class actions or collective actions, or on the merits of Plaintiffs' claims, that was not the question before the Court. The issue was whether the allegations of the *Swank* SAC, if true, were enough to get to the next step and, in the Court's estimation, they were. *Id.* Accordingly, the Court denied the parties' motions without prejudice to reassertion of the bases alleged at a later procedural juncture upon more fulsome discovery.

(lxxi) Settlement Enforcement Issues In Class Action Litigation

***Crusan, et al. v. Carnival Corp.*, Case No. 13-CV-20592 (S.D. Fla. June 2, 2015).** Plaintiffs, a group of passengers who booked a trip on Defendant's cruise ship, brought an action after suffering injuries as a result of an engine room fire on the ship. Subsequently, the parties settled the action and Plaintiffs' counsel filed a notice of settlement, along with a motion to withdraw as counsel with respect to four Plaintiffs. Defendant moved to enforce the settlement asserting that regardless of any irreconcilable

differences between Plaintiffs' counsel and the four Plaintiffs, their counsel had apparent authority to settle the entire case, and any irreconcilable differences should not affect the enforceability of the parties' settlement. *Id.* at *2. The Magistrate Judge recommended that the motion be granted. The Magistrate Judge noted that under federal law, an attorney of record is presumed to have authority to compromise and settle on behalf of his clients, and that to rebut the presumption of an attorney's authority, the party opposing the settlement must come forward with evidence that the attorney lacked the authority to settle on behalf of his client. *Id.* at *2-3. In this case, Plaintiffs' counsel was the attorney of record for all 55 Plaintiffs and had consistently stated that he had the authority to settle the entire case at the time of mediation. The settlement terms required resolution of the entire case for all 55 Plaintiffs, and Defendant provided the Court with the settlement agreement *in camera*, which was signed by representatives of both parties. *Id.* at *3. Further, Plaintiffs' counsel had also averred that two of the four Plaintiffs had given him authority to settle the claims on behalf of the entire family at a prior mediation, and that he subsequently confirmed his authority with the third Plaintiff to settle the claims. The fourth Plaintiff had not come forward with affirmative proof that the attorney lacked the authority to settle on his behalf. Accordingly, the Magistrate Judge recommended granting the motion to enforce the settlement.

***Lerma, et al. v. Schiff Nutrition International Inc.,* Case No. 11-CV-1056 (S.D. Cal. Mar. 26, 2015).** Plaintiffs, a group of customers, brought a class action alleging that Defendants falsely marketed their glucosamine supplement as an arthritis treatment. Although the parties settled the action for $5 million, they had filed two motions to stay the settlement process based on a Seventh Circuit decision in *Pearson v. NBTY, Inc.,* 772 F.3d 778 (7th Cir. 2014). In denying those two motions, the Court had rejected the view that the *Pearson* decision required a stay of the proceedings in this case to allow the parties to return to mediation and consider changing their settlement agreement ("agreement"). *Id*. at 4. The Court had found that differences between the parties' agreement and the settlement agreement in *Pearson*, and differences in circuit law, did not invalidate the terms of the agreement in this case. *Id*. Plaintiffs moved for leave to withdraw from the settlement, and the Court denied the motion. Plaintiffs initially sought the Court's approval to withdraw from the amended agreement based upon the perceived impact of *Pearson,* upon the Court's ultimate determination of fairness, and on the likelihood of the *Pearson* ruling inspiring objections. *Id*. at 2. Defendants disagreed that *Pearson* or the possibility of objections would authorize Plaintiffs to withdraw from the agreement. Considering Plaintiffs' assertion that they would not support final approval nor move to seek final approval, Defendants suggested that the Court should consider replacing class counsel and the class representatives. *Id*. at 3. The Court found that neither party had addressed the provision in the agreement that provided for the circumstances under which a party could withdraw from the agreement. After a review of that provision, the Court found that it did not provide a basis for withdrawal by either party at this time. *Id*. Although Plaintiffs asked the Court to invoke its inherent power as a fiduciary for the class as a whole to allow withdrawal in their interest, the Court declined Plaintiffs' invitation. *Id*. The Court also indicated that it had previously held that it would not rule in advance of any objections that had not yet been filed; rather, it left it to the parties to decide whether to negotiate changes and seek the Court's approval to further modify the agreement. *Id*. at 4. The Court found that the possibility of objections did not justify a stay or continuance in the case. *Id*. Thus, for the same reasons, the Court held that Plaintiffs failed to persuade the Court that their withdrawal from the agreement was justified or warranted. *Id*. Accordingly, the Court denied Plaintiffs' motion to withdraw from the agreement. Further, because Plaintiffs' counsel unequivocally renounced their previous statement that they would not support the agreement and would not bring the motion for final approval, the Court decided not to replace the representative Plaintiffs nor their counsel at that time. *Id*. at 4-5.

(lxxii) Case Management Issues Of Class Actions

***In Re C. R. Bard, Inc., Pelvic Repair System Products Liability Litigation,* MDL No. 2187 (S.D. W. Va. Mar. 12, 2015).** In this multi-district litigation, Plaintiffs alleged that Defendant defectively designed, manufactured, and sold the surgical mesh products used to treat pelvic organ prolapse and stress urinary incontinence without adequate warnings regarding their risks, dangers, and complications. Defendant moved to strike Plaintiffs' expert disclosures in the Wave 3 "Miniwave" cases, which the Court granted in part. *Id.* at *1. Defendant contended that rather than disclosing three expert witnesses per case, as required by a pre-trial order ("PTO"), Plaintiffs disclosed a minimum of 14 expert witnesses. *Id*. Defendant

argued that Plaintiffs' numerous disclosures would burden the parties and the Court with wasteful motion practice. Plaintiffs asserted that the limitation might prevent them from carrying their burden of proof if one or more of their experts in a particular case was not available or was excluded by motion practice. *Id*. at *2. Further, Plaintiffs contended that they had no intention of calling duplicative witnesses at trial, but in some cases they might require more than three experts, including a pathologist, a materials expert, a causation expert (urogynecologist, gynecologist, or urologist), and a specialist, such as a pelvic pain specialist. *Id*. The Court ruled that its intention was to quickly work up those cases for trial and remand them to the appropriate districts for trial. *Id*. at *3. The Court remarked that the three-expert limitation contained in the PTO would remain in place. The Court, however, reminded the parties that the PTO provided a provision for the disclosure of additional experts for good cause shown. *Id*. Regarding Plaintiffs' concern of lack of availability of experts given the large number of remands, the Court explained that the issue could be taken up with the judge who was ultimately assigned the case on transfer or remand. *Id*. Accordingly, the Court struck Plaintiffs' disclosure of experts, and ordered them to disclose experts again in compliance with the PTO.

***In Re General Motors LLC Ignition Switch Litigation*, Case No. 14-CV-4798 (S.D.N.Y. Feb. 17, 2015).** In this multi-district class action litigation, Plaintiffs alleged that a defect in certain vehicles caused the vehicle's ignition switch to move unintentionally from the run position to the off position. The Court established a bellwether trial plan for eligible personal injury and wrongful death claims based on alleged defects in vehicles. The trial plan consisted of adjudicating "test cases" of wrongful death claims, severe personal injury claims, and mild to moderate personal injury claims. *Id.* at 1. The Court granted approval to the parties' proposed classification for distinguishing between "severe" and "mild to moderate" personal injury claims. *Id.* at 2. The Court determined that severe personal injury claims would include a claim for injuries including skeletal or bone fracture requiring surgery; spinal injury requiring surgery; traumatic brain injury resulting in a Glasgow Coma Scale score of 12 or lower; limb amputation; cuts or lacerations resulting in permanent and significant scars or disfigurement; second or third degree burns on more than 10% of the body; paraplegia; quadriplegia; blindness or vision impairment lasting for one week or more; brachial plexus injury; or nerve damage or any other medically diagnosed injury that prevents the injured person from performing substantially all of the material acts that constitute such person's usual and customary daily activities, or results in the loss or limitation of a body function or system. *Id.* The Court concluded that any other claim involving an injury other than those listed would be eligible for inclusion in the mild to moderate personal injury claims. *Id.*

(lxxiii) Trial Issues In Class Action Litigation

***David, et al. v. Signal International, LLC*, 2015 U.S. Dist. LEXIS 35907 (E.D. La. Mar. 20, 2015).** Plaintiffs, a group of migrant workers, brought a putative class action seeking to recover damages inflicted by Defendants and their recruiters and agents operating in India, the United Arab Emirates, and the United States. Over 500 Indian men came the United States through the federal government's H-2B guest-worker program to provide labor and services to Defendants. Plaintiffs alleged that Defendants fraudulently recruited them to work in the United States and effectuated a broad scheme of psychological coercion, threats of serious harm and physical restraint, and threated abuse of the legal process to maintain control over the class members. Claims of five Plaintiffs ("Trial Plaintiffs") proceeded to trial, and the jury returned its verdict and awarded the Trial Plaintiffs over $14 million in damages. *Id*. at *220. The Trial Plaintiffs moved for entry of final judgment, and the Court granted the motion. The Court noted that the primary issue was whether the Court should enter final judgment even though multiple claims of seven Plaintiffs (the "non-Trial Plaintiffs") and claims under the FLSA were pending. The Court observed that Rule 54(b) allows entry of judgment in these scenarios if two requirements were met: (i) the Court must determine that is it dealing with a final judgment; and (ii) the Court must determine there was no just reason for delay. *Id*. at *221. The Court remarked that the first requirement had two elements, *i.e.*, the decision on which appeal is sought: (i) must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief; and (ii) it must be "final" in the sense that it is an ultimate disposition of an individual claim entered in the Court of an action with multiple claims. *Id*. Here, the Court noted that Trial Plaintiffs worked at Defendant's facility at Mississippi, and the non-Trial Plaintiffs worked in Texas; therefore, the evidence presented for the two would substantially different. *Id*. at *222. To the extent that there was an overlap

between the claims of the Trial Plaintiffs and the non-Trial Plaintiffs, the Court found that that was not dispositive for two reasons. First, the Fifth Circuit and the U.S. Supreme Court had long recognized that claims arising out of the same transaction or sharing certain factual elements may be appealed separately under Rule 54(b). *Id*. at *223. Therefore, a certain amount of overlap was permissible. Second, the potential for piece-meal appeals may be off-set by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of claims. *Id*. The Court remarked that if it did not enter final judgment now, the Trial Plaintiffs would be forced to wait an extraordinary amount of time (approximately 19 months) to proceed. *Id*. at *224. Accordingly, the Court ruled that there was no just reason to delay entry of final judgment. In addition, the Court remarked that it must determine whether execution should be stayed pending appeal. The Court opined that Defendant had made no showing that there was a likelihood of success, or it would be irreparably injured absent a stay. *Id*. at *226. Accordingly, the Court entered final judgment.

***David, et al. v. Signal International, LLC,* 2015 U.S. Dist. LEXIS 119980 (E.D. La. Sept. 9, 2015).** Plaintiffs brought an action alleging that Defendants violated the Trafficking Victims Protection Act ("TVPA") and state law claims of fraud, negligent misrepresentation, and breach of contract. After a trial, the jury rendered its verdict in two distinct stages. First, the jury affirmed the questions asked with respect to individual Defendants for all alleged claims and in the second stage the jury did not award damages against individual Defendants personally, but instead entered an award of $0 for all claims. *Id.* at *1. The Court subsequently entered judgments as to the individual Defendants, dismissing all claims against Defendants with prejudice. Plaintiffs subsequently filed a motion requesting amendment of the judgments, which the Court granted in part. *Id.* at *2. First, Plaintiffs argued that the damages verdicts of $0 against Defendants personally were entered due to the jury's belief that the damages would be duplicative of damages awarded against the corporate Defendants. The Court found that the interrogatories regarding damages against Defendants individually came before the interrogatories concerning the corporate Defendants, and if the jury intended to award damages, they would have awarded damages against Defendants due to the order in which the jury interrogatories were formulated and appeared. Thus, the Court found that the jury performed its task of assessing damages and its verdict was not inconsistent. *Id.* at *3-4. Second, Plaintiffs argued that an award of nominal damages be granted as Defendants violated a civil rights statute. The Court found that Plaintiffs were entitled to an award of nominal damages for the violation of their civil rights, even where there is no injury. The Court held that the TVPA was intended to redress slavery and involuntary servitude to increase civil rights protections under which nominal damages should be awarded. Thus, the Court awarded nominal damages in the sum of $1.00 to Plaintiffs. *Id.* at *5-7. Plaintiffs further argued that if the judgment was not amended, there should be a new trial in the alternative. *Id.* at *10. The Court found no justification for granting a new trial on both TVPA and non-TVPA counts and concluded that Plaintiffs failed to demonstrate a lack of evidence to support the jury's verdict. Accordingly, the Court granted Plaintiffs motion in part and denied in part.

(lxxiv) Immigration Class Actions

***Lyon, et al. v. U.S. Immigration & Customs Enforcement,* 2015 U.S. Dist. LEXIS 97694 (N.D. Cal. July 27, 2015).** Plaintiffs, a group of immigration detainees, brought a putative class action against Defendants – the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), and certain employees of both agencies – alleging that Defendants violated Plaintiffs' constitutional and statutory rights while Defendants held Plaintiffs in government custody awaiting deportation proceedings. *Id.* at *2. Specifically, Plaintiffs alleged that Defendants applied telephone policies and practices that did not allow them adequate access to resources necessary to prepare for their removal proceedings. *Id.* at *3. Following certification of a class consisting of all detainees held at the three County Detention Facilities located throughout Northern California (the "County Facilities"), Plaintiffs moved to modify the certification order to include detainees housed at ICE's newly-opened Bakersfield facility, to file a supplemental complaint in order to add allegations regarding the new facility, and to extend all deadlines to allow for necessary discovery regarding that facility. *Id.* at *3-4. The Court granted Plaintiffs' motion. Defendants argued that adding detainees at the Bakersfield facility to the class defeated commonality because the Bakersfield facility differed from the County Facilities in ways material to determining whether the facility conditions impeded detainees' communications with their attorneys. The Court rejected

Defendants' argument, finding that Plaintiffs asserted harm with regard to the Bakersfield facility that fell within their overarching claim that Defendants denied detainees effective access to telephones and, thereby, impeded their communications with counsel, family, and others necessary to protect and vindicate their legal rights. *Id.* at *19. The Court found that variations among the practices of each facility, including how those practices specifically impacted individual class members, were not sufficient to defeat commonality. *Id.* Defendants argued that differences between the Bakersfield facility and the County Facilities precluded a finding that Defendants "acted or refused to act on grounds that applied generally to the class" because practices at any particular facility could not be enjoined or declared unlawful as to all of the facilities given the particular security concerns, physical make-up, and staffing of each individual facility. *Id.* at *25. The Court rejected Defendants' arguments on the basis that they hinged upon the practical differences between the Bakersfield facility and the County Facilities. The Court held that the differences did not negate the fact that Plaintiffs sought relief applicable to and appropriate for the entire class. *Id.* at *26. The Court concluded that allowing Plaintiffs to file their proposed supplemental complaint would allow the Court to fashion more complete relief for the class than forcing Plaintiffs to bring a second suit on behalf of detainees at the Bakersfield facility. The Court noted that, given Plaintiffs' evidence of significant overlap between Defendants' practices at the Bakersfield facility and the County Facilities, adding the Bakersfield facility would promote judicial efficiency by saving the Court and the parties time and expense. *Id.* at *31-32. Because Plaintiffs based their supplemental complaint on new and pertinent information, and because Plaintiffs exercised due diligence in moving for leave to supplement, Plaintiffs satisfied the good cause requirement. The Court, accordingly, granted Plaintiffs' motion to modify the class certification order and to file a supplemental complaint and extended all deadlines by sixteen weeks to allow for additional discovery.

***Mehta, et al. v. U.S. Department Of State,* 2015 U.S. Dist. LEXIS 137261 (W.D. Wash. Oct. 6, 2015).** Plaintiffs, a group of beneficiaries of approved employment-based visa petitions for highly skilled workers, brought an action challenging the U.S. Department of State's ("State Department") revised Visa Bulletin. The State Department had published a monthly Visa Bulletin with a date for which applicants could submit adjustment of status applications that comes before the projected date on which final adjudicative action would occur. *Id*. at *3. Plaintiffs alleged that they spent significant time and money assembling adjustment applications based on their reasonable expectation that the Government would abide by the Visa Bulletin it published on September 9, 2015. *Id.* at *3-4. On September 25, 2015, however, the State Department published a revised Visa Bulletin withdrawing or changing the date on which applicants could submit adjustment of status applications. Plaintiffs filed this action, and moved for a temporary restraining order ("TRO"), which the Court denied. Plaintiffs argued that Defendants' abrupt and unexplained change in visa bulletin policy was an arbitrary and capricious action in violation of the Administrative Procedure Act ("APA") and the Immigrant and National Act, and that the rescission of the original Visa Bulletin and replacement of it with a Revised Visa Bulletin was a final agency action subject to the APA's judicial review provisions. *Id.* at *4. The Court, however, noted that pursuant to 4 U.S.C. § 704, agency action made reviewable by statute and final agency action for which there is no other adequate remedy were subject to judicial review. *Id.* at *5. Further, the Court noted that a preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review after the final agency action. *Id.* Defendants explained that the earlier Visa Bulletin did not accurately reflect visa availability to accept adjustment of status applications, and argued that the initial Visa Bulletin erroneously implied that visas were immediately available to certain individuals. The revised Visa Bulletin was necessary to prevent the State Department from exceeding its statutory authority. *Id.* at *7. The Court thus remarked that even if the Visa Bulletins constituted final agency action, Plaintiffs failed to show a likelihood of success on their APA claim because the revised Visa Bulletin included a plausible explanation for its action, and noted that the revised Visa Bulletin did not in fact substantially alter or diminish the rights of Plaintiffs and potential class members, and that it clarified an erroneous prior statement of their rights. *Id.* at *7-8. Without citing to a declaration of an injured Plaintiff or any other evidence, Plaintiffs argued that a TRO was necessary to prevent economic losses including non-refundable monies paid to civil surgeons for medical examinations and for certifications. The Court, however, ruled that as most if not all of the harm cited had already occurred, and since Plaintiffs' economic damages were recoverable if they ultimately prevail at trial, Plaintiffs failed to meet their burden on this element. *Id.* at *11. Defendants also contended that it was in the public's interest

that the agency has the authority to update its guidance when necessary. Because the revised Visa Bulletin corrected a statement contrary to statutory authority, the Court opined that the public interest lay in denying the motion.

***R.I. L-R, et al. v. Johnson,* 2015 U.S. Dist. LEXIS 20441 (D.D.C. Feb. 20, 2015).** Plaintiffs, a group of mothers and their minor children who sought asylum in the U.S., brought a putative class action alleging that Defendants, the Department of Homeland Security and Immigration and Customs Enforcement ("ICE") and its officials, enforced a policy to detain Plaintiffs despite their credible fears of persecution in their home country. Plaintiffs alleged that this violated the Immigration and Nationality Act, was arbitrary and capricious under the Administrative Procedure Act and ICE policies, and violated constitutional guarantees of due process. Plaintiffs claimed that Defendants' policy began in June 2014 when increased violence and instability in Central America and Mexico led to a surge in immigration, particularly of children. All Plaintiffs crossed the border with intent to seek asylum. None had a criminal history and all had family members in the U.S. who offered shelter and support through their immigration proceedings. *Id.* at *5. Defendants allegedly refused bond for each Plaintiff even after establishing credible fear of persecution, and detained each family for weeks or months in a Texas facility before releasing them based on custody re-determination hearings. *Id.* at *6-7. Plaintiffs claimed that an abrupt about-face occurred when Defendants adopted an unprecedented "no-release policy" in response to the increased immigration, which resulted in denial of their releases. *Id.* at *7-8. Plaintiffs moved for a preliminary injunction barring the continued implementation of the no-release policy during the pendency of this action, as well as for provisional class certification for purposes of the requested injunction. The Court granted Plaintiffs' motions. Although the Court was reluctant to find the existence of a universal no-release policy, it ruled that ICE does have a policy of considering mass migration deterrence when making custody decisions and this policy had played a significant role in the increased detention of Plaintiffs. *Id.* at *13-16. Defendants argued that because Plaintiffs were not the U.S. citizens and entered the country illegally, they had very few due process protections. The Court, however, found that case law precedents have made it clear that once a person is in the U.S., he or she has due process rights. Citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), the Court found that "[a]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* at *48-49. The Court therefore held that Plaintiffs, as people apprehended within the U.S. and with the possibility of legitimate claims to asylum, had clear rights to due process. Responding to Defendants' justification for detention, the Court pointed out that "[t]he simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security, with all the attendant deference such characterization entails." *Id.* at *52-53. According to the Court, the government's power over immigration is subject to significant constitutional limitations, and Defendants' justification was poorly substantiated in its own right. *Id.* at *55-56. The Court further found that a large number of asylum-seeking families were currently being detained as a result of Defendants' policy and such detention could harm them, particularly minor children, in myriad ways, and the harm could not be balanced by the public interest in this case. *Id. at* *57-58. The Court therefore granted Plaintiffs' motion for a preliminary injunction. The Court also granted Plaintiffs' motion for provisional class certification, finding that Plaintiffs satisfied the Rule 23 requirements. The Court noted that ICE's consideration of mass immigration as a factor in its custody determinations united over 40 Central American families who had been detained since June 2014, and a determination of whether Defendants' policy requiring deterrence of mass immigration was unlawful would resolve all class members' claims "in one stroke." *Id.* at *29-35. Accordingly, the Court granted Plaintiffs' motions for a preliminary injunction and provisional class certification for purposes of the requested injunction.

(lxxv) Class Actions Under 42 U.S.C. § 1981

***Burgis, et al. v. New York City Department Of Sanitation*, 2015 U.S. App. LEXIS 13353 (2d Cir. July 31, 2015).** Plaintiffs, a group of 9 employees, brought an action alleging that Defendants discriminated against them on the basis of their race and/or national origin in the New York City Department of Sanitation's ("DSNY") promotional practices. After the DSNY promoted sanitation workers to supervisor positions, these supervisors were promoted to the position of general superintendent of various levels. Prior to 1979, DSNY promotions were based on one to three written examinations; the

examinations were later eliminated for promotions to levels two and three, and promotions to levels two, three, and four were done on the basis of recommendations. *Id.* at *3. Plaintiffs alleged that such recommendations created a supervisory workforce that was not representative of the racial and/or national origin composition of the sanitation worker workforce. Defendants filed a motion to dismiss, which the District Court granted. On appeal, the Second Circuit affirmed. The Second Circuit observed that to state a discrimination claim under the Fourteenth Amendment's equal protection clause or 42 U.S.C. § 1981, Plaintiffs must sufficiently allege that Defendants acted with discriminatory intent. *Id.* at *8. Here, all Plaintiffs at some point had been promoted from a sanitation worker to supervisor, and five of the nine were subsequently promoted to general superintendent level one, the highest level. Although Plaintiffs alleged that several of them were passed over for subsequent promotions, and White individuals who were allegedly less qualified were promoted, Plaintiffs failed to provide meaningful specifics of the alleged difference in qualifications, let alone discriminatory intent. *Id.* at *8-9. The Second Circuit opined that the bare allegations in the complaint did not present circumstances that give rise to an inference of unlawful discrimination. *Id.* at *9. Plaintiffs also argued that statistics alone were sufficient to warrant a plausible inference of discriminatory intent if they showed a pattern or practice that could not be explained except on the basis of intentional discrimination. The Second Circuit noted that to show discriminatory intent in a § 1981 or equal protection case based on statistics alone, the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely. *Id.* at *11. The statistics provided by Plaintiffs showed only the raw percentages of White, Black, and Hispanic individuals at each employment level, without providing any detail as to the number of individuals at each level, the qualifications of individuals in the applicant pool and of those hired for each position, or the number of openings at each level. *Id.* at *12. The Second Circuit reasoned that the fact that each Plaintiff had been promoted at some point to the position of supervisor undermined their allegations of discrimination in the promotion of sanitation workers to supervisors. Five of the nine Plaintiffs had also been promoted from supervisor to general superintendent level one, again calling into doubt their allegations of discrimination at that phase, especially given that the racial composition between individuals in the supervisor and general superintendent level one positions was essentially the same. Thus, the Second Circuit affirmed the order granting Defendants' motion to dismiss Plaintiffs' equal protection and § 1981 claims.

***Heldt, et al. v. Tata Consultancy Service*, 2015 U.S. Dist. LEXIS 126131 (N.D. Cal. Sept. 18, 2015).** Plaintiffs brought a putative class action alleging that Defendant, an information technology ("IT") consulting and outsourcing company headquartered in Mumbai, India, discriminated against them in their hiring, employment, and/or termination practices based on race and national origin in violation of Title VII and 42 U.S.C. § 1981. Specifically, Plaintiffs claimed that Defendant had a pattern or practice of intentional discrimination relative to its U.S. workforce whereby it treated those of South Asian descent, South Asian race, and South Asian national origin, more favorably than those who were not South Asian, including Plaintiffs. *Id.* at *2-3. Plaintiffs alleged that, as a result of Defendant's discrimination, its 14,000 employees in 19 offices across the U.S. consisted of approximately 95% South Asian descent, race, and/or national origin, compared to 1% to 2% of the U.S. population. *Id.* at *3. Plaintiff Heldt alleged he was initially appointed to a position that utilized his advanced experience and skills but Defendant subsequently assigned him to other positions that involved more menial work, and effectively "benched" him throughout his employment. Ultimately, Defendant terminated him after less than two years. *Id.* at *4-5. Defendant moved to dismiss the complaint, which the Court denied. First, Defendant argued that Plaintiffs failed to state claims under both Title VII and § 1981 to the extent they based those claims on Defendant's alleged use of the H-1B, L-1, and B-1 visa programs to recruit foreign workers to achieve its goal of discrimination against persons who were not South Asian. Defendant contended that that basis for Plaintiffs' claims was "self-defeating" because Defendant's use of the visa program established that its recruitment was non-discriminatory as a matter of law. *Id.* at *9. The Court found Defendant's attempt to recast the complaint as an attack on its business model was the result of a skewed reading of Plaintiffs' allegations. *Id.* Further, the Court stated Defendant's argument was misplaced insofar as it asserted that its use of the visa programs was non-discriminatory by definition and Plaintiffs could never show that the named Plaintiffs (or any class members) were discriminated against as a result of Defendant's use of the visa programs. *Id.* The Court observed that for purposes of the motion, the complaint had sufficient allegations of

discriminatory conduct to put Defendant on notice of the basis for the claim. *Id.* Defendant also contended that the Court did not have subject-matter jurisdiction over Plaintiffs' claims insofar as Plaintiffs alleged that Defendant misused the visa programs because Plaintiffs had not exhausted their administrative remedies with the U.S. Departments of Justice and Labor. *Id.* at *14. The Court maintained that, in light of Plaintiffs' affirmative denial that Defendant misused the visa program, Defendant's argument was moot. Moreover, the Court found Defendant provided no authority to support its proposition that jurisdiction over the proper use of the visa program also would be lacking. *Id.* Finally, Defendant contended that because it hired Plaintiff Heldt, he did not have standing to bring a failure to hire claim. *Id.* at *15-16. The Court reiterated that a named Plaintiff's individual standing was a threshold issue; thus, Heldt's allegations challenging Defendant's discriminatory hiring practices were sufficient to maintain his cause of action at that juncture. *Id.* at *16. The Court concluded by expressing concern with Plaintiffs' definition of the persons included in the proposed class, and ordered Plaintiffs to file an amended complaint. *Id.* at *20-21.

***Hill, et al. v. City Of New York,* 2015 U.S. Dist. LEXIS 130928 (E.D.N.Y. Sept. 28, 2015).** Plaintiffs, a group of police communications technicians ("PCTs"), brought an action alleging that Defendants discriminated against them on the basis of race in violation of 42 U.S.C. § 1981 and § 1983, and the New York State and City Human Rights Laws. *Id.* at *3. Defendant, the New York Police Department ("NYPD"), employed PCTs to answer and direct public emergency calls to the City's 911 response system so that the appropriate police, fire, or emergency resources could be dispatched. According to Plaintiffs, Defendants instituted several policies starting in May 2013 that overworked 911 operators without regard for their health and safety. Plaintiffs alleged that NYPD mandated that 911 operators work several double-shifts of undefined lengths, often consecutively, without meal or rest breaks, and seven of the named Plaintiffs worked 16-hour tours three times a week in accordance with the policy. *Id.* at *9-10. Since July 2013, the NYPD also required 911 operators to work two 12-hour tours weekly as a minimum amount of overtime until relieved from duty, and as a result, seven named Plaintiffs worked a minimum of two 12-hour overtime shifts each week, with additional overtime and tours as required. *Id.* Defendants further subjected the 911 operators who refused or did not complete mandatory overtime to discipline. Plaintiffs asserted that Defendants' policies were driven by discriminatory animus toward the 911 operators and as punishment for their use of sick and FMLA leave, and that none of the challenged policies were imposed on other non-minority NYPD employees, including police administrative aids. *Id.* at *13-19. Plaintiffs also alleged that Defendants undertook some of the alleged policies in retaliation for Plaintiffs' public complaints about their work conditions. *Id.* at *20. Defendants moved to dismiss for failure to state a claim. Defendants contended that Plaintiffs' allegations were insufficient to raise an inference that the applicable policies were motivated by race. *Id.* at *31. The Court granted the motion in part. The Court found that Plaintiffs' allegations of an overarching pattern of intentional over-work, under-staffing, and punitive measures against 911 operators, motivated by racial animus, and detrimental to their health and safety, sufficiently stated a pattern or practice claim. *Id.* at *32. Plaintiffs' complaint alleged facts regarding Defendants' formal announcement of the challenged policies and specific instances of the policies being enforced against Plaintiffs. *Id.* Thus, the Court concluded that Plaintiffs met their minimal burden, particularly at this stage of litigation, to allege an inference of discriminatory intent. *Id.* at *44. Since Plaintiffs' allegations asserted facts that suggested personal involvement by each of the individual Defendants sued in their personal capacity, and provided the individual Defendants with fair notice of the basis for Plaintiffs' personal capacity claims against them, the Court also denied Defendants' motion to dismiss Plaintiffs' §§ 1981 and 1983 claims against the individual Defendants in their personal capacities. *Id*. at *47-48. The Court further denied Defendant DC-37's (a labor organization) motion to dismiss Plaintiffs' § 1981 racial discrimination claim based on DC 37's alleged acquiescence to the City's discriminatory treatment of the 911 operators. Plaintiffs had alleged that DC 37 violated § 1981 by subjecting Plaintiffs to differential terms and conditions of representation because of race by approving of the NYPD's discriminatory policies. *Id*. at *13. The Court, however, granted Defendants' motion to dismiss Plaintiffs' FMLA inference claims based on certification delay, miscalculation of eligibility hours, use of a designated FMLA numbers, and investigation of FMLA use and Plaintiffs' FMLA retaliation claim based on the "high absentee" list, finding that Plaintiffs' allegations failed to raise a non-speculative, plausible FMLA claims based on Defendants' alleged practices. *Id.* at *65-71. The Court also granted Defendants' motion to dismiss Plaintiffs' First Amendment retaliation claim, finding that Plaintiffs failed to adequately plead a causal connection between

their protected activity and any adverse employment action. *Id.* at *72-74. Accordingly, the Court granted in part and denied in part Defendants' motion to dismiss.

***Wynn, et al. v. The New York City Housing Authority,* 2015 U.S. Dist. LEXIS 99419 (S.D.N.Y. July 29, 2015).** Plaintiffs, a group of African-American and Hispanic employees, alleged that Defendant systematically under-compensated them based on their race and/or ethnicity in violation of 42 U.S.C. § 1981 as well as New York City Human Rights Law ("NYCHRL"). *Id.* at *1. Defendant filed a motion to dismiss both for failure to state a claim as well as for lack of subject-matter jurisdiction. The Court granted in part and denied in part Defendant's motion to dismiss. Plaintiffs were employed as plasterer tenderers with Defendant. *Id*. at *2. Plaintiffs worked for Defendant from between 12 and 17 years, and alleged that they were discriminated against based on their race and were not paid prevailing wages. *Id.* Plaintiffs also alleged that Defendant attempted to cover up its discriminatory practices by assigning them to an improper job title (and thus locking them into certain salary schedule set by an applicable collective bargaining agreement). *Id.* at *3. The Court set forth what must be established by a party seeking to have a case dismissed under both Rule 12(b)(1) and 12(b)(6). With respect to a Rule 12(b)(1) dismissal, a Court must "take all uncontroverted facts in the complaint as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Id*. at *8. In reaching such a decision, the Court may look to "evidence outside of the pleadings" when deciding issues of fact concerning jurisdiction. *Id*. Defendant argued that Plaintiffs' claims were governed by a collective bargaining agreement, and thus the Court lacked subject-matter jurisdiction because Plaintiffs failed to exhaust their administrative remedies. *Id.* at *13. The Court rejected Defendant's argument, finding that "NYCHA fails to cite any case linking the existence of a collective bargaining agreement to depriving federal courts of subject-matter jurisdiction to hear a claim of employment discrimination. There is none." *Id.* at *14. As such, the Court refused to dismiss the case based on lack of subject-matter jurisdiction. *Id.* As to the remainder of Defendant's motion, the Court granted Plaintiffs leave to file an amended complaint. With respect to their § 1981 claim alleging municipal liability, Plaintiffs' proposed amended complaint alleged that Defendant gave preferential treatment to mason helpers – who are predominantly white – by assigning them to a higher rate of pay than the positions Plaintiffs held (plasterer tenderers, a position mostly occupied by Hispanic and African-American employees). *Id.* at *17-18. The Court held that the new alleged practice – assigning a lower compensation and incorrect job title to minority workers – could constitute a "persistent or widespread practice that has the force of law" which is needed to state a claim for municipal liability. As such, the Court allowed Plaintiffs to amend their complaint. *Id.* at *18. The Court similarly granted Plaintiffs leave to amend their §§ 1981 and 1983 claims, as well as their claims for discrimination under the New York City Human Rights Law. *Id.* at *18-20. The Court, however, refused to grant Plaintiffs leave to assert a disparate impact theory of liability in connection with their §§ 1981 and 1983 claims since such claims are not cognizable under § 1981 or a claim of denial of equal protection under § 1983. *Id.* at *21. Accordingly, the Court granted in part and denied in part Defendant's motion to dismiss.

(lxxvi) Costs In Class Actions

***Resnick, et al. v. Netflix, Inc.*, 2015 U.S. App. LEXIS 3095 (9th Cir. Feb. 27, 2014).** Plaintiffs, a class of subscribers, brought an antitrust class action alleging that Defendant violated the Sherman Act by illegally allocating and monopolizing the on-line DVD-rental market. Defendant and Wal-Mart Stores Inc. allegedly agreed to split up the market with Defendant promising to refrain from selling new DVDs and Wal-Mart agreeing to shut down its on-line DVD rental program and transfer subscribers to Defendant. While Wal-Mart settled its portion of the class action, in late 2011 the District Court granted summary judgment to Defendant finding that Plaintiffs could not establish antitrust injury-in-fact. *Id*. at *13-14. Defendant then sought $744,740.11 in discovery costs. The District Court ultimately awarded Defendant $710,194.23 in costs. *Id.* at *12. While Plaintiffs appealed that award arguing that the District Court erred in its taxing of e-discovery and data management costs totaling $317,616.69, and abused its discretion in taxing consulting fees, Tagged Image File Formats ("TIFFs"), and copying costs totaling $245,471.31, Defendant cross-appealed arguing that the District Court abused its discretion in disallowing $21,000 in costs to copy certain PowerPoint files. *Id.* at *23. The Ninth Circuit affirmed the District Court's summary judgment order, but partly vacated the discovery costs award. The Ninth Circuit found that even though the District Court applied applicable precedent offering broad access to costs for electronic production as copying, a U.S.

Supreme Court ruling overturning that precedent required a new evaluation of what electronic discovery costs might be properly taxed as costs of "making copies of any materials where the copies are necessarily obtained for use in the case." *Id.* at *22. Plaintiffs identified four broad categories of charges appeared on Defendant's invoices as non-taxable, including: (i) data upload; (ii) endorsing; (iii) keyword; and (iv) professional services. First, as to the data upload charge, the Ninth Circuit determined that it was non-taxable because the charge description established only that the copy was essential to the document process but failed to establish that it was necessarily obtained for use in the case. *Id.* at *36. Second, as to the endorsing charge, the Ninth Circuit refused to consider it, finding that the parties did not specifically and distinctly argue that matter. *Id.* at *37. Third, as to the key wording charge, the Ninth Circuit found that the charge was not taxable as Defendant used an automated software process to identify which documents to copy and which not to copy. *Id.* at *39. Fourth, as to the professional services charge, the Ninth Circuit remanded the issue to the District Court as the record before it was insufficient to make a determination. *Id.* at *40. Finally, Plaintiffs challenged Defendant's $10,000 cost involved in copying nearly 80GB of data for production of 167,311 documents. Although the cost incurred for some of the described tasks appeared to be taxable, the Ninth Circuit determined that not all the tasks were taxable. The Ninth Circuit held that to the extent the invoiced tasks exceeded optical character recognition, conversion to TIFF, and other activities essential to the making of copies necessary to the case, they were not taxable. *Id.* at *41. The Ninth Circuit thus concluded that, out of the $317,616.69 costs challenged by Plaintiffs, Defendant could recover only those costs attributable to optical character recognition, converting documents to TIFF, and endorsing activities, all of which Plaintiffs explicitly required. The Ninth Circuit, however, also found that the District Court properly awarded $245,471.31 in consulting fees, TIFF images, and copying costs as the records supported the District Court's conclusion. The Ninth Circuit noted that Defendant had provided sufficient information for the District Court to identify the documents being reproduced, and ultimately, to determine which costs were taxable. *Id.* at *41-45. The Ninth Circuit further noted that the District Court properly denied Defendant $21,000 in costs to copy certain PowerPoint files as Defendant could have avoided the duplicative production by first producing the documents maintained in its usual course of business. *Id.* at *46. Accordingly, the Ninth Circuit partly affirmed and partly reversed the District Court's award of costs.

(lxxvii) Media Privilege Issues In Class Actions

***Goldberg, et al. v. Amgen, Inc.,* 2015 U.S. Dist. LEXIS 110726 (D.D.C. Aug. 21, 2015).** Plaintiffs, a group of investors, brought a putative class action against Amgen and four of its former officers claiming that they misled investors when they publicly stated that their product Aranesp was safe for its FDA-approved uses. In 2007, Paul Goldberg, a journalist, wrote an article about a clinical trial conducted by the Danish Head and Neck Cancer Group (the "DAHANCA10") that showed significantly inferior therapeutic outcomes from adding Aranesp to radiation treatment of patients with head and neck cancer. *Id.* at *3. In the article, Goldberg reported that DAHANCA10 suspended the study in October 2006, that DAHANCA10 decided not to resume the study on December 1, 2006, and that Defendant had failed to announce the study's results in public disclosures or during its January 2007 investor call. *Id.* Defendant sought to depose Goldberg regarding the article, and Goldberg moved to quash Defendant's subpoena claiming that the information that Defendant sought was protected by the First Amendment reporter's privilege. The Court granted Goldberg's motion to quash the subpoena. *Id.* at *1-2. Plaintiffs claimed that, through Goldberg's article, they first learned of DAHANCA10's study results and that the article, therefore, was a "corrective disclosure" that revealed the truth about Aranesp's safety. *Id.* at *5. Defendant contended that it could defend itself by showing that investors or other stock market participants learned of the termination of DAHANCA10 before the publication of the article, and, therefore, the article's publication did not cause their losses. *Id.* at *5-6. Defendant argued that Goldberg, as the author of the article, was uniquely positioned to provide admissible testimony critical to Defendant's defenses concerning the disclosure of the DAHANCA10 termination to market participants and that, because it sought to elicit non-confidential evidence, *i.e.*, how and when Goldberg learned of the DAHANCA10 termination and when he spoke to the identified and anonymous sources cited in the article, the journalist's privilege did not apply. *Id.* at *6, 11. Although the Court agreed that evidence showing that sources spoke to Goldberg about the DAHANCA10 study before the article's publication went to the heart of Defendant's defenses, the Court found that Defendant failed to demonstrate the requisite diligence in seeking evidence from alternative sources before

attempting to compel disclosure of a journalist's First Amendment activities. *Id.* at *18-19. Although Defendant knew of 26 analysts who followed the company at the time of DAHANCA10 study, it only deposed three of them to discover which of them might have spoken to Goldberg. *Id.* at *19-20. Defendant also failed to attempt to obtain the information from alternative sources discussed in Goldberg's article. *Id.* at *21. According to the Court, a journalist's privilege could be overridden only as a "last resort," and unless Goldberg learned about the DAHANCA10 study from a direct market participant, the manner by which he learned about the study would do little to establish that the market was aware of the DAHANCA10 results with the degrees of intensity and credibility necessary to sustain Defendant's defenses. *Id.* at *23-25. The Court, therefore, found no evidence to show that questioning Goldberg would provide critical evidence and concluded that there would be little purpose in requiring Goldberg to invoke the privilege on a question-by-question basis. *Id.* at *26-28. Accordingly, the Court granted Goldberg's motion to quash Defendant's subpoena.

(lxxviii) Issue Certification Under Rule 23(c)

***I.B., et al. v. Facebook, Inc.*, 2015 U.S. Dist. LEXIS 29357 (N.D. Cal. Mar. 10, 2015).** Plaintiffs, a group of minors, brought an action alleging that Defendant's policy representing that purchases made through its website were final, or otherwise non-refundable, violated § 6701(c) of the California Family Code. Defendant permitted its users, including minors, to make purchases through its website. *Id*. at *2. Plaintiffs allegedly made purchases without parental permission through Defendant's website. The minors sought to invoke the protections of century-old protections under California law, which recognizes that minors will occasionally use their lack of judgment to enter into contractual relationships and later assert the right to walk away from the contract. *Id*. at *2-3. Plaintiffs sought to certify a class of Facebook users who were minors, and a sub-class consisting of minors who made purchases through Facebook, which the Court granted in part. At the class certification hearing, the Court raised the issue whether §§ 6701 and 6710 could be invoked by minors, who were not residents of California. The Court remarked that in order to determine the applicability of §§ 6701(c) and 6710, it must determine whether the parties' anticipated application of California law, and whether the statutes were intended to protect transactions between out-of-state minors and a California-based corporation. *Id*. at *10. The Court observed that Defendant clearly intended California law to control, as its statement of rights and responsibilities, which must be accepted before joining or making a purchase, stated that laws of California would govern it. *Id*. at *11. Because it was Defendant that selected California law to apply to interactions between itself and its users, and also because Defendant was located in California, the Court concluded that §§ 6701(c) and 6710 applied to all minors in the proposed class. *Id*. at *14-16. Regarding Plaintiffs' motion for class certification, Defendant argued that Plaintiffs' proposed injunctive relief failed to address a common injury suffered by the class as a whole, and that the relief was aimed exclusively at users who were currently minors, and would be pointless for those members who were now adults. *Id*. at *27. The Court disagreed, and remarked that if it found that certain contracts were void, those contracts would be rendered null regardless of whether the minor had since reached the age of majority. *Id*. at *28. Accordingly, the Court found that Plaintiffs raised common questions as to their injunctive as well as declaratory relief claims. Defendant also contended that Plaintiffs' demands were atypical because they conflicted with the rest of the class. Defendant argued that Plaintiffs' requested relief was to restrain it from selling Facebook credits or similar currency to accounts that belonged to minors. Defendant pointed to an expert report stating that millions of users, including minors, made in-app purchases to enhance their game play, and therefore many minors in the proposed class would object to such a demand. *Id*. at *32. Plaintiffs argued that their goal for injunctive relief was focused on requiring Defendant to change its practices to conform their refund policy to California law, and not to end sales to minors. *Id*. at *33. Because Plaintiffs' relief focused on making Defendant conform with California law, and not to prevent sales to minors, the Court found that typicality was satisfied. The Court noted that Plaintiffs' class claim for restitution would require refunding the money spent by any class member who made a transaction over Facebook, if it was ultimately found to be void or voidable. The Court therefore denied certification of Plaintiffs' restitution claims, but granted certification for Plaintiffs' claims for injunctive and declaratory relief.

(lxxix) Special Masters In Class Actions

***In Re General Motors LLC Ignition Switch Litigation*, Case No. 14-MD-2543 (S.D.N.Y. Dec. 11, 2015).** Plaintiffs filed several class actions relative to defects in Defendant's ignition systems in their cars. The parties entered into a memorandum of understanding ('MOU") to resolve certain claims. Pursuant to Rule 53(a)(1)(A), the parties requested the Court to appoint Special Masters to create a settlement framework to identify criteria to evaluate claims; assign "points and allocate dollar values" to claims they evaluate; and retain experts, if necessary, to assist in the evaluation of the claims. *Id*. at 2. The Court granted the parties' motion. The parties nominated Daniel Balhoff and John Perry to jointly perform general duties as Special Masters. *Id.* at 2. The Court reviewed the credentials of Balhoff and Perry and concluded that both were well-qualified for the appointment. Each had an expertise in mediation and dispute resolution, and had previous experience as Special Masters charged with allocating settlement funds in complex litigation, including several multi-district litigation settings. *Id.* The Court determined that Balhoff and Perry possessed the requisite skills, experience, knowledge, and credibility necessary to aid in the implementation and administration of the MOU. *Id.* at 3. The Court further determined that the Special Masters would be compensated privately as specified in the MOU and in anticipation of the contract to be entered into between the parties and the Special Masters. *Id.* at 4.

(lxxx) Incentive Awards In Class Actions

***In Re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation,* Case No. 05-MD-1720 (E.D.N.Y. Jan. 23, 2015).** A group of merchants brought an antitrust class action lawsuit against Visa, MasterCard, and a number of banks, alleging that Defendants conspired to fix certain credit card fees and rules. After extensive litigation, the Court approved the parties' settlement agreement of $5.7 billion and subsequently awarded $544.8 million in attorneys' fees using a percentage-of-the-fund calculation. Plaintiffs moved for class representative service awards for their prosecution of the litigation and for their efforts obtaining the settlement on behalf of the class. Plaintiffs originally moved for incentive payments totaling $1.8 million for nine class representatives. The Court noted that the $1.8 million constituted only 0.03% of the $5.7 billion settlement fund, but that an average class representative service award of $200,000 would dwarf the average monetary recovery per class member (of which there were an estimated 12 million class members). As a result, the Court requested class counsel to submit additional authority to support their request. Class counsel subsequently did so, and the Court granted the motion and awarded a total sum of $950,000, as well as costs, to nine representative Plaintiffs. The Court ordered that the amounts should be paid from the net cash settlement escrow account no less than 20 days after the final settlement date. *Id*. at 2.

Appendix I

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Appendix II

Largest Employment Discrimination Class Action Settlements

Largest Employment Discrimination Class Action Settlements

1. $250 million – *Arnett v. California Public Employees' Retirement System*, Case No. 95-3022 (N.D. Cal. Jan. 29, 2003) (approval given to consent decree in a lawsuit involving charges that the California Public Employees' Retirement System discriminated against public safety officers who took disability retirements on the basis of age).

2. $240 million – *Kraszewksi v. State Farm*, Case No. 79-CV-1261 (N.D. Cal. Jan. 13, 1988) (approval given to consent decree in a long-running sex discrimination lawsuit involving female employees of State Farm in California alleging that the company discriminated against them in recruitment, hiring, job assignment, training and termination).

3. $192.5 million – *Abdallah v. The Coca-Cola Co.*, Case No. 98-CV-3679 (N.D. Ga. June 7, 2001) (approval given to consent decree involving class action brought on behalf of salaried African-American employees alleging race discrimination consisting of systemic discrimination in promotions, compensation, and performance evaluations).

4. $175 million – *Velez, et al. v. Novartis*, Case No. 04-CV-9194 (S.D.N.Y. July 14, 2010) (preliminary approval granted to settlement of a nationwide class action accusing Novartis of discriminating against 5,600 current and former female sales representatives in pay and promotions).

5. $172 million – *Roberts v. Texaco*, Case No. 94-2015 (S.D.N.Y. July 29, 1997) (approval given to settlement in a lawsuit involving fees for services rendered prior to the entry of judgment in the race discrimination lawsuit).

6. $160 million – *McReynolds v. Merrill Lynch & Co.*, Case No. 05-CV-6583 (N.D. Ill. Dec. 6, 2013) (final approval given to settlement of a class action involving African-American employees claiming discrimination in pay and promotions).

7. $132.5 million – *Haynes v. Shoney's, Inc.*, Case No. 89-30093 (N.D. Fla. Jan. 25, 1993) (approval given to consent decree in a race discrimination lawsuit brought in 1989 by a class of African-American Shoney's employees).

8. $128 million –*The Vulcan Society, Inc., et al. v. City Of New York*, Case No. 07-CV-2067 (E.D.N.Y. Mar. 11, 2015) (final approval granted for a class action settlement to resolve claims alleging that certain aspects of the City's policies of the pass-fail and rank ordering used on written exams had an unlawful disparate impact on African-American and Hispanic candidates for entry-level firefighters positions).

9. $89.5 million – *Lane v. Hughes Aircraft Co.*, Case No. S059064 (Cal. S. Ct. Mar. 6, 2000) (approval granted to settlement of race discrimination class action lawsuit).

10. $81.5 million – *Shores v. Publix Super Markets, Inc.*, Case No. 95-CV-1162 (M.D. Fla. May 23, 1997) (final approval given to a consent decree in a class action involving sex discrimination claims that Publix Super Markets had discriminated against female employees in job assignments, promotions, allocation of hours and full-time work, and otherwise limited advancement, pay, and employment opportunities for women at Publix stores in Florida and the Southeast).

11. $80 million – *McReynolds, et al. v. Sodexho Marriott Services, Inc.*, Case No. 01-CV-510 (D.D.C. Aug. 10, 2005) (settlement of class action filed by African-American employees alleging discriminatory promotion and pay policies and practices).

12. $76.3 million – *Andrews, et al. v. City Of New York*, Case No. 10-CV-2426 (S.D.N.Y. Mar. 26, 2015) (final approval granted for a pay equity class action settlement for female school safety agents suing over the City's alleged violations of the Equal Pay Act, Title VII, and the New York Human Rights Law, claiming that they were paid less than male counterparts, including $33 million in back pay and $43.3 million in retroactive raises).

13. $72.5 million – *Beck, et al. v. Boeing Co.*, Case No. 00-CV-0301 (W.D. Wash. July 16, 2004) (settlement of Title VII class action alleging gender discrimination in pay, promotions, and other conditions of employment of 29,000 female employees).

14. $70 million – *In Re TV Writers Cases*, Case Nos.: BC 268 882 (Sup. Ct. Cal. Jan. 22, 2010) (preliminary approval granted to settlement by state court to television writers aged 40 and over in litigation involving 23 age discrimination class action cases against television networks, studios, and talent agencies).

15. $65 million – *Frank v. Home Depot, Inc.*, Case No. 95-CV-2182 (N.D. Cal. Jan. 14, 1998); Butler v. Home Depot, Inc., Case No. 94-4335 (N.D. Cal. Jan. 14, 1998) (final approval given to a consent decree in a Title VII class action lawsuit involving female current and former employees and job applicants at Home Depot stores in 10 western states).

16. $61 million – *Glover, et al. v. U.S. Postal Service*, EEOC Case No. 320-A2-8011 (U.S. Equal Employment Opportunity Commission – Denver, Colorado May 23, 2007) (approval given to a settlement agreement for a class action brought by 7,500 workers with disabilities claiming discrimination in denial of promotions and advancement opportunities).

17. $57 million – *Williams, et al. v. Sprint Corp.*, No. 03-CV-2200 (D. Kan. Sept. 10, 2007) (final approval given to a settlement for a collective action involving 1,697 former employees claiming age discrimination in lay-offs between 2001 and 2003).

18. $55 million – *Satchell, et al. v. Federal Express Corp.*, Case No. 03-CV-2659 (N.D. Cal. Aug. 14, 2007) (final approval given to a consent decree for a class action settlement involving African-American lower-level managers and Hispanic non-supervisory workers claiming race and national origin discrimination with respect to pay, promotions, and terms and conditions of employment).

19. $54 million – *EEOC v. Morgan Stanley & Co.*, Case No. 01-CV-8421 (S.D.N.Y. July 12, 2004) (settlement of EEOC pattern or practice lawsuit for alleged sex discrimination in compensation and denials of promotions for present and former female employees).

20. $53 million – *Brady, et al. v. Airline Pilots Association*, Case No. 02-CV-2917 (D.N.J. May 29, 2014) (court approval of class action brought by TWA pilots over discriminatory application and breach of duty of fair representation relative to seniority lists).

21. $50 million – *Gonzalez, et al. v. Abercrombie & Fitch*, Case Nos.: 03-CV-2817, 04-CV-4730 & 04-CV-4731 (N.D. Cal. Nov. 9, 2004) (settlement of consolidated Title VII class actions alleging race and national origin discrimination against female, African-American, and Asian-American applicants, employees, and ex-employees in pay, promotions, and terms and conditions of employment).

22. $48.9 million – *EEOC v. Bell Atlantic*, Case No. 97-CV-6723 (S.D.N.Y. June 5, 2006) (final approval of consent decree in pregnancy discrimination pattern or practice lawsuit where female employees of Bell Atlantic in 13 states were denied pension credits for their pregnancy and maternity leaves in alleged violation of Title VII of the 1964 Civil Rights Act and the Equal Pay Act).

23. $47 million – *Wilfong v. Rent-A-Center, Inc.*, Case No. 00-CV-680 (S.D. Ill. Oct. 4, 2002) (approval given to a consent decree to settle two lawsuits alleging class-wide sex discrimination under Title VII of the Civil Rights Act of 1964).

24. $46 million – *Augst-Johnson, et al. v. Morgan Stanley & Co., Inc.*, Case No. 06-CV-1142 (D.D.C. Oct. 26, 2007) (final approval given to a consent decree for a class action settlement involving female financial advisors and trainees claiming gender discrimination in pay and promotions).

25. $45 million – *Sanchez v. Detroit Edison*, Case No. 97-706639 (Mich. Cir. Ct. Oct. 28, 1999) & Gilford v. Detroit Edison, Case No. 93-333296 (Mich. Cir. Ct. Oct. 28, 1999) (approval given to a class action settlement involving Detroit Edison Co. employees alleging unlawful race, age, and national origin discrimination during a reorganization).

26. $42.4 million – *In Re General Motors Corp. / United Auto Workers* (1984) (approval granted to settlement in a class action lawsuit alleging the company engaged in a pattern or practice of sex and race discrimination).

27. $39 million – *Calibuso, et al. v. Bank of America*, Case No. 10-CV-1413 (E.D.N.Y. Dec. 30, 2013) (final approval granted in settlement of a class action alleging gender discrimination involving pay and promotions allegedly withheld from female employees).

28. $37 million – *Burns, et al. v. Merrill Lynch*, Pierce, Fenner & Smith Inc., Case No. 04-CV-4135 (N.D. Cal. Sept. 13, 2005) (preliminary approval of settlement of class action alleging violations of federal and state wage & hour laws in treating inside sales representatives as exempt from overtime requirements).

29. $37 million – *Andrews, et al. v. Lawrence Livermore National Security, LLC*, Case No. RG09453596 (Cal. Super. Ct. Sept. 30, 2015) (settlement of an employment discrimination class action involving 129 workers who claimed the company discriminated against them on the basis of age in a workforce restructuring).

30. $36.5 million – *Frank v. United Airlines Inc.*, Case No. 92-CV-0692 (N.D. Cal. Feb. 11, 2004) (settlement of Title VII class action alleging UAL's weight policies for male and female flight attendants constituted sex discrimination).

31. $34 million – *EEOC v. Mitsubishi Motor Manufacturing of America*, Case No. 96-1192 (C.D. Ill. June 23, 1998) (approval given to consent decree involving an EEOC pattern or practice lawsuit involving sexual harassment).

32. $33 million – *Amochaev, et al. v. Citigroup Global Markets, Inc.*, Case No. 05-CV-1298 (N.D. Cal. Aug. 13, 2008) (final approval given to class action settlement involving female managers claiming gender discrimination with respect to pay, promotions, and terms and conditions of employment).

33. $31 million – *Kosen, et al. v. American Express Financial Advisors, Inc., et al.*, Case No. 02-CV-82 (D.D.C. Feb. 19, 2002) (approval of a consent decree stemming from a class action lawsuit brought on behalf of more than 4,000 female employees alleging sex and age discrimination consisting of denial of equal pay and promotions).

34. $30 million – *Butler, et al. v. Countrywide Home Loans, Inc.*, Case No. BC 268250 (S. Ct. Cal. May 6, 2005) (settlement of class action filed by account executives who alleged that company misclassified them as exempt from receiving overtime compensation under state wage & hour laws).

35. $29.5 million – *Babbitt v. Albertson's Inc.*, Case No. 92-CV-1883 (N.D. Cal. Oct. 5, 1994) (final approval given to class action settlement agreement and consent decree brought on behalf of former female and Hispanic workers alleging race and sex discrimination involving pay and promotions).

36. $28 million – *EEOC v. Johnson & Higgins Inc.*, Case No. 03-5481 (S.D.N.Y. July 29, 1999) (final approval given to consent decree settlement in an age discrimination lawsuit brought on behalf of 13 former company directors compelled to retire at age 62).

37. $27.5 million – *EEOC v. Sidley & Austin LLP*, Case No. 05-CV-208 (N.D. Ill. Oct. 4, 2007) (final approval given to a settlement of an EEOC pattern or practice lawsuit alleging age discrimination in a law firm's demotions of partners).

38. $24.4 million – *EEOC v. Walgreen Co.*, Case No. 05-CV-440 (S.D. Ill. Mar. 24, 2008) (final approval given to settlement of an EEOC pattern or practice lawsuit alleging race discrimination with respect to pay and promotions of a class of more than 10,000 African-American employees).

39. $23.5 million – *Jaffe, et al. v. Morgan Stanley & Co.*, Case No. 06-CV-3903 (N.D. Cal. Oct. 22, 2007) (stipulation filed by the parties for preliminary approval of a consent decree for a class action settlement involving African-American and Hispanic financial advisors and trainees claiming gender and race discrimination in pay and promotions).

40. $22 million – *Womack, et al. v. Dolgencorp, Inc.*, Case No. 06-CV-465 (N.D. Ala. July 23, 2012) (final approval granted for settlement of a sex discrimination class action involving female store managers who claim they were victims of sex-based compensation discrimination)

41. $22 million – *David, et al. v. Signal International, LLC*, Case No. 08-CV-1220 (E.D. La. July 12, 2015) (settlement through bankruptcy of class action claims of 500 foreign-based workers who alleged discrimination under 42 U.S.C. § 1981 due to their national origin in terms of their recruitment and treatment at oil-rig repair and construction sites in Mississippi and Texas).

42. $21.4 million – *Davis, et al. v. Eastman Kodak Co.*, Case No. 04-CV-6512 (W.D.N.Y. July 4, 2009) (preliminary approval granted to settlement of a nationwide class action involving former and current African-American employees claiming discriminatory practices in pay and promotions).

43. $21 million – *Wright, et al. v. New York City Parks Department*, Case No. 01-CV-4437 (S.D.N.Y. May 15, 2008) (final approval given to class action settlement involving African-American and Hispanic employees claiming race discrimination and national origin discrimination with respect to pay and promotions).

44. $20 million – *EEOC v. Verizon Delaware LLC*, Case No. 11-CV-1832 (D. Md. July 6, 2011) (approval of a consent decree stemming from an EEOC pattern or practice disability discrimination lawsuit involving claims that the company's attendance policies failed to accommodate a class of workers whose absences were caused by their disabilities).

45. $20 million – *EEOC v. LA Weight Loss Centers, Inc.*, Case No. 02-CV-648 (D. Md. Dec. 1, 2008) (final approval given to a settlement of an EEOC pattern or practice lawsuit alleging sex discrimination against male applicants in hiring).

46. $19 million – *EEOC v. Outback Steakhouse Of Florida, Inc.*, Case No. 06-CV-1935 (D. Colo. Dec. 29, 2009) (approval of a consent decree stemming from an EEOC pattern or practice gender discrimination lawsuit involving pay and promotions brought by the EEOC on behalf of a nationwide class of over 150,000 women).

47. $17.5 million – *Nelson, et al. v. Wal-Mart Stores, Inc.*, Case No. 04-CV-171 (E.D. Ark. July 8, 2009) (final approval granted to settlement of a nationwide class action involving approximately 4,500 African-American truck drivers who claimed they were rejected for truck driver jobs or were discouraged from applying due to their race).

48. $16.65 million – *Weddington v. Ingles Markets Inc.*, Case No. 98-CV-44 (N.D. Ga. April 15, 1999) (final approval given to class action settlement involving approximately 39,000 current and former female employees claiming gender discrimination in pay and promotions).

49. $16 million – *Wade, et al. v. Kroger Co.*, Case No. 01-CV-699 (W.D. Ky. Nov. 21, 2008) (final approval given to class action settlement involving African-American hourly employees and management trainees claiming race discrimination with respect to pay and promotions).

50. $16 million – *Curtis-Bauer, et al. v. Morgan Stanley & Co.*, Case No. 06-CV-3903 (N.D. Cal. Oct. 22, 2008) (final approval given to class action settlement involving African-American and Hispanic financial advisors claiming race discrimination and national origin discrimination with respect to pay and promotions).

51. $15.36 million – *Bellifemine, et al. v. Sanofi-Aventis U.S. LLC*, Case No. 07-CV-2207 (S.D.N.Y. Aug. 6, 2010) (final approval granted to settlement of a class action involving approximately 5,200 current and former Sanofi-Aventis female sales representatives accusing the French drug-maker of gender bias in pay and promotions).

52. $15 million – *Carlson, et al. v. CH Robinson, Inc.*, Case No. 02-CV-3780 (D. Minn. Sept. 18, 2006) (final approval of consent decree for a class action settlement involving approximately 2,000 female employees and ex-employees claiming gender discrimination in promotions and compensation).

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